No. _____

In the
Supreme Court of the United States

ADAM J TENSER,

Petitioner,

v.

BETH SILVERMAN, TANNAZ MOKAYEF, WILLIAM COTTER; ROBERT MARTINDALE; MAURICE JOLLIF; ELIZABETH DUMAIS MILLER, IN THEIR PERSONAL AND OFFICIAL CAPACITIES FOR THE COUNTY OF LOS ANGELES,

Respondents.

On Appeal to the United States Court of Appeals for the Ninth Circuit

APPENDIX

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CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. XIV. § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL STATUTES

42 U.S.C § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the

Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATE STATUTES

Cal.Bus.Prof.C. § 6068.

It is the duty of an attorney to do all of the following:

(a) To support the Constitution and laws of the United States and of this state.

(b) To maintain the respect due to the courts of justice and judicial officers.

(c) To counsel or maintain those actions, proceedings, or defenses only as appear to him or her legal or just, except the defense of a person charged with a public offense.

(d) To employ, for the purpose of maintaining the causes confided to him or her those means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.

(e) (1) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.

(2) Notwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

(f) To advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which he or she is charged.

(g) Not to encourage either the commencement or the continuance of an action or proceeding from any corrupt motive of passion or interest.

(h) Never to reject, for any consideration personal to himself or herself, the cause of the defenseless or the oppressed.

(i) To cooperate and participate in any disciplinary investigation or other regulatory or disciplinary proceeding pending against himself or herself. However, this subdivision shall not be construed to deprive an attorney of any privilege guaranteed by the Fifth Amendment to the Constitution of the United States, or any other constitutional or statutory privileges. This subdivision shall not be construed to require an attorney to cooperate with a request that requires him or her to waive any constitutional or statutory privilege or to comply with a request for information or other matters within an unreasonable period of time in light of the time constraints of the attorney's practice. Any exercise by an attorney of any constitutional or

statutory privilege shall not be used against the attorney in a regulatory or disciplinary proceeding against him or her.

(j) To comply with the requirements of Section 6002.1.

(k) To comply with all conditions attached to any disciplinary probation, including a probation imposed with the concurrence of the attorney.

(l) To keep all agreements made in lieu of disciplinary prosecution with the State Bar.

(m) To respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.

(n) To provide copies to the client of certain documents under time limits and as prescribed in a rule of professional conduct which the board shall adopt.

(o) To report to the State Bar, in writing, within 30 days of the time the attorney has knowledge of any of the following:

(1) The filing of three or more lawsuits in a 12-month period against the attorney for malpractice or other wrongful conduct committed in a professional capacity.

(2) The entry of judgment against the attorney in a civil action for fraud, misrepresentation, breach of fiduciary duty, or gross negligence committed in a professional capacity.

(3) The imposition of judicial sanctions against the attorney, except for sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars ($1,000).

(4) The bringing of an indictment or information charging a felony against the attorney.

(5) The conviction of the attorney, including any verdict of guilty, or plea of guilty or no contest, of a felony, or a misdemeanor committed in the course of the practice of law, or in a manner in which a client of the attorney was the victim, or a necessary element of which, as determined by the statutory or common law definition of the misdemeanor, involves improper conduct of an attorney, including dishonesty or other moral turpitude, or an attempt or a conspiracy or solicitation of another to commit a felony or a misdemeanor of that type.

(6) The imposition of discipline against the attorney by a professional or occupational disciplinary agency or licensing board, whether in California or elsewhere.

(7) Reversal of judgment in a proceeding based in whole or in part upon misconduct, grossly incompetent representation, or willful misrepresentation by an attorney.

(8) As used in this subdivision, "against the attorney" includes claims and proceedings against any firm of attorneys for the practice of law in which the attorney was a partner at the time of the conduct complained of and any law corporation in which the attorney was a shareholder at the time of the conduct complained of unless the matter has to the attorney's knowledge already been reported by the law firm or corporation.

(9) The State Bar may develop a prescribed form for the making of reports required by this section, usage of which it may require by rule or regulation.

(10) This subdivision is only intended to provide that the failure to report as required herein may serve as a basis of discipline.

(Amended by Stats. 2003, Ch. 765, Sec. 1. Effective January 1, 2004. Operative July 1, 2004, by Sec. 4 of Ch. 765.)

Cal.C.Civ.Prod. § 124.

Except as provided in Section 214 of the Family Code or any other provision of law, the sittings of every court shall be public.

(Amended by Stats. 1992, Ch. 163, Sec. 12. Effective January 1, 1993. Operative January 1, 1994, by Sec. 161 of Ch. 163.)

Cal.C.Civ.Prod. § 177.5.

A judicial officer shall have the power to impose reasonable money sanctions, not to exceed fifteen hundred dollars ($1,500), notwithstanding any other provision of law, payable to the court, for any violation of a lawful court order by a person, done without good cause or substantial justification. This power shall not apply to advocacy of counsel before the court. For the purposes of this section, the term "person" includes a witness, a party, a party's attorney, or both.

Sanctions pursuant to this section shall not be imposed except on notice contained in a party's moving or responding papers; or on the court's own motion, after notice and opportunity to be heard. An order imposing sanctions shall be in writing and shall recite in detail the conduct or circumstances justifying the order.

(Amended by Stats. 2005, Ch. 75, Sec. 27. Effective July 19, 2005. Operative January 1, 2006, by Sec. 156 of Ch. 75.)

Cal.C.Civ.Prod. § 284.

The attorney in an action or special proceeding may be changed at any time before or after judgment or final determination, as follows:

1. Upon the consent of both client and attorney, filed with the clerk, or entered upon the minutes;

2. Upon the order of the court, upon the application of either client or attorney, after notice from one to the other.

(Amended by Stats. 1967, Ch. 161.)

Cal.C.Civ.Prod. § 1211.

(a) When a contempt is committed in the immediate view and presence of the court, or of the judge at chambers, it may be punished summarily; for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he or she be punished as therein prescribed.

When the contempt is not committed in the immediate view and presence of the court, or of the judge at chambers, an affidavit shall be presented to the court or judge of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators, or other judicial officers.

(b) In family law matters, filing of the Judicial Council form entitled "Order to Show Cause and Affidavit for Contempt (Family Law)" shall constitute compliance with this section.

(Amended by Stats. 2001, Ch. 754, Sec. 1. Effective January 1, 2002.)

Cal.C.Civ.Prod. § 2015.5.

Whenever, under any law of this state or under any rule, regulation, order or requirement made pursuant to the law of this state, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn statement, declaration, verification, certificate, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may with like force and effect be supported, evidenced, established or proved by the unsworn statement, declaration, verification, or certificate, in writing of such person which recites that it is certified or declared by him or her to be true under penalty of perjury, is subscribed by him or her, and (1), if executed within this state, states the date and place of execution, or (2), if executed at any place, within or without this state, states the date of execution and that it is so certified or declared under the laws of the State of California. The certification or declaration may be in substantially the following form:

(a) If executed within this state:

"I certify (or declare) under penalty of perjury that the foregoing is true and correct":_____ _____(Date and Place)(Signature)

(b) If executed at any place, within or without this state:

"I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct":_____ _____(Date)(Signature)

(Amended by Stats. 1980, Ch. 889, Sec. 1. Operative July 1, 1981, by Sec. 6 of Ch. 889.)

Cal.Civ.C. § 46.

Slander is a false and unprivileged publication, orally uttered, and also communications by radio or any mechanical or other means which:

1. Charges any person with crime, or with having been indicted, convicted, or punished for crime;

2. Imputes in him the present existence of an infectious, contagious, or loathsome disease;

3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office

or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits;
4. Imputes to him impotence or a want of chastity; or
5. Which, by natural consequence, causes actual damage.
(Amended by Stats. 1945, Ch. 1489.)

Cal.Civ.C. § 1798.24.

An agency shall not disclose any personal information in a manner that would link the information disclosed to the individual to whom it pertains unless the information is disclosed, as follows:

(a) To the individual to whom the information pertains.

(b) With the prior written voluntary consent of the individual to whom the record pertains, but only if that consent has been obtained not more than 30 days before the disclosure, or in the time limit agreed to by the individual in the written consent.

(c) To the duly appointed guardian or conservator of the individual or a person representing the individual if it can be proven with reasonable certainty through the possession of agency forms, documents or correspondence that this person is the authorized representative of the individual to whom the information pertains.

(d) To those officers, employees, attorneys, agents, or volunteers of the agency that has custody of the information if the disclosure is relevant and necessary in the ordinary course of the performance of their official duties and is related to the purpose for which the information was acquired.

(e) To a person, or to another agency where the transfer is necessary for the transferee agency to perform its constitutional or statutory duties, and the use is compatible with a purpose for which the information was collected and the use or transfer is accounted for in accordance with Section 1798.25. With respect to information transferred from a law enforcement or regulatory agency, or information transferred to another law enforcement or regulatory agency, a use is compatible if the use of the information requested is needed in an investigation of unlawful activity under the jurisdiction of the requesting agency or for licensing, certification, or regulatory purposes by that agency.

(f) To a governmental entity when required by state or federal law.

(g) Pursuant to the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code).

(h) To a person who has provided the agency with advance, adequate written assurance that the information will be used solely for statistical research or reporting purposes, but only if the information to be disclosed is in a form that will not identify any individual.

(i) Pursuant to a determination by the agency that maintains information that compelling circumstances exist that affect the health or safety of an individual, if upon the disclosure notification is transmitted to the individual to whom the information pertains at his or her last known address. Disclosure shall not be made if it is in conflict with other state or federal laws.

(j) To the State Archives as a record that has sufficient historical or other value to warrant its continued preservation by the California state government, or for evaluation by the Director of General Services or his or her designee to determine whether the record has further administrative, legal, or fiscal value.

(k) To any person pursuant to a subpoena, court order, or other compulsory legal process if, before the disclosure, the agency reasonably attempts to notify the individual to whom the record pertains, and if the notification is not prohibited by law.

(l) To any person pursuant to a search warrant.

(m) Pursuant to Article 3 (commencing with Section 1800) of Chapter 1 of Division 2 of the Vehicle Code.

(n) For the sole purpose of verifying and paying government health care service claims made pursuant to Division 9 (commencing with Section 10000) of the Welfare and Institutions Code.

(o) To a law enforcement or regulatory agency when required for an investigation of unlawful activity or for licensing, certification, or regulatory purposes, unless the disclosure is otherwise prohibited by law.

(p) To another person or governmental organization to the extent necessary to obtain information from the person or governmental organization as necessary for an investigation by the agency of a failure to comply with a specific state law that the agency is responsible for enforcing.

(q) To an adopted person and is limited to general background information pertaining to the adopted person's natural parents, provided that the information does not include or reveal the identity of the natural parents.

(r) To a child or a grandchild of an adopted person and disclosure is limited to medically necessary information pertaining to the adopted person's natural parents. However, the information, or the process for obtaining the information, shall not include or reveal the identity of the natural parents. The State Department of Social Services shall adopt regulations governing the release of information pursuant to this subdivision by July 1, 1985. The regulations shall require licensed adoption agencies to provide the same services provided by the department as established by this subdivision.

(s) To a committee of the Legislature or to a Member of the Legislature, or his or her staff when authorized in writing by the member, where the member has permission to obtain the information from the individual to whom it pertains or where the member provides reasonable assurance that he or she is acting on behalf of the individual.

(t) (1) To the University of California, a nonprofit educational institution, or, in the case of education-related data, another nonprofit entity, conducting scientific research, provided the request for information is approved by the Committee for the Protection of Human Subjects (CPHS) for the California Health and Human Services Agency (CHHSA) or an institutional review board, as authorized in paragraphs (4) and (5). The approval required under this subdivision shall include a review and determination that all the following criteria have been satisfied:

(A) The researcher has provided a plan sufficient to protect personal information from improper use and disclosures, including sufficient administrative, physical, and technical safeguards to protect personal information from reasonable anticipated threats to the security or confidentiality of the information.

(B) The researcher has provided a sufficient plan to destroy or return all personal information as soon as it is no longer needed for the research project, unless the researcher has demonstrated an ongoing need for the personal information for the research project and has provided a long-term plan sufficient to protect the confidentiality of that information.

(C) The researcher has provided sufficient written assurances that the personal information will not be reused or disclosed to any other person or entity, or used in any manner, not approved in the research protocol, except as required by law or for authorized oversight of the research project.

(2) The CPHS or institutional review board shall, at a minimum, accomplish all of the following as part of its review and approval of the research project for the purpose of protecting personal information held in agency databases:

(A) Determine whether the requested personal information is needed to conduct the research.

(B) Permit access to personal information only if it is needed for the research project.

(C) Permit access only to the minimum necessary personal information needed for the research project.

(D) Require the assignment of unique subject codes that are not derived from personal information in lieu of social security numbers if the research can still be conducted without social security numbers.

(E) If feasible, and if cost, time, and technical expertise permit, require the agency to conduct a portion of the data processing for the researcher to minimize the release of personal information.

(3) Reasonable costs to the agency associated with the agency's process of protecting personal information under the conditions of CPHS approval may be billed to the researcher, including, but not limited to, the agency's costs for conducting a portion of the data processing for the researcher, removing personal information, encrypting or otherwise securing personal information, or assigning subject codes.

(4) The CPHS may enter into written agreements to enable other institutional review boards to provide the data security approvals required by this subdivision, provided the data security requirements set forth in this subdivision are satisfied.

(5) Pursuant to paragraph (4), the CPHS shall enter into a written agreement with the institutional review board established pursuant to Section 49079.5 of the Education Code. The agreement shall authorize, commencing July 1, 2010, or the date upon which the written agreement is executed, whichever is later, that board to provide the data security approvals required by this subdivision, provided the data security requirements set forth in this subdivision and the act specified in paragraph (1) of subdivision (a) of Section 49079.5 are satisfied.

(u) To an insurer if authorized by Chapter 5 (commencing with Section 10900) of Division 4 of the Vehicle Code.

(v) Pursuant to Section 450, 452, 8009, or 18396 of the Financial Code.

This article shall not be construed to require the disclosure of personal information to the individual to whom the information pertains when that information may otherwise be withheld as set forth in Section 1798.40.

(Amended by Stats. 2014, Ch. 64, Sec. 2. (AB 2742) Effective January 1, 2015.)

Cal.Evid.C § 1200.

(a) "Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.

(b) Except as provided by law, hearsay evidence is inadmissible.

(c) This section shall be known and may be cited as the hearsay rule.

(Enacted by Stats. 1965, Ch. 299.)

Cal.Evid.C § 1401.

(a) Authentication of a writing is required before it may be received in evidence.

(b) Authentication of a writing is required before secondary evidence of its content may be received in evidence.

(Enacted by Stats. 1965, Ch. 299.)

Cal.Pen.C. § 646.9.

(a) Any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking, punishable by imprisonment in a county jail for not more than one year, or by a fine of not more than one thousand dollars ($1,000), or by both that fine and imprisonment, or by imprisonment in the state prison.

(b) Any person who violates subdivision (a) when there is a temporary restraining order, injunction, or any other court order in effect prohibiting the behavior described in subdivision (a) against the same party, shall be punished by imprisonment in the state prison for two, three, or four years.

(c) (1) Every person who, after having been convicted of a felony under Section 273.5, 273.6, or 422, commits a violation of subdivision (a) shall be punished by imprisonment in a county jail for not more than one year, or by a fine of not more than one thousand dollars ($1,000), or by both that fine and imprisonment, or by imprisonment in the state prison for two, three, or five years.

(2) Every person who, after having been convicted of a felony under subdivision (a), commits a violation of this section shall be punished by imprisonment in the state prison for two, three, or five years.

(d) In addition to the penalties provided in this section, the sentencing court may order a person convicted of a felony under this section to register as a sex offender pursuant to Section 290.006.

(e) For the purposes of this section, "harasses" means engages in a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, torments, or terrorizes the person, and that serves no legitimate purpose.

(f) For the purposes of this section, "course of conduct" means two or more acts occurring over a period of time, however short, evidencing a continuity of purpose. Constitutionally protected activity is not included within the meaning of "course of conduct."

(g) For the purposes of this section, "credible threat" means a verbal or written threat, including that performed through the use of an electronic communication device, or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements and conduct, made with the intent to place the person that is the target of the threat in reasonable fear for his or her safety or the safety of his or her family, and made with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to reasonably fear for his or her safety or the safety of his or her family. It is not necessary to prove that the defendant had the intent to actually carry out the threat. The present incarceration of a person making the threat shall not be a bar to prosecution under this section. Constitutionally protected activity is not included within the meaning of "credible threat."

(h) For purposes of this section, the term "electronic communication device" includes, but is not limited to, telephones, cellular phones, computers, video recorders, fax machines, or pagers. "Electronic communication" has the same meaning as the term defined in Subsection 12 of Section 2510 of Title 18 of the United States Code.

(i) This section shall not apply to conduct that occurs during labor picketing.

(j) If probation is granted, or the execution or imposition of a sentence is suspended, for any person convicted under this section, it shall be a condition of probation that the person participate in counseling, as designated by the court. However, the court, upon a showing of good cause, may find that the counseling requirement shall not be imposed.

(k) (1) The sentencing court also shall consider issuing an order restraining the defendant from any contact with the victim, that may be valid for up to 10 years, as determined by the court. It is the intent of the Legislature that the length of any

restraining order be based upon the seriousness of the facts before the court, the probability of future violations, and the safety of the victim and his or her immediate family.

(2) This protective order may be issued by the court whether the defendant is sentenced to state prison, county jail, or if imposition of sentence is suspended and the defendant is placed on probation.

(l) For purposes of this section, "immediate family" means any spouse, parent, child, any person related by consanguinity or affinity within the second degree, or any other person who regularly resides in the household, or who, within the prior six months, regularly resided in the household.

(m) The court shall consider whether the defendant would benefit from treatment pursuant to Section 2684. If it is determined to be appropriate, the court shall recommend that the Department of Corrections and Rehabilitation make a certification as provided in Section 2684. Upon the certification, the defendant shall be evaluated and transferred to the appropriate hospital for treatment pursuant to Section 2684.

(Amended by Stats. 2007, Ch. 582, Sec. 2.5. Effective January 1, 2008.)

Cal.Pen.C. § 825.

(a) (1) Except as provided in paragraph (2), the defendant shall in all cases be taken before the magistrate without unnecessary delay, and, in any event, within 48 hours after his or her arrest, excluding Sundays and holidays.

(2) When the 48 hours prescribed by paragraph (1) expire at a time when the court in which the magistrate is sitting is not in session, that time shall be extended to include the duration of the next court session on the judicial day immediately following. If the 48-hour period expires at a time when the court in which the magistrate is sitting is in session, the arraignment may take place at any time during that session. However, when the defendant s arrest occurs on a Wednesday after the conclusion of the day s court session, and if the Wednesday is not a court holiday, the defendant shall be taken before the magistrate not later than the following Friday, if the Friday is not a court holiday.

(b) After the arrest, any attorney at law entitled to practice in the courts of record of California, may, at the request of the prisoner or any relative of the prisoner, visit the prisoner. Any officer having charge of the prisoner who willfully refuses or neglects to allow that attorney to visit a prisoner is guilty of a misdemeanor. Any officer having a prisoner in charge, who refuses to allow the attorney to visit the prisoner when proper application is made, shall forfeit and pay to the party aggrieved the sum of five hundred dollars ($500), to be recovered by action in any court of competent jurisdiction.

(*Amended by Stats. 2003, Ch. 149, Sec. 66. Effective January 1, 2004.*)

Superior Court of California, L.A.L.R. Rule 3.11

CONTEMPT

A direct contempt committed in the immediate view and presence of the judge in court or in chambers will be handled by the judge before whom the contempt occurs. Indirect contempts may be heard in the department to which the case is assigned or, if the department cannot hear the contempt and transfer is required by law, that court may transfer the contempt proceeding to (1) the appropriate writs and receivers department, if it is a Central District case, or (2) the supervising judge of the district, if it is a case filed in another district.

(a) Order to Show Cause. Although Code of Civil Procedure section 1212 permits a warrant of attachment against the person charged with contempt, the standard procedure is section 1212's alternative method of issuance of an order to show cause ("OSC") re: contempt. An OSC will issue if the affidavit is sufficient, and the OSC must then be personally served on the accused person. The OSC may issue upon ex parte application, but only if the requesting party has complied with the notification requirements of California Rules of Court, rule 3.1204. If the accused person is served with the OSC and fails to appear, the court may issue a body attachment.

(b) Trial. The hearing on the OSC re: contempt is in the nature of a quasi-criminal trial. The accused person has the right to appointed counsel, to remain silent, to confront and cross-examine witnesses, and to be proven guilty beyond a reasonable doubt. The only major difference between contempt and a criminal trial is that the accused person has no right to a jury. The moving party must appear for the trial with witnesses prepared to testify unless the accused person stipulates in writing that the moving party's declarations will constitute the case-in-chief against him or her. If there is no stipulation, the parties should stipulate that the moving parties' declarations will constitute the direct testimony of each declarant, with the declarant then subject to cross-examination.

(c) Punishment. If the court finds the accused person guilty, the court may impose a fine of up to $1,000, imprison the person for up to five days, or both, for each act of contempt. (Code Civ. Proc., § 1218.)

Cal.R.Crt. Rule 3.1204.

Contents of notice and declaration regarding notice

(a) Contents of notice

When notice of an ex parte application is given, the person giving notice must:

(1) State with specificity the nature of the relief to be requested and the date, time, and place for the presentation of the application; and

(2) Attempt to determine whether the opposing party will appear to oppose the application.

(b) Declaration regarding notice

An ex parte application must be accompanied by a declaration regarding notice stating:

(1) The notice given, including the date, time, manner, and name of the party informed, the relief sought, any response, and whether opposition is expected and that, within the applicable time under rule 3.1203, the applicant informed the opposing party where and when the application would be made;

(2) That the applicant in good faith attempted to inform the opposing party but was unable to do so, specifying the efforts made to inform the opposing party; or

(3) That, for reasons specified, the applicant should not be required to inform the opposing party.

(c) Explanation for shorter notice

If notice was provided later than 10:00 a.m. the court day before the ex parte appearance, the declaration regarding notice must explain:

(1) The exceptional circumstances that justify the shorter notice; or

(2) In unlawful detainer proceedings, why the notice given is reasonable.

CALIFORNIA RULES OF PROFESISONAL CONDUCT

Rule 5-120 Trial publicity

(A) A member who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the member knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(B) Notwithstanding paragraph (A), a member may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(a) the identity, residence, occupation, and family status of the accused;

(b) if the accused has not been apprehended, the information necessary to aid in apprehension of that person;

(c) the fact, time, and place of arrest; and

(d) the identity of investigating and arresting officers or agencies and the length of the investigation.

(C) Notwithstanding paragraph (A), a member may make a statement that a reasonable member would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the member or the member's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

Rule 5-200 Trial Conduct

In presenting a matter to a tribunal, a member:

(A) Shall employ, for the purpose of maintaining the causes confided to the member such means only as are consistent with truth;

(B) Shall not seek to mislead the judge, judicial officer, or jury by an artifice or false statement of fact or law;

(C) Shall not intentionally misquote to a tribunal the language of a book, statute, or decision;

(D) Shall not, knowing its invalidity, cite as authority a decision that has been overruled or a statute that has been repealed or declared unconstitutional; and

(E) Shall not assert personal knowledge of the facts at issue, except when testifying as a witness

Rule 5-320 Contact with jurors

(A) A member connected with a case shall not communicate directly or indirectly with anyone the member knows to be a member of the venire from which the jury will be selected for trial of that case.

(B) During trial a member connected with the case shall not communicate directly or indirectly with any juror.

(C) During trial a member who is not connected with the case shall not communicate directly or indirectly concerning the case with anyone the member knows is a juror in the case.

(D) After discharge of the jury from further consideration of a case a member shall not ask questions of or make comments to a member of that jury that are intended to harass or embarrass the juror or to influence the juror's actions in future jury service.

(E) A member shall not directly or indirectly conduct an out of court investigation of a person who is either a member of a venire or a juror in a manner likely to influence the state of mind of such person in connection with present or future jury service.

(F) All restrictions imposed by this rule also apply to communications with, or investigations of, members of the family of a person who is either a member of a venire or a juror.

(G) A member shall reveal promptly to the court improper conduct by a person who is either a member of a venire or a juror, or by another toward a person who is either a member of a venire or a juror or a member of his or her family, of which the member has knowledge.

(H) This rule does not prohibit a member from communicating with persons who are members of a venire or jurors as a part of the official proceedings.

(I) For purposes of this rule, "juror" means any empanelled, discharged, or excused juror.

DIRECTLY RELATED PROCEEDINGS

***ADAM J. TENSER v. BETH SILVERMAN, et al.*, No. 20-56176 (9th Cir. October 26, 2021)(unpublished opinion)(dismissal with prejudice affirmed, motion to strike denied as moot)**

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ADAM J. TENSER, Plaintiff-Appellant, v. BETH SILVERMAN, in her personal/professional capacity as Deputy District Attorney for the Los Angeles County District Attorneys Office; et al., Defendants-Appellees, and ROBERT JOSHUA RYAN; et al., Defendants.	No. 20-56176 D.C. No. 2:19-cv-05496-VBF-RAO MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Valerie Baker Fairbank, District Judge, Presiding

Submitted October 22, 2021**
Pasadena, California

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: KLEINFELD, R. NELSON, and VANDYKE, Circuit Judges.

Tenser is an attorney bringing several Section 1983 claims against the prosecutors, detectives, and officials he encountered during his messy involvement with his civil client's prosecution for murder. He appeals the district court's order dismissing his Section 1983 claims with prejudice pursuant to Federal Rule of Civil Procedure 12(b)(6), as well as its order declining to enter default judgment in his favor. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm.[1]

A dismissal for failure to state a claim is reviewed de novo. *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir. 2005). A denial of leave to amend is reviewed for abuse of discretion. *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990). A denial of a motion for default judgment is reviewed for abuse of discretion. *Aldabe v. Aldabe*, 616 F.2d 1089, 1092–93 (9th Cir. 1980). We may affirm on any ground supported by the record. *Vega v. United States*, 881 F.3d 1146, 1152 (9th Cir. 2018).

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[1] Tenser also moves to strike portions of Silverman's brief and excerpts from the record. **Dkt. 17**. The motion is **Denied as Moot**. In affirming the district court, we consider none of the material Tenser wishes stricken. **Dkt. 17 at 5**.

I. Tenser's Failure to State Claims

First, Tenser's claims against prosecutors Mokayef and Silverman are barred by absolute immunity. Because Tenser's allegations focus on conduct leading up to his contempt citation, they concern conduct "intimately associated with the judicial phase of the criminal process." *Torres v. Goddard*, 793 F.3d 1046, 1051 (9th Cir. 2015) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976)).

Second, Tenser fails to state claims against detectives Cotter and Martindale. To the extent that he bases his claims on the detectives' conduct as witnesses or submitting declarations in support of the contempt citation, his claims are barred by absolute immunity. *Burns v. Cnty. of King*, 883 F.2d 819, 822 (9th Cir. 1989). Further, he fails to state a right to petition claim because the detectives had no duty to respond to Tenser's complaints. *Smith v. Arkansas State Highway Emp., Local 1315*, 441 U.S. 463, 464–65 (1979). Furthermore, Tenser fails to state a Fourth Amendment claim because it is not a seizure to escort someone from a courthouse on a judge's order, particularly where that person voluntarily leaves and no force is used. *See Sheppard v. Beerman*, 18 F.3d 147, 153 (2d Cir. 1994). Nor is it a seizure to cause someone to be required to appear before the court by submitting

declarations showing cause for contempt. *Cf. Karam v. City of Burbank*, 352 F.3d 1188, 1194 (9th Cir. 2003). Finally, Tenser fails to state a "class of one" equal protection claim because all of the events leading up to his contempt citation involved discretionary decision-making. *Towery v. Brewer*, 672 F.3d 650, 660 (9th Cir. 2012).

Third, Tenser fails to state claims against the defendants associated with Twin Towers Correctional Facility. He fails to state a free speech claim because, even assuming the in camera requirement somehow interfered with his legal practice, he has cited no authority to suggest there is a constitutional right to speak to an imprisoned client in person rather than by camera, particularly where, as here, there was a process in place by which he could seek a court order for in person meetings. He fails to state a due process claim because the right to practice law is not violated by brief interruptions to one's ability to practice. *Lowry v. Barnhart*, 329 F.3d 1019, 1023 (9th Cir. 2003). And he fails to state an equal protection claim because his own allegations show that the camera rule applied to similarly situated attorneys.

Because Tenser fails to state any claim against individual defendants, we do not reach his claims against any government entity ("Doe 10") that employed them.

II. The District Court's Denial of Tenser's Motion for Default Judgment

The district court did not abuse its discretion when it declined to enter default judgment in favor of Tenser. Tenser argues that Silverman failed to timely answer the First Amended Complaint. However, a motion to dismiss extends the time to answer an amended complaint to 14 days after the court rules on the motion. Fed. R. Civ. P. 12(a)(4), (b).

III. The District Court's Denial of Leave to Amend

The district court did not abuse its discretion when it denied Tenser leave to amend. Tenser argues that the district court failed to give him the leeway owed to *pro se* litigants. But this rule of leniency does not apply when, as here, the litigant is a lawyer. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam) (indicating that the proper contrast is between pleadings drafted by lawyers and

non-lawyers). Moreover, leave to amend may be denied when, as here, amendment would be futile. *Sonoma Cnty. Ass'n of Retired Emps. v. Sonoma Cty.*, 708 F.3d 1109, 1117 (9th Cir. 2013).

IV. Tenser's Violation of Rule 8

We note that Tenser's complaint fails to give "a short and plain statement of the claim" that is "simple, concise, and direct." Fed. R. Civ. Proc. 8(a)(2), (d)(1). The district court struggled, as have we, to identify which claims attach to which defendants, and precisely what claims are made. The complaint runs 100 pages. Tenser's numbered allegations comprise long, dense, rambling sentences. The unfortunate result is that Tenser, by his prolixity, has taken "a great deal of time away from more deserving litigants waiting in line." *McHenry v. Renne*, 84 F.3d 1172, 1180 (9th Cir. 1996).

AFFIRMED.

ADAM J. TENSER, v. ROBERT JOSHUA RYAN, et al., No. 2:19-cv-05496-VBF-RAO (C.D. Cal. October 7, 2020) (order accepting R&R)

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ADAM J. TENSER,

Plaintiff,

v.

ROBERT JOSHUA RYAN, et al.,

Defendants.

Case No. CV 19-05496 VBF (RAO)

ORDER ACCEPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Pursuant to 28 U.S.C. § 636, the Court has reviewed the First Amended Complaint, Defendants' Motion to Strike and Motion to Dismiss ("Motion"), Plaintiff's *Ex Parte* Application, the Report and Recommendation of United States Magistrate Judge ("Report"), and all other records and files herein. Further, the Court has made a *de novo* determination of those portions of the Report to which Plaintiff has objected. The Court is not persuaded by Plaintiff's objections.

The Court hereby accepts and adopts the findings, conclusions, and recommendations of the Magistrate Judge.

IT IS ORDERED that:

(1) Plaintiff's *Ex Parte* Application is DENIED;

(2) Defendants' Motion is GRANTED IN PART as to Plaintiff's federal law claims pursuant to 42 U.S.C. § 1983 and the federal law claims are

dismissed with prejudice;

(3) The Court declines to exercise supplemental jurisdiction over Plaintiff's state law claims and the state law claims are dismissed without prejudice; and

(4) Defendants' Motion is DENIED IN PART AS MOOT as to the request to strike Plaintiff's state law claims and the request for attorneys' fees.

DATED: October 7, 2020

Valerie Baker Fairbank

VALERIE BAKER FAIRBANK
UNITED STATES DISTRICT JUDGE

***ADAM J. TENSER, v. ROBERT JOSHUA RYAN, et al.*, No. 2:19-cv-05496-VBF-RAO (C.D. Cal. May 26, 2020) (U.S. magistrate judge report and recommendations dismissing federal claim with prejudice)**

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ADAM J. TENSER,

Plaintiff,

v.

ROBERT JOSHUA RYAN, et al.,

Defendants.

Case No. CV 19-05496 VBF (RAO)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE [53][54]

This Report and Recommendation is submitted to the Honorable Valerie Baker Fairbank, United States District Judge, pursuant to 28 U.S.C. § 636 and General Order 05-07 of the United States District Court for the Central District of California.

I. INTRODUCTION

On June 24, 2019, Plaintiff Adam J. Tenser ("Plaintiff"), an attorney representing himself, filed a civil rights complaint ("Complaint") pursuant to 42 U.S.C. § 1983 and state law. Dkt. No. 1. The Complaint was dismissed with leave to amend on January 6, 2020. Dkt. No. 46.

On January 27, 2020, Plaintiff filed a First Amended Complaint ("FAC") against Defendants Robert Joshua Ryan, Beth Silverman, Tannaz Mokayef, William

Cotter, Robert Martindale, Maurice Jollif, Jose Velasquez, Elizabeth Dumais Miller, and Does 1-10. Dkt. No. 49. Except for Defendant Ryan, all named defendants are sued in their "personal capacity and professional capacity." *Id.* ¶¶ 3-10.

On February 10, 2020, Defendants Silverman, Mokayef, Martindale, Cotter, Jollif, Jay Velasquez, and Miller (collectively, "Defendants") filed a Special Anti-SLAPP Motion to Strike and Motion to Dismiss and Strike Portions of the Complaint ("Motion") pursuant to California Code of Civil Procedure section 425.16 and Federal Rules of Civil Procedure 12(b)(6) and 12(f)(2). Dkt. No. 53. Plaintiff filed an opposition ("Opposition") on March 4, 2020. Dkt. No. 58. Defendants filed a reply ("Reply") on March 11, 2020. Dkt. No. 60.

On February 19, 2020, Plaintiff filed an Ex Parte Application for Default Judgment ("Ex Parte Application"), Dkt. No. 54, which the Court construed as a regularly noticed motion, Dkt. No. 56. Defendants filed an opposition ("Ex Parte Application Opposition") on March 4, 2020. Dkt. No. 59. Plaintiff filed a reply ("Ex Parte Application Reply") on March 11, 2020. Dkt. No. 61.

The Court held a telephonic hearing on both the Motion and Ex Parte Application on May 21, 2020. Dkt. No. 66. For the reasons set forth below, the Court recommends that Defendants' Motion be granted as to request to dismiss the federal law claims, that supplemental jurisdiction be declined over the state law claims, and that Defendants' Motion as to the request to strike the state law claims under California's anti-SLAPP statute be denied as moot.

II. LEGAL STANDARDS

A. Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) permits dismissal, as a matter of law, "where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Medical Center,* 521 F.3d 1097, 1104 (9th Cir. 2008) (citation omitted). To survive a Rule 12(b)(6) motion, a plaintiff must allege enough facts to state a claim that is plausible on its face. *Bell*

Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007). A claim is facially plausible when a plaintiff "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). Plausibility does not mean probability, but does require "more than a sheer possibility that a defendant has acted unlawfully." *Id.* A pleading that offers mere "labels and conclusions" or "a formulaic recitation of a cause of action's elements will not do." *Twombly,* 550 U.S. at 555.

In considering a motion to dismiss, a court must accept all factual allegations in the complaint as true "and construe the pleadings in the light most favorable to the nonmoving party." *Knievel v. ESPN,* 393 F.3d 1068, 1072 (9th Cir. 2005). *Pro se* pleadings, "however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus,* 551 U.S. 89, 94 (2007) (per curiam) (citation omitted). But the liberal pleading standard "applies only to a plaintiff's factual allegations." *Neitzke v. Williams,* 490 U.S. 319, 330 n.9 (1989). The Court will not accept as true unreasonable inferences or legal conclusions cast in the form of factual allegations. *Ileto v. Glock Inc.,* 349 F.3d 1191, 1200 (9th Cir. 2003). In giving liberal interpretations, a court may not supply essential elements of a claim not initially pled. *Pena v. Gardner,* 976 F.2d 469, 472 (9th Cir. 1992).

The Court may consider exhibits attached to the complaint and incorporated by reference, *see Petrie v. Electronic Game Card, Inc.*, 761 F.3d 959, 964 n.6 (9th Cir. 2014); Fed. R. Civ. P. 10(c), but is not required to blindly accept conclusory allegations, unwarranted deductions of fact, or unreasonable inferences, nor accept as true allegations that are contradicted by the exhibits attached to the complaint. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001).

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B. Anti-SLAPP Motion to Strike

"California law provides for the pre-trial dismissal of certain actions, known as Strategic Lawsuits Against Public Participation, or SLAPPs, that masquerade as ordinary lawsuits but are intended to deter ordinary people from exercising their political or legal rights or to punish them for doing so." *Makaeff v. Trump University, LLC*, 715 F.3d 254, 261 (9th Cir. 2013) (citation and internal quotations omitted). These special motions to strike, also called anti-SLAPP motions, may be brought in federal court to strike California state law claims. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1109 (9th Cir. 2003). "[T]he moving defendant must make a prima facie showing that the plaintiff's suit arises from an act in furtherance of the defendant's constitutional right to free speech." *Id.* (citation omitted); Cal. Civ. Proc. Code § 425.16(b)(1). "The burden then shifts to the plaintiff . . . to establish a reasonable probability that it will prevail on its claim." *Makaeff*, 715 F.3d at 261 (citing Cal. Civ. Proc. Code § 425.16(b)(1)).

III. SUMMARY OF ALLEGATIONS[1]

Plaintiff is an attorney who represents Blake Leibel ("Leibel"). FAC ¶ 31. Leibel was arrested, charged, and convicted of murder, but Plaintiff did not represent Leibel in the criminal case. *Id.* ¶¶ 33, 37, 38, 48. Plaintiff engaged a public relations advisor for Leibel, endeavored to engage a criminal attorney for Leibel, and engaged a child dependency attorney for Leibel. *Id.* ¶¶ 34, 35, 40, 41, 42. Plaintiff, through an associate attorney, also filed a copyright application for Leibel. *Id.* ¶ 50.

Plaintiff arranged for an experienced criminal defense attorney to meet with Leibel at Twin Towers Correctional Facility ("TTCF"), but TTCF denied the attorney-client visit on June 7, 2016. *Id.* ¶ 42. As of August 1, 2016, TTCF officers

[1] Plaintiff references several attachments to his original Complaint which were not attached to the FAC. Because an amended complaint supersedes the original complaint, *see Lacey v. Maricopa Cty.*, 693 F.3d 896, 925 (9th Cir. 2012), the Court will not consider any allegations or exhibits from the original Complaint.

advised Plaintiff that civil attorneys could no longer visit their inmates without providing a court minute order. *Id.* ¶ 44. Plaintiff alleges that Defendant Jollif, a TTCF legal unit officer, threatened Plaintiff over the phone with judicial action if he continued to petition for attorney-client visits with Leibel. *Id.* Leibel's child dependency attorney obtained a minute order for visits with Leibel and was granted access by TTCF. *Id.* ¶ 45. Plaintiff was refused visits with Leibel. *Id.* ¶ 46. TTCF officers did permit "in-camera meetings," but Leibel refused to appear in camera except on one occasion. *Id.* ¶ 47.

Plaintiff observed Leibel's criminal trial in June 2018 from the courtroom gallery. *Id.* ¶ 48. Defendant Ryan, one of the writers of Leibel's graphic novel "Syndrome," testified against Leibel. *Id.* ¶¶ 49, 51. Following Defendant Ryan's testimony, Defendant Ryan and Plaintiff had a conversation where Plaintiff expressed his belief that Leibel was innocent. *Id.* ¶ 52. A Canadian reporter was present for the conversation. *Id.* That reporter created the narrative that the novel "Syndrome" was related to the murder. *Id.* ¶ 53. Plaintiff had expressed his belief in the media that the murder was an act of espionage with the intent of interfering with the 2016 presidential election. *Id.* ¶ 55. This included an interview for the Hollywood Reporter in 2017. *Id.* ¶ 79.

On June 13, 2018, following witness testimony in the criminal trial, Defendants Silverman, Mokayef, Cotter and Martindale were engaged in a conversation on their opinions of the case in the presence of jurors. *Id.* ¶ 58. Plaintiff cautioned Defendant Cotter that the behavior was not appropriate, and Defendant Silverman lashed out. *Id.* ¶ 59. Plaintiff believes that when he was out of earshot, Defendants Silverman and Mokayef called Plaintiff a stalker in the presence of the jury. *Id.* ¶ 60.

On June 14, 2018, Defendants Silverman and Mokayef had a private meeting in chambers with the judge presiding over Leibel's criminal trial. *Id.* ¶ 61. When Defendant Silverman emerged from chambers, Defendant Silverman pointed at

Plaintiff while speaking to Defendant Cotter in full view of the gallery and members of the press. *Id.* A juror was then excused. *Id.* ¶ 62.

On June 18, 2018, Plaintiff entered the courtroom and approached the clerk to submit documents for substitution of attorney. *Id.* ¶ 63. The clerk went into chambers. *Id.* Defendants Silverman and Mokayef called Plaintiff an idiot and a moron. *Id.* ¶ 64. When court was in session but Leibel not present, Plaintiff was called to appear and was cited for contempt. *Id.* ¶ 65. The conduct at issue did not occur before the judge, but the judge made and held private inquiries. *Id.* Defendants Cotter and Martindale followed Plaintiff out of the courtroom and the jury was seated in the hallway. *Id.* ¶ 66. Defendants Cotter and Martindale backed Plaintiff into a corner and insisted that he get in the elevator. *Id.*

Plaintiff engaged legal counsel for representation for his hearing on June 22, 2018. *Id.* ¶ 67. Plaintiff's counsel appeared for the June 22, 2018 hearing, at which the court issued a bench warrant for Plaintiff's arrest should he not appear at a hearing on July 18, 2018. *Id.* Plaintiff's attorney filed a demurrer, which the court sustained on July 18, 2018. *Id.* ¶ 69. No sanctions were ordered. *Id.*

Following the hearing, Plaintiff filed a report at the West Hollywood office of the Los Angeles Sheriff's Department ("LASD") against Defendants Silverman, Mokayef, Cotter and Martindale alleging witness intimidation, assault, and filing false documents. *Id.* ¶ 70. Plaintiff alleges that after he initiated the complaint, Defendant Silverman sent an email to Plaintiff's attorney alleging that Plaintiff violated California Penal Code section 148 for filing a false statement. *Id.* Plaintiff proceeded to file the complaint with LASD and Defendants Cotter and Martindale were administratively sanctioned. *Id.* ¶ 71. Plaintiff also filed a writ of habeas corpus in the Los Angeles County Superior Court charging that Defendants Silverman, Mokayef, Cotter and Martindale were in contempt of court for abuse of process, misbehavior in office, and following Plaintiff from the court, pursuant to California Code of Civil Procedure sections 1209-1222. *Id.* ¶¶ 72-73.

Plaintiff alleges there is a pattern of conduct within the Los Angeles District Attorney's office of district attorneys engaging in *ex parte* communications with the court and jurors, falsely charging political opponents with intimidation or harassment, and cheating to win. *Id.* ¶ 76. Plaintiff alleges that Defendants Silverman and Mokayef have made sexual harassment charges to gain advantage over political rivals. *Id.* ¶ 77. Because of their conduct, Plaintiff was shunned by Leibel's criminal defense attorney. *Id.* ¶ 85.

Plaintiff brings a number of claims under 42 U.S.C. section 1983 ("Section 1983") and California state law. *Id.* ¶¶ 92-366. Plaintiff requests compensatory damages, including punitive damages, against Defendants. *Id.* at 98-99.

IV. DISCUSSION

A. Plaintiff's Ex Parte Application[2]

Plaintiff moves for default judgment against Defendants Cotter, Jollif, Velasquez, and Miller. Ex Parte Application at 2. Plaintiff contends that 14 days after Plaintiff filed his FAC, the named Defendants brought a Motion that was almost identical to their first motion. *Id.* at 6-7. Plaintiff asserts that Defendants Cotter, Jollif, Velasquez and Miller have not filed a responsive pleading, and are therefore in default. *Id.* at 7-8. Plaintiff also moves for sanctions against Defendants' counsel. *Id.* at 14-16.

Defendants were served via electronic notice when Plaintiff electronically filed his FAC on January 27, 2020. Dkt. No. 49. Under Federal Rule of Civil Procedure 15(a)(3) ("Rule 15(a)(3)"), Defendants' response to the FAC was due by

[2] The Ex Parte Application includes arguments in opposition to Defendants' Motion. The Court directed Plaintiff to file an Opposition to Defendants' Motion that included all arguments in opposition to that Motion. Dkt. No. 56. The Court also provided that any arguments in opposition to Defendants' Motion contained only in the Ex Parte Application would not be considered. *Id.* Therefore, the Court will consider only the arguments in the Ex Parte Application that are in support of Plaintiff's request for default and sanctions.

February 10, 2020. On February 10, 2020, all named defendants except for Ryan filed the Motion to Strike and Motion to Dismiss. Dkt. No. 53. A motion under Federal Rule of Civil Procedure 12 ("Rule 12") tolls the time for defendants to serve a responsive pleading. Fed. R. Civ. P. 12(a)(4). Therefore, Defendants' Motion to Dismiss pursuant to Rule 12(b)(6) tolled the time for them to serve an answer to the FAC. Defendants have not "failed to plead or otherwise defend." Fed. R. Civ. P. 55(a).

Plaintiff cites to *General Mills, Inc. v. Kraft Foods Global, Inc.*, 495 F.3d 1378 (Fed. Cir. 2007), in support of his position. Plaintiff argues that under *General Mills*, the 14-day period set forth in Rule 15(a)(3) for filing an amended complaint is not tolled by a Rule 12 motion and Defendants have forfeited their right to file a responsive pleading. Ex Parte Application Reply at 2.

General Mills, a Federal Circuit case, is not binding on this Court in the instant non-patent action. Moreover, the language of Rule 15 has since been amended. In 2007, Rule 15(a) provided that "[a] party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be longer, unless the court otherwise orders." *See General Mills*, 495 F.3d at 1379 (quoting the version of Rule 15 at the time). Rule 15(a)(3) currently provides, "[u]nless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later." Fed. R. Civ. P. 15(a)(3). Plaintiff's argument appears to rest on the language of the former version of Rule 15 that a party must "plead" in response to an amended pleading within a certain amount of time, and that a Rule 12 motion to dismiss is not a pleading. Because Rule 15 has since been amended, Plaintiff's argument loses force.

General Mills is also factually distinguishable. In *General Mills*, the Federal Circuit considered whether it was an abuse of discretion for the district court to refuse

to permit the defendant from reasserting its counterclaim after its motion to dismiss an amended complaint was granted. 495 F.3d at 1379. The issue was not whether the defendant was in default for moving to dismiss an amended complaint rather than filing an answer within the prescribed amount of time. In fact, the defendant in *General Mills* did file a motion to dismiss instead of filing an answer to the amended complaint, and the motion to dismiss was granted. The Court is not persuaded that *General Mills* supports Plaintiff's position that Defendants should be found in default for filing a Rule 12 motion to dismiss rather than an answer to Plaintiff's amended complaint.

Plaintiff also cites to *Jimena v. UBS AG Bank*, No. CV-F-07-367 OWW/SKO (E.D. Cal. 2010), for the proposition that Federal Rule of Civil Procedure 55(a) is not a limitation on this Court's power to enter default judgment. In a June 9, 2010 order in the *Jimena* case, the district court rejected the plaintiff's argument that the defendant was in default under *General Mills*. 2010 WL 2353531, at *4. The *Jimena* court did not consider whether the defendant was in default for filing a motion to dismiss rather than an answer to amended pleading. *Id.* Rather, the court considered whether the clock to file an answer began to run when the plaintiff moved to file a third amended complaint or when the court directed the clerk to file the third amended complaint. *Id.* The *Jimena* court found that the defendant there was not in default because it timely filed its answer after the clerk filed the plaintiff's third amended complaint. *Id.* Therefore, *Jimena* does not support Plaintiff's position here that Defendants should be held in default.

Other district courts in this circuit agree that a motion to dismiss can toll the time to file an answer to an amended pleading. *See, e.g.*, *Douglas v. Executive Bd. of the Dry Creek Rancheria Band of Pomo Indians*, No. CV-08-159-S-EJL-LMB, 2008 WL 4809910, at *1-2 (D. Idaho Oct. 3, 2008) (finding a motion to dismiss an amended complaint altered the time for serving a responsive pleading under Rule 12(a)(4)); *Hunt v. San Diego Police Officer Spears*, Civil No. 07cv355-BEN (CAB),

2008 WL 1832210, at *1 (S.D. Cal. April 23, 2008) (explaining an answer to a second amended complaint "would have been premature" because defendants' motion to dismiss was pending and rejecting Plaintiff's argument that defendants should be held in default). The Court also finds persuasive the reasoning of district courts in other circuits that have disagreed with *General Mills* and found that "the same reasoning for tolling the time to answer applies when an amended complaint has been filed." *Direct Enters., Inc. v. Sensient Colors LLC*, No. 1:15-cv-01333-JMS-TAB, 2017 WL 2985623, at *3 n.2 (S.D. Ind. July 13, 2017); *see also Management Registry, Inc. v. A.W. Cos., Inc.*, Case No. 0:17-cv-5009-JRT-KMM, 2020 WL 468846, at *2 (D. Minn. Jan. 29, 2020). Finally, even if the Court were to find that Defendants' motion to dismiss did not toll the time to answer, a default judgment would not be proper where Defendants' intent to defend the action is clear from their motion practice and activity in this case to date. *See* Fed. R. Civ. P. 55(a).

Accordingly, Defendants are not in default and the Court recommends that Plaintiff's Ex Parte Application be denied. Because the Court finds that Defendants are not in default for their filing of a motion to dismiss rather than an answer to the FAC, the Court recommends that Plaintiff's request for sanctions based on counsel's negligence for "failure to know the difference between a motion and a responsive pleading" be denied. The Court also finds that any other actions by Defendants' counsel about which Plaintiff complains do not warrant the imposition of sanctions and recommends denial of the request for sanctions on any other basis set forth in the Ex Parte Application.

B. Defendants' Motion

1. The Parties' Arguments

a. Defendants' Motion

Defendants assert that the FAC violates the Federal Rules of Civil Procedure because of its volume and confusing and repetitive allegations. Mot. at 13-14. Defendants state that "Jose Velasquez" should be dismissed because Plaintiff has not

sought leave to add parties and has not effectuated service on this new defendant. *Id.* at 14.

Defendants contend that Plaintiff's state law claims against them are barred by California's anti-SLAPP statute. *Id.* at 14. The state law claims are based on Defendants' submission of declarations in support of Plaintiff's contempt proceedings in California court, the initiation of civil contempt proceedings, walking Plaintiff out of the courtroom after he was banned from court proceedings, and statements made regarding visiting rights to see Leibel. *Id.* at 16-17. Defendants contend that these allegations all involve protected conduct. *Id.* at 17-18. Moreover, Defendants contend that their alleged statements and actions were in connection with issues under consideration by a judicial body. *Id.* at 18. Defendants also assert that Plaintiff cannot establish a probability of prevailing on the merits because communications made in a judicial proceeding are absolutely privileged under California Code of Civil Procedure section 47(b). *Id.* at 18-19.

Defendants further contend that Plaintiff fails to state sufficient facts under Federal Rule of Civil Procedure 12(b). With respect to Plaintiff's claims of libel, false light, deceit, or malicious prosecution, Defendants are entitled to the state litigation privilege. *Id.* at 20. Defendants argue that Plaintiff's claim under California Civil Code section 52.1 (the "Bane Act") fails because Plaintiff is attempting to assert a violation based on the violation of Leibel's right to see an attorney under the California Penal Code. *Id.* at 21. Plaintiff's claim for intentional interference with contractual relations fails because the challenged policy applied to all prisoners and attorneys, and Defendants are immune from liability under California Government Code section 820.2. *Id.* at 22.

Defendants assert that Plaintiff's Section 1983 claims fail as well. *Id.* at 22-23. Defendants Silverman and Mokayef are absolutely immune because the alleged actions that form the factual basis for Plaintiff's claims were undertaken in their roles as prosecutors during a trial. *Id.* at 23-24. Defendants contend that Plaintiff's first

and third claims fail because the court's decision to send him out of the courtroom resulted from his interference with the proceedings and not from any viewpoints Plaintiff expressed. *Id.* at 24-25. Plaintiff's eleventh claim fails because Plaintiff was not denied his right to visit Leibel *in camera*. *Id.* at 25. Defendants assert that Plaintiff's second, fifth, and sixth claims on denial of the right to petition the government and right to access the courts are meritless because they are based on Defendants not responding to Plaintiff's reprimand for having conversations in a courtroom hallway and the criminal court's decision to deny Plaintiff's request to substitute as counsel. *Id.* at 26. Plaintiff's fourth and eighth claims of violation of the Sixth Amendment fail because Plaintiff was given notice and retained an attorney for his contempt proceedings. *Id.* at 26-27. Defendants contend that Plaintiff has not stated a claim based on the deprivation of his right to practice law because he has not alleged that he ceased practicing law following his removal from the courtroom in the Leibel criminal case or due to the restrictions imposed on attorney-client visits at TTCF. *Id.* at 27-28. Plaintiff's ninth and tenth claims for unlawful seizure under the Fourth Amendment fail because Plaintiff did not actually take the elevator despite the detectives' request and there is no legal merit to Plaintiff's contention that the court ordering him to appear for contempt proceedings is an unlawful seizure. *Id.* at 28-30. Finally, Defendants argue that Plaintiff's thirteen and fourteenth claims for violation of his equal protection rights fail because he has not alleged that he is a member of a protected claim and his allegations show that he was treated the same as other attorneys representing Leibel. *Id.* at 30-32.

Defendants also move to strike Plaintiff's request for punitive damages because he pleads no facts showing any malicious, oppressive, or reckless conduct. *Id.* at 32-33.

b. Plaintiff's Opposition

Plaintiff contends that Defendants have failed to file a responsive pleading and that tolling is unavailable because Federal Rule of Civil Procedure 15(a)(3) addresses

the timing of responsive pleadings to the FAC. Opp'n at 16, 17-18. Plaintiff argues that Defendants' Motion should be dismissed as moot because his pending request for entry of default judgment should be granted. *Id.* at 16-17. Plaintiff also asserts that Defendants' Motion is a second successive anti-SLAPP motion, which is not a responsive pleading. *Id.* at 18. Plaintiff contends that Defendants are attempting to carry their defamation forward to mislead the Court and suppress Plaintiff's litigation activity. *Id.* at 29-31. Plaintiff argues that Defendants' oppressive tortious conduct is a proper predicate for punitive damages. *Id.* at 36-37.

In the footnotes of his opposition brief, Plaintiff makes numerous arguments as to why his individual claims should survive. With respect to his retaliation claims, Plaintiff contends that he has shown that the exercise of his First and Fourteenth Amendment rights were the substantial or motivating factor in the retaliatory conduct, and Defendants misled and pressured the judge in the contempt proceedings. *Id.* at 13 n.1. For his freedom of speech and right to petition claims, Plaintiff alleges that the prosecutor Defendants engaged in a sham litigation to cover up what was an attempt to interfere with the business relationships of a political rival. *Id.* at 14 n.2. Plaintiff also alleges that Defendants violated his First Amendment right to access the courts because he was ordered not to contact Leibel's counsel. *Id.* Plaintiff contends that he did not have a fair hearing for his contempt proceedings because there was judicial misconduct. *Id.* at 24 n.4. Plaintiff asserts that he has a liberty interest to practice his chosen profession. *Id.* at 25 n.5.

c. Defendants' Reply

Defendants argue that Plaintiff's Opposition fails to address Defendants' substantive arguments, is incoherent, and contains inaccurate statements of law with extensive citations in footnotes with minimal legal analysis. Reply at 2.

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2. Analysis

a. The Opposition circumvents the page limit through the use of excessive footnotes.

As an initial matter, the Court admonishes Plaintiff, who is an attorney admitted to practice in this state and district, for his use of excessive footnotes in what appears to be an attempt to circumvent this district's page limits. Plaintiff's original opposition was over 28 pages long, and Plaintiff also included arguments in opposition in his Ex Parte Application. After the Court struck Plaintiff's original opposition and directed him to re-file an opposition that did not exceed the 25-page limit, Plaintiff filed the pending Opposition. Although the Memorandum of Points and Authorities in support of the Opposition is exactly 25 pages long, it includes 18 single-spaced footnotes, most of which are very lengthy. Out of the 25 pages, ten pages are at least half filled with single-spaced footnotes, and five of those ten pages contain only two or three lines of regular text, with the remainder of the page consisting of single-spaced footnotes. *See* Opp'n at 14, 25, 29, 30, 36. The footnotes contain multiple citations to law and argument as to why Plaintiff's claims should survive. Thus, the footnotes include the core of Plaintiff's arguments in opposition. Had Plaintiff included some of these footnotes in the text of his Opposition brief, the brief would have likely exceeded the page limit. It would be within the discretion of the Court to strike the Opposition for Plaintiff's excessive use of footnotes. *See, e.g.*, *Caldera v. J.M. Smucker Co.*, No. CV 12-4936-GHK (VBKx), 2013 WL 6987893, at *1 (C.D. Cal. Oct. 4, 2013) (striking opposition for excessive use of footnotes). In the interest of judicial economy and to avoid further delay of the matter, however, the Court will not strike the Opposition.

b. Plaintiff fails to state a cognizable Section 1983 claim.

To state a claim under Section 1983, Plaintiff must plead that Defendants, while acting under color of state law, deprived him of a right created by federal law. 42 U.S.C. § 1983; *West v. Atkins*, 487 U.S. 42, 48 (1988). Vicarious liability is

unavailable in a Section 1983 claim. *Iqbal*, 556 U.S. at 676. To state a viable Section 1983 claim against an individual, a plaintiff's complaint must allege that the individual's own actions caused the particular constitutional deprivation alleged. *Id.* Individuals cause a constitutional deprivation when they: (1) affirmatively act, participate in another's affirmative act, or fail to perform an act they are legally required to do that causes the deprivation; or (2) set in motion a series of acts by others which they know or reasonably should know would cause others to inflict the constitutional injury. *See Lacey v. Maricopa County*, 693 F.3d 896, 915 (9th Cir. 2012) (citation omitted). Allegations regarding causation must be individualized and must focus on the duties and responsibilities of the defendant "whose acts or omissions are alleged to have caused a constitutional deprivation." *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988) (citations omitted).

Although Plaintiff references the California constitution and state statutes under his claims for Section 1983 relief, a Section 1983 claim must be based on a violation of federal law. Thus, to the extent Plaintiff bases his Section 1983 claims on violations of the California state constitution or statutes, Plaintiff fails to state cognizable claims. The Court will next address the Section 1983 claims that are based on alleged violations of federal law.

i. Defendants Mokayef and Silverman

Plaintiff alleges that Defendants Mokayef and Silverman, both of whom are deputy district attorneys for the County of Los Angeles, *see* FAC ¶¶ 3-4, violated Plaintiff's right of free speech through retaliation, right to petition, due process rights, right to counsel, right to a fair hearing, right to be free from unlawful seizure, and right to equal protection. *Id.* ¶¶ 92-104 (First Claim for Relief); *id.* ¶¶ 105-115 (Second Claim for Relief); *id.* ¶¶ 116-122 (Third Claim for Relief); *id.* ¶¶ 123-129 (Fourth Claim for Relief); *id.* ¶¶ 130-134 (Fifth Claim for Relief); *id.* ¶¶ 135-139 (Sixth Claim for Relief); *id.* ¶¶ 140-145 (Seventh Claim for Relief); *id.* ¶¶ 146-152

(Eighth Claim for Relief); *id.* ¶¶ 153-161 (Ninth Claim for Relief); *id.* ¶¶ 162-169 (Tenth Claim for Relief); *id.* ¶¶ 203-210 (Fourteenth Claim for Relief).

Plaintiff's allegations are based on Defendants Mokayef and Silverman's purported *ex parte* communications with the judge on Leibel's criminal trial regarding Plaintiff's conduct, *see id.* ¶¶ 92-102, 117-120, 131-132, 137, 141, conversations about the trial in the presence of the jury and the press, *see id.* ¶ 106, purported *ex parte* communications with a juror who asserted Plaintiff was a stalker and their subsequent request for contempt, *see id.* ¶¶ 124-127, their drawing the attention of jurors to Plaintiff, *see id.* ¶ 111, their directing Defendants Cotter and Martindale to escort Plaintiff out of the courthouse following a court order to leave the courthouse, *see id.* ¶ 154, and their directing Defendants Cotter and Martindale to submit declarations in support of an order to show cause for contempt against Plaintiff, *see id.* ¶ 163.

Absolute immunity applies where prosecutors engage in activities "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). When a prosecutor performs "investigatory or administrative functions," however, or "is essentially functioning as a police officer or detective," only qualified immunity may be granted. *Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir. 2003) (citing *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993)). In determining immunity, the court examines "the nature of the function performed, not the identity of the actor who performed it." *Kalina v. Fletcher*, 522 U.S. 118, 127 (1997).

Here, Plaintiff complains of conduct by Defendants Silverman and Mokayef that was "intimately associated with the judicial phase" of Leibel's criminal trial. Defendants Silverman and Mokayef, as prosecutors on Leibel's criminal trial, raised Plaintiff's conduct and purported interference in Leibel's criminal trial as an issue to the judge. Plaintiff's other allegations involve the prosecutors' discussion of the case and interactions with jurors during the ongoing criminal trial, and the contempt proceeding of Plaintiff that arose out of his conduct during the Leibel criminal trial.

Defendants Silverman and Mokayef are entitled to absolute immunity because their actions at issue were intimately associated with an ongoing criminal trial and related judicial contempt proceeding, and the two prosecutors were acting as officers of the court in addressing Plaintiff's conduct, rather than as administrators or investigators. Even if their statements made to the judge or the declarations elicited from Defendants Cotter and Martindale were false, the two prosecutors are entitled to immunity because these statements were made during and related to judicial proceedings. *See Buckley*, 509 U.S. at 270 (explaining that immunity applies to "eliciting false or defamatory testimony from witnesses or for making false or defamatory statements during, and related to, judicial proceedings").

Plaintiff, through a series of citations to law in a footnote, appears to argue that Defendants Silverman and Mokayef are not entitled to absolute immunity because they were complaining witnesses, obtaining evidence as collateral investigation into new crimes, or giving advice to police about a criminal investigation. *See* Opp'n at 29 n.10. However, the allegedly unconstitutional actions by these two prosecutors were not simply for purposes of investigating or as complaining witnesses, but rather to bring to the court's attention an individual who the prosecutors believed was being disruptive to the ongoing criminal trial. Because the acts complained of in the FAC relate to Defendants Silverman and Mokayef's role as prosecutors in an ongoing criminal proceeding, Defendants Silverman and Mokayef are entitled to absolute immunity for Plaintiff's Section 1983 claims against these two defendants.

Accordingly, the Court recommends that Plaintiff's Section 1983 claims against Defendants Silverman and Mokayef be dismissed.

ii. Defendants Cotter and Martindale

Plaintiff brings a number of Section 1983 claims against Defendants Cotter and Martindale, both of whom are alleged to be homicide detectives for LASD. FAC ¶¶ 6, 7.

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(a.) Second Claim for Relief

Plaintiff alleges that following his complaint regarding Defendants Silverman, Mokayef and Martindale's *ex parte* conversation of their opinions of the trial in the presence of the jury and the press, Defendant Cotter violated Plaintiff's right to petition the government for grievances by telling Plaintiff that Cotter was not interested in Plaintiff's opinion. FAC ¶¶ 106-110.

The First Amendment protects the right of an individual to petition the government for redress of grievances. *Smith v. Arkansas State Highway Emp., Local 1315*, 441 U.S. 463, 464 (1979). "The government is prohibited from infringing upon these guarantees either by a general prohibition against certain forms of advocacy, or by imposing sanctions for the expression of particular views it opposes." *Id.* (citations omitted). The First Amendment right to petition "does not impose any affirmative obligation on the government to listen [or] to respond." *Id.* at 465.

Plaintiff has not alleged that Defendants prohibited Plaintiff from addressing his grievance with the County or the court, or that they imposed sanctions on him for expressing his view. Rather, Plaintiff complains that Defendant Cotter did not listen to his grievance and instead told Plaintiff to mind his own business. This does not state a cognizable claim based on the right to petition. With respect to Defendant Martindale, Plaintiff only alleges that Defendant Martindale continued with his conduct despite Plaintiff's complaints. Plaintiff fails to state a cognizable claim against Defendant Martindale because there is no duty for the government to respond to a grievance.

(b.) Eighth Claim for Relief

Although Plaintiff brings his Eighth Claim for Relief against Defendants Cotter and Martindale, Plaintiff does not allege under this claim that any specific actions by these two defendants violated his constitutional rights. To the extent Plaintiff bases this claim on Defendants Cotter and Martindale's alleged infringement of Plaintiff's right to petition, *see, e.g.*, FAC ¶¶ 150-151, this claim fails for the same

reasons as Plaintiff's Second Claim for Relief. Accordingly, Plaintiff fails to state a cognizable claim against Defendants Cotter and Martindale under this claim for relief.

(c.) Ninth Claim for Relief

Plaintiff alleges that Defendants Cotter and Martindale violated his right to be free from a seizure without probable cause when they followed him and escorted him from the courthouse. FAC ¶ 154. Plaintiff alleges this occurred when he was attempting to comply with the court's order to leave the courthouse. *Id.*

The Fourth Amendment prohibits unreasonable searches and seizures by the government. *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (citing *Terry v. Ohio*, 392 U.S. 1, 9 (1968)). "[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). "Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Id.* (citation omitted).

Here, Plaintiff only alleges that after he was ordered to leave the courthouse, Defendant Cotter and Martindale escorted him out and told him to leave using the elevator. FAC ¶¶ 66, 154-56. Plaintiff concedes that he was already attempting to comply with the court's order to leave the courthouse when he was escorted to the elevator. Plaintiff does not allege any use of force by these two defendants. Under these circumstances, there is no Fourth Amendment violation. *See Price v. Peerson*, No. CV 13-3390 PSG (JEMx), 2014 WL 12579823, at *8 (C.D. Cal. May 15, 2014) (finding no seizure where court security officers approached the plaintiff and escorted him to the nearest exit), *aff'd*, 643 Fed. App'x 637 (9th Cir. Mar. 22 2016); *Warden*

v. Walkup, No. CV 13-00283-TUC-DCB, 2020 WL 1694752, at *5 (D. Ariz. April 7, 2020) (finding no seizure where the plaintiff was ordered removed and escorted outside from a city council meeting).

(d.) Tenth Claim for Relief

Plaintiff alleges that Defendants Cotter and Martindale submitted false declarations in support of an order to show cause for contempt. FAC ¶ 163. Plaintiff alleges that as a result of the declarations, Plaintiff was subjected to an unconsented seizure and unlawful detention because he was required to appear before the court with counsel. *Id.* ¶¶ 164-166.

"[A] Fourth Amendment seizure occurs when a person is held in custody by arresting officers." *Karam v. City of Burbank*, 352 F.3d 1188, 1193 (9th Cir. 2003). However, a requirement to appear before a court does not rise to the level of a Fourth Amendment seizure. *See id.* (finding pre-trial release restrictions that required, *inter alia*, that the plaintiff show up for court appearances were de minimus and no Fourth Amendment seizure occurred); *see also Harrison v. Dennerline*, No. CV 15-01060-PHX-SPL, 2015 WL 13322434, at *4 (D. Ariz. Nov. 30, 2015) (finding no Fourth Amendment violation where the plaintiff was issued a citation and released on his own recognizance), *aff'd*, 670 Fed. App'x 587 (9th Cir. Nov. 7, 2016); *Garber v. Flores*, No. CV 08-4208-DDP (RNB), 2009 WL 1649727, at *8 (C.D. Cal. June 10, 2009) ("A traffic citation, even if it did require that plaintiff appear in court at some future time, does not constitute a seizure under the Fourth Amendment). Here, Plaintiff does not allege that he was ever arrested or held in custody pursuant to the bench warrant or any other court order that resulted from the contempt proceedings in which Defendants Cotter and Martindale submitted their declarations. At most, as a result of Defendants Cotter and Martindale's declaration, Plaintiff was required to appear before a court pursuant to a court order. These allegations do not amount to a seizure under the Fourth Amendment.

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(e.) Fourteenth Claim for Relief

Plaintiff alleges that because of Defendants Cotter and Martindale's intentional and arbitrary discrimination, Plaintiff was disparately admonished by the court. FAC ¶¶ 206-210.

Plaintiff's allegations do not make clear the alleged violation of equal protection by Defendants Cotter and Martindale, separate from the alleged violation of equal protection by Defendants Silverman and Mokayef. In the paragraph of allegations where Plaintiff alleges a violation of equal protection based on a "class of one," Plaintiff only names Defendants Silverman and Mokayef. *See* FAC ¶ 204. To the extent Plaintiff brings his equal protection claim against Defendants Cotter and Martindale based on the same allegations and theory of liability, Plaintiff fails to state a claim.

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall deny to any person within its jurisdiction the equal protection of the laws, which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) (quotations and citation omitted). To succeed on a "class of one" claim, Plaintiff must demonstrate that Defendants intentionally treated Plaintiff differently than other similarly situated individuals without a rational basis. *Gerhart v. Lake Cty., Mont.*, 637 F.3d 1013, 1022 (9th Cir. 2011). "The class-of-one doctrine does not apply to forms of state action that 'by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments.'" *Towery v. Brewer*, 672 F.3d 650, 660 (9th Cir. 2012) (quoting *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 603 (2008)).

Here, Plaintiff complains of Defendants Cotter and Martindale's involvement in the events leading up to the contempt proceedings against Plaintiff. These actions, which were allegedly made at the direction of Defendants Silverman and Mokayef, *see* FAC ¶ 207, were part of Defendants Silverman and Mokayef's discretionary

decision to initiate a request for contempt charges against a potentially disruptive individual in an ongoing criminal trial. Thus, the Court finds that a class-of-one doctrine cannot be brought against Defendants Cotter and Martindale under the facts alleged by Plaintiff. *See Donahoe v. Arpaio*, 869 F. Supp. 2d 1020, 1074 (D. Ariz. 2012) (finding decisions in the investigation and prosecution of criminal charges and institution of civil proceedings to be discretionary decisions which cannot be challenged in a class of one equal protection claim).

Additionally, even if the class-of-one doctrine could apply, Plaintiff fails to identify similarly-situated comparators. Plaintiff alleges that he is an attorney and was an attorney for Leibel. FAC ¶¶ 31, 204, 217. Plaintiff also alleges that he attempted to submit documents to the court for substitution of attorney. *Id.* ¶ 63. Plaintiff does not allege that any of the other members of the public observing the trial were also attorneys or attorneys of Leibel, or other facts that would show how these other individuals would be proper comparators for a class-of-one claim. The Court finds that Plaintiff's identification of other members of the public in the courtroom gallery as similarly-situated individuals is insufficient for a class-of-one claim. *See Warkentine v. Soria*, 152 F. Supp. 3d 1269, 1294 (E.D. Cal. 2016) (finding plaintiffs bringing class-of-one equal protections claims "must show an extremely high degree of similarity between themselves and the persons to whom they compare themselves" (citing *Clubside, Inc. v. Valentin*, 468 F.3d 144, 159 (2d Cir. 2006)).

In summary, Plaintiff fails to state a cognizable Section 1983 claim against Defendants Cotter and Martindale.

iii. Defendants Jollif, Miller, Velasquez, Doe 1, and Doe 2

Under his Eleventh, Twelfth, and Thirteenth Claims for Relief, Plaintiff alleges violations of his right to free speech, right to due process, and right to equal protection by Defendants Jollif, Miller, Velasquez,[3] Doe 1, and Doe 2. FAC ¶¶ 170-

[3] Plaintiff spells the last name of this individual as both "Velasques" and "Velasquez." The Court will use the spelling set forth by Defendants. The Court

202. Plaintiff alleges that on August 1, 2016, and other occasions, at TTCF, Defendants Jollif, Velasquez, and Doe 1 denied Plaintiff access to an attorney-client visit with Leibel, which denied Plaintiff the right of free speech. *Id.* ¶ 171. Plaintiff alleges that between August 2016 and June 2018, Defendant Miller, county counsel for the County of Los Angeles, implemented a policy denying Plaintiff attorney-client visits without a minute order from the court. *Id.* ¶ 172. Doe 2, an officer at TTCF, implemented the policy and denied Plaintiff in-person visits, claiming that only in-camera visits were available. *Id.* ¶ 173. Defendant Jollif, and officer for the legal unit at TTCF, established the final policy with respect to the administration of attorney-client visits at TTCF. *Id.* ¶ 176. Doe 1, the intake officer for TTCF, denied Plaintiff attorney-client visits without a minute order from the court. *Id.* ¶ 178. Plaintiff alleges that the conduct by these Defendants amounted to a violation of his right to free speech, right to practice his chosen profession of law, and right to equal protection. *Id.* ¶¶ 170-202.

The Court finds that these allegations are insufficient to state a violation of Plaintiff's federal constitutional rights. With respect to Defendant Velasquez, there are no factual allegations on his individual role or involvement in the purported violations. Therefore, Plaintiff fails to state a cognizable Section 1983 claim against Defendant Velasquez.

Although Plaintiff does not appear to bring a claim for violation of the Sixth Amendment under his claims for relief against the remaining individuals, the Court observes that the right to contact attorney visitation is part of a prisoner client's right to access the courts, and not the attorney's constitutional right. *Casey v. Lewis*, 4 F.3d 1516, 1520 (9th Cir. 1992) (citing *Ching v. Lewis*, 895 F.2d 608, 610 (9th Cir.

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declines to address Defendants' arguments regarding the addition of a new defendant named Jose Velasques because, regardless of the correct spelling of the name of individual, Plaintiff fails to state a cognizable Section 1983 claim against this individual.

1990)). Here, Plaintiff alleges that he was not able to speak to his client in-person, but he was permitted to speak to his client in-camera. Plaintiff has not alleged how his right to free speech was impinged by this limitation, and he has not cited any cases for the proposition that limiting an attorney to in-camera visits instead of in-person visits is a violation of the attorney's right to free speech. *Cf. McGinnis v. Cty. of Fresno*, No. CV-F-08-542 OWW, 2008 WL 4348000, at *8 (E.D. Cal. Sept. 22, 2008) (finding no cases to support plaintiff's First Amendment claim that his right to speak freely with a client was violated by jail's monitoring of the conversation).

Plaintiff has also not alleged a violation of his right to practice his chosen profession of law. Although there is a "generalized due process right to choose one's field of private employment" under the liberty component of the Fourteenth Amendment's Due Process Clause, that right is generally invoked in cases where there is a "complete prohibition of the right to engage in a calling," not brief interruptions. *Conn v. Gabbert*, 526 U.S. 286, 291-92 (1999). Here, Plaintiff has not sufficiently alleged how the requirement to conduct his visits with Leibel in-camera rather than in-person until he obtained a court order prevented him from practicing law altogether. Rather, at most, Plaintiff's allegations amount to a brief interruption in his ability to represent Leibel. *See McGinnis*, 2008 WL 4348000, at *8 (dismissing Fourteenth Amendment claim where plaintiff admitted intercom monitoring of interview with client by jail personnel did not eliminate his ability to practice law).

Additionally, Plaintiff fails to allege a violation of equal protection because his allegations show that he was treated the same as other civil attorneys of Leibel. Plaintiff alleges that Leibel's child dependency attorney also had to comply with the demand to present a minute order from the court and was subsequently granted access to Leibel after this condition was met. FAC ¶ 194. Thus, Plaintiff does not allege that he was treated differently from similarly-situated individuals.

Accordingly, the Court recommends that Plaintiff's Section 1983 claims against Defendants Jollif, Velasquez, Miller, Doe 1, and Doe 2 be dismissed.

iv. Doe 10

In addition to bringing his Section 1983 claims against individual defendants, Plaintiff brings each Section 1983 claim against Doe 10, which Plaintiff describes as "a municipal corporation organized under the laws and Constitution of the State of California." FAC ¶ 14. Plaintiff also describes Doe 10 as "maintain[ing] and operat[ing] the Los Angeles County District Attorney's Office and the LASD, in Los Angeles County, California," and "the employer of Defendants Silverman, Mokayef, Cotter, Martindale, Jollif, Velasquez, Miller, Doe 1, [] Doe 2, and Doe 3." *Id.*

To the extent Plaintiff claims that Doe 10 is the Los Angeles County District Attorney's Office and is liable for its failure to train its prosecutors, the Los Angeles County District Attorney's Office is entitled to Eleventh Amendment immunity. As explained above, Defendants Silverman and Mokayef are entitled to prosecutorial immunity for their actions at issue, which are prosecutorial functions. The Los Angeles County District Attorney's Office is entitled to Eleventh Amendment immunity for any alleged failure to train Defendants Silverman and Mokayef for the conduct at issue. *See, e.g., Nazir v. Cty. of Los Angeles*, No. CV 10-06546 SVW (AGRx), 2011 WL 819081, at *8 (C.D. Cal. Mar. 2, 2011) (finding a district attorney's office is a state actor and thus entitled to Eleventh Amendment immunity where the procedure at issue related to prosecutorial functions); *Pellerin v. Nevada Cty.*, No. CIV S 12-665 KJM CKD, 2013 WL 1284341, at *4 (E.D. Cal. Mar. 28, 2013) (district attorney's office deemed to be a state agency when involved in prosecutorial activities).

To the extent Plaintiff claims that Doe 10 is the County of Los Angeles and is liable for the actions of Defendants Silverman and Mokayef, the County of Los Angeles cannot be held liable for allegedly unconstitutional procedures at the district attorney's office that relate to prosecutorial functions because the state would be the relevant actor, not the county. *See Weiner v. San Diego Cty.*, 210 F.3d 1025, 1031 (9th Cir. 2000) (finding district attorney was acting as a state official and not a county

officer in making prosecutorial decision); *see also Nazir*, 2011 WL 819081, at *8; *Pellerin,* 2013 WL 1284341, at *4 ("Because members of the District Attorney's office were state officials for purposes of prosecutorial decisions, they cannot be deemed to be policy makers for the County.").

Finally, to the extent Plaintiff claims that Doe 10 is the County of Los Angeles and is liable as a municipality for the conduct of the non-prosecutor defendants, Plaintiff's claim fails. A local government agency can be held liable if "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers, or where the action is made pursuant to governmental custom even though such a custom has not received formal approval through the body's official decisionmaking channels." *Jackson v. Barnes*, 749 F.3d 755, 762-63 (9th Cir. 2014) (quoting *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 691 (1978)). Alternatively, a municipality can be held liable under a failure-to-train claim if a plaintiff alleges: (1) he was deprived of a constitutional right; (2) the municipality had a training policy that amounts to deliberate indifference to the constitutional rights of persons with whom officials are likely to come into contact; and (3) his constitutional injury would not have happened had the municipality properly trained those officials. *Blankenhorn v. City of Orange*, 485 F.3d 463, 484 (9th Cir. 2007). Here, as explained above, Plaintiff has failed to allege any deprivation of his constitutional violations by the non-prosecutor defendants. Thus, Plaintiff may not maintain a municipal liability claim against Doe 10.

Accordingly, the Court recommends that Plaintiff's Section 1983 claims against Doe 10 be dismissed.

c. Further leave to amend is not warranted.

After the period to amend as a matter of course has passed, a party generally "may amend its pleading only with the opposing party's written consent or the court's leave." *See* Fed. R. Civ. P. 15(a)(2). The Federal Rules of Civil Procedure encourage

courts to "freely give leave when justice so requires," *id.*, and the Ninth Circuit has instructed courts in this circuit to apply Rule 15(a)(2) liberally. *Sonoma Cty. Ass'n of Retired Emps. v. Sonoma Cty.*, 708 F.3d 1109, 1117 (9th Cir. 2013). "Courts may decline to grant leave to amend only if there is strong evidence of 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment, etc.'" *Sonoma Cty.*, 708 F.3d at 1117 (alteration in original) (quoting *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)). Leave to amend need not be granted where a party has previously been given opportunities to cure pleading deficiencies but has failed to do so. *See Brown v. Fitzpatrick*, 667 F. App'x 267 (9th Cir. June 23, 2016) (mem.) ("The district court did not abuse its discretion in dismissing [the pro se plaintiff's] amended complaint without leave to amend after providing [the plaintiff] with one opportunity to amend."); *Chodos v. West Publ'g Co.*, 292 F.3d 992, 1003 (9th Cir. 2002) ("It is generally our policy to permit amendment with extreme liberality, although when a district court has already granted a plaintiff leave to amend, its discretion in deciding subsequent motions to amend is particularly broad." (citation omitted) (internal quotation marks omitted)).

The Court notes that Plaintiff, though representing himself, is an attorney licensed to practice in this state and before this Court. Therefore, Plaintiff is not necessarily entitled to the level of leniency usually provided to non-attorney *pro se* litigants. *See Crockett v. California*, No. CV 12-1741-DOC (SP), 2012 WL 2153801, at *3, 8 (C.D. Cal. May 22, 2012) (finding it doubtful that plaintiff, who had practiced law for over seven years in California before his license was suspended, was entitled to a liberal pleading standard), *report and recommendation adopted*, 2012 WL 2153684 (C.D. Cal. June 8, 2012); *Burns v. Burns*, Case No. 15-cv-02329-HRL, 2016 WL 6679807, at *2 (N.D. Cal. Nov. 14, 2016) ("An attorney representing himself clearly benefits from the representation of counsel, and does not require the flexibility

afforded those without the benefit of legal training and experience." (citation and internal punctuation omitted)). Additionally, Plaintiff has had a prior opportunity to amend his complaint. The Court also finds that further leave to amend would be futile because, in light of the allegations to date, Plaintiff would not be able allege a set of facts that would state a cognizable Section 1983 claim.

Accordingly, the Court recommends that Plaintiff's Section 1983 claims be dismissed without leave to amend.

d. Supplemental jurisdiction over the remaining state law claims should be declined, and Defendants' anti-SLAPP motion should be denied as moot.

Plaintiff brings a number of state law claims against Defendants and Ryan, who has not appeared in the action. The basis for jurisdiction of these state law claims is supplemental jurisdiction under 28 U.S.C. § 1367(a). *See* FAC ¶ 17. Because the Court recommends that Plaintiff's federal law claims against Defendants be dismissed, the Court recommends that supplemental jurisdiction over Plaintiff's state law claims be declined, and the state law claims be dismissed without prejudice. *See* 28 U.S.C. § 1367(c). Consequently, the Court recommends that Defendants' request to strike Plaintiff's state law claims and request for attorneys' fees pursuant to California's anti-SLAPP statute be denied as moot. *See McMillan v. Chaker*, 791 Fed. App'x 666, 667 (9th Cir. Jan. 27, 2020) (affirming district court's declining to address anti-SLAPP motion after state law claim dismissed); *Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1097 (N.D. Cal. 2015) (denying as moot anti-SLAPP motion after declining to exercise supplemental jurisdiction over state law claims).

V. RECOMMENDATION

For the reasons stated above, IT IS RECOMMENDED that the District Court issue an Order:

(1) Accepting and adopting this Report and Recommendation;

(2) GRANTING IN PART Defendants' Motion as to the request to dismiss Plaintiff's federal claims and dismissing Plaintiff's Section 1983 claims with prejudice and without leave to amend;

(3) Declining to exercise supplemental jurisdiction over Plaintiff's state law claims and dismissing the state law claims without prejudice; and

(4) DENYING AS MOOT Defendants' Motion as to the request to strike Plaintiff's state law claims and the request for attorneys' fees under California's anti-SLAPP statute.

DATED: May 26, 2020

/S/
ROZELLA A. OLIVER
UNITED STATES MAGISTRATE JUDGE

NOTICE

Reports and Recommendations are not appealable to the Court of Appeals, but may be subject to the right of any party to file objections as provided in Local Civil Rule 72 and review by the District Judge whose initials appear in the docket number. No Notice of Appeal pursuant to the Federal Rules of Appellate Procedure should be filed until entry of the Judgment of the District Court.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ADAM J TENSER, et al. PLAINTIFF(S) v. ROBERT JOSHUA RYAN, et al. DEFENDANT(S)	CASE NUMBER: 2:19-cv-05496-VBF-RAO **NOTICE OF FILING OF MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION**

TO: All Parties of Record

You are hereby notified that the Magistrate Judge's Report and Recommendation has been filed on May 26, 2020.

Any party having Objections to the Report and Recommendation and/or order shall, not later than June 9, 2020, file and serve a written statement of Objections with points and authorities in support thereof before the Honorable Magistrate Judge Rozella A. Oliver. A party may respond to another party's Objections within 14 days after being served with a copy of the Objections.

Failure to object within the time limit specified shall be deemed a consent to any proposed findings of fact. Upon receipt of Objections and any Response thereto, or upon expiration of the time for filing Objections or a Response, the case will be submitted to the District Judge for disposition. Following entry of Judgment and/or Order, all motions or other matters in the case will be considered and determined by the District Judge.

The Report and Recommendation of a Magistrate Judge is not a Final Appealable Order. A Notice of Appeal pursuant to Federal Rules of Appellate Procedure 4(a)(1) should not be filed until entry of a Judgment and/or Order by the District Judge.

CLERK, UNITED STATES DISTRICT COURT

Dated: May 26, 2020

By: /s/ *Christianna Howard*
Deputy Clerk

ADAM J. TENSER, v. ROBERT JOSHUA RYAN, et al., No. 2:19-cv-05496-VBF-RAO **(C.D. Cal. February 21, 2020)(order striking opposition with leave to file opposition; directing parties to meet and confer on pending motions; setting briefing schedule and continuing hearing on pending motions)**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.: CV 19-5496 VBF (RAO) Date: February 21, 2020
Title: Adam J. Tenser et al. v. Robert Joshua Ryan et al.

Present: The Honorable **ROZELLA A. OLIVER, U.S. MAGISTRATE JUDGE**

Donnamarie Luengo	N/A
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiff(s):	Attorneys Present for Defendant(s):
N/A	N/A

Proceedings: **ORDER STRIKING OPPOSITION WITH LEAVE TO FILE AMENDED OPPOSITION [55]; DIRECTING PARTIES TO MEET AND CONFER ON PENDING MOTIONS; AND SETTING BRIEFING SCHEDULE AND CONTINUING HEARING ON PENDING MOTIONS [53][54]**

On February 10, 2020, Defendants Beth Silverman, Tannaz Mokayef, William Cotter, Robert Martindale, Maurice Jollif, Jay Velasquez, and Elizabeth Dumais Miller (collectively, "Defendants") filed a Special Anti-SLAPP Motion to Strike and Motion to Dismiss and Strike Portions of the Complaint ("Motion"). Dkt. No. 53. The Motion notices a hearing for March 11, 2020 at 10:00 a.m. *Id.*

On February 19, 2020, Plaintiff Adam J. Tenser ("Plaintiff") filed two documents. Dkt. Nos. 54, 55. The first filing is captioned as both "Pro Se Plaintiff's Opposition to Defendants Beth Silverman, Tannaz Mokayef, William Cotter, Robert Martindale, Maurice Jollif, Jose Velasquez, and Elizabeth Dumais Miller's Special Anti-SLAPP Motion to Strike and Motion to Dismiss and Strike Portions of the Complaint Per CCP § 425.16: FRCP 12(b)(6); FRCP 12(f)(2)" and "Ex Parte Application for Entry of Default Judgment Per FRCP 55(2)(b)." Dkt. No. 54. The Court will refer to the first filing as the "Ex Parte Application." The second filing is captioned "Pro Se Plaintiff's Opposition to Defendants Beth Silverman, Tannaz Mokayef, William Cotter, Robert Martindale, Maurice Jollif, Jose Velasquez, and Elizabeth Dumais Miller's Special Anti-SLAPP Motion to Strike and Motion to Dismiss and Strike Portions of the Complaint Per CCP § 425.16: FRCP 12(b)(6); FRCP 12(f)(2)." Dkt. No. 55. The Court will refer to the second filing as the "Opposition."

The Ex Parte Application includes arguments in support of Plaintiff's request for default or default judgment, *see* Dkt. No. 54 at 7-9, arguments in opposition to Defendants' Motion, *see*

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.: CV 19-5496 VBF (RAO) Date: February 21, 2020
Title: Adam J. Tenser et al. v. Robert Joshua Ryan et al.

id. at 9-14, and a request for sanctions, *see id.* at 14-16. The Opposition appears to contain only arguments in opposition to Defendants' Motion. *See generally* Dkt. No. 55.

This district's local rules provide for a party opposing a motion to file a single memorandum in opposition or a written statement that the party will not oppose the motion. L.R. 7-9. Plaintiff's attempt to file two separate filings containing arguments in opposition to Defendant's pending Motion is in violation of the local rules. Moreover, any memorandum of points and authorities may not exceed 25 pages in length unless permitted by Court order. L.R. 11-6. The Opposition, which contains a memorandum of points and authorities of over 28 pages, *see* Dkt. No. 55 at 10-38, violates the local rules even when considered alone. Considering the Opposition and Ex Parte Application together, Plaintiff presents over 33 pages of arguments in opposition to Defendants' Motion. *See* Dkt. No. 54 at 9-14, Dkt. No. 55 at 10-38. Plaintiff has not moved for leave to file an opposition in excess of the 25-page limit or to file more than one document in opposition to Defendants' Motion and the Court has not granted Plaintiff leave to do so.

Accordingly, the Court **STRIKES** Plaintiff's Opposition, Dkt. No. 55, for exceeding the 25-page limit. *See* L.R. 11-6. Plaintiff may file an amended opposition, no longer than 25 pages in length and in conformance with all applicable local rules. Plaintiff is cautioned that although the Court is not striking Plaintiff's Ex Parte Application, the Court will not consider any arguments in the Ex Parte Application in relation to Defendants' pending Motion. Any arguments in the Ex Parte Application that Plaintiff would like for the Court to consider in relation to Defendants' pending Motion must be included in Plaintiff's amended opposition. Defendants will be provided additional time to file their reply and the Court will continue the hearing date as set forth below.

With respect to the Ex Parte Application, Plaintiff has provided no grounds for why the Court should consider the requested relief *ex parte*. *See Mission Power Eng'g Co. v. Cont'l Cas. Co.*, 883 F. Supp. 488, 492 (C.D. Cal. 1995). The Ex Parte Application also does not comply with Local Rule 7-19. To the extent Plaintiff intended for his request for default to be noticed as a regular motion and not an *ex parte* application, the noticed hearing date of March 11, 2020 does not comply with Local Rule 6-1. Although these would be sufficient grounds to deny or strike the Ex Parte Application, in the interest of judicial efficiency, the Court will consider the Ex Parte Application as a regularly noticed motion and will set a briefing schedule that will provide Defendants with adequate time to respond. As explained above, the Court will not

consider any arguments in the Ex Parte Application that are in opposition to Defendants' Motion. The Court will only consider Plaintiff's request for default and sanctions.

Finally, it appears that a meet and confer may not have taken place prior to the filing of Defendants' Motion. The Court ORDERS the parties to meet and confer, in person or by telephone, by **February 26, 2020**, regarding the two pending motions addressed in this order. If the parties agree to a narrowing or withdrawal of either of the motions, the parties shall promptly file a joint status report indicating so. If the parties are unable to agree to any narrowing of the pending motions, the following briefing and hearing schedule shall apply:

- Plaintiff shall file his Amended Opposition to Defendants' Motion by **March 4, 2020**. Defendants shall file any Reply to their Motion by **March 11, 2020**.
- Defendants shall file their Opposition to the Ex Parte Application by **March 4, 2020**. Plaintiff's Reply to the Ex Parte Application, if any, shall be due by **March 11, 2020**.
- A hearing will be held on Defendants' Motion and Plaintiff's Ex Parte Application on **March 25, 2020 at 10:00 a.m.** The hearing will be held in Courtroom 590 on the 5th Floor of the Roybal Federal Building and United States Courthouse, 255 E. Temple St., Los Angeles, CA, 90012.

IT IS SO ORDERED.

Initials of Preparer dl

ADAM J. TENSER, v. ROBERT JOSHUA RYAN, et al., No. 2:19-cv-05496-VBF-RAO (C.D. Cal. January 6, 2020)(order granting special anti-slapp motion to strike and motion to dismiss and strike portions of the complaint with leave to amend)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.: CV 19-5496 VBF (RAO) Date: January 6, 2020
Title: Adam J. Tenser et al. v. Robert Joshua Ryan et al.

Present: The Honorable **ROZELLA A. OLIVER, U.S. MAGISTRATE JUDGE**

Donnamarie Luengo	N/A
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiff(s):	Attorneys Present for Defendant(s):
N/A	N/A

Proceedings: **ORDER GRANTING SPECIAL ANTI-SLAPP MOTION TO STRIKE AND MOTION TO DISMISS AND STRIKE PORTIONS OF THE COMPLAINT WITH LEAVE TO AMEND [38]**

On November 22, 2019, Defendants William Cotter, Maurice Jollif, Jay Velasquez and Elizabeth Dumais Miller (collectively, "Defendants") filed a Special Anti-SLAPP Motion to Strike and Motion to Dismiss and Strike Portions of the Complaint ("Motion"). Dkt. No. 38. The Motion notices a hearing for January 8, 2020 at 10:00 a.m. *Id.* On December 24, 2019, Defendants filed a Notice of Non-Receipt of Opposition to their Motion. Dkt. No. 41. On December 26, 2019, Plaintiff Adam J. Tenser ("Plaintiff"), an attorney representing himself, filed an Opposition to the Motion. Dkt. No. 43. Also on December 26, 2019, Plaintiff filed a Demurrer to the Motion, an Application for a Continuance of Hearing, an Application for Order to Show Cause for Contempt, and an Application for Sanctions ("Demurrer and Applications"). Dkt. No. 42. On December 31, 2019, Defendants filed an Objection to the Demurrer and Applications, Dkt. No. 44, and a Reply in support of their Motion, Dkt. No. 45. For the reasons set forth below, Defendants' Motion is **GRANTED** with leave to amend. The Court declines to consider the Demurrer and Application. The January 8, 2020 hearing is **VACATED**.

Defendants filed their Motion on November 22, 2019 and noticed it for a hearing on January 8, 2020. Dkt. No. 38. Under Local Rule 7-9, Plaintiff's Opposition was due no later than 21 days before January 8, 2020, or December 18, 2019. Plaintiff filed his Opposition over a week late on December 26, 2019, and only after Defendants filed their Notice of Non-Receipt of Opposition. *See* Dkt. Nos. 41, 43. Plaintiff did not move for leave to file an untimely Opposition and Plaintiff provides no reasons in his Opposition for his late filing. Under Local Rule 7-12, Plaintiff's failure to file a timely opposition may be deemed consent to the granting of the motion. Although Plaintiff is proceeding *pro se*, the Court finds that Plaintiff is not entitled

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.: CV 19-5496 VBF (RAO) Date: January 6, 2020
Title: Adam J. Tenser et al. v. Robert Joshua Ryan et al.

to any leniency regarding his failure to file a timely opposition. Plaintiff is a licensed attorney, admitted to the Bar in the State of California and admitted to practice before the Central District. Thus, he is expected to be aware of the local rules and comply with them. *See Burns v. Burns Rhine*, Case No. 15-cv-02329-HRL, 2016 WL 6679807, at *2 (N.D. Cal. Nov. 14, 2016) (declining to consider supplemental opposition filed in violation of local rules where filer was a licensed attorney). Thus, the Court will not consider Plaintiff's untimely Opposition and will deem Plaintiff's failure to file a timely Opposition as consent to the granting of Defendants' Motion. Accordingly, Defendants' Motion is GRANTED. Because Plaintiff has not had an opportunity to amend his Complaint and it appears that Plaintiff wishes to amend, the Court will grant Plaintiff leave to amend. Plaintiff shall file any amended complaint by **January 27, 2020**. Plaintiff's failure to file an amended complaint by this deadline will result in a recommendation that the claims at issue in Defendants' Motion be dismissed with prejudice.

Turning to Plaintiff's Demurrer and Applications, it is unclear what relief Plaintiff seeks with his purported Demurrer. A demurrer is a California state court filing and is considered the equivalent of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)"). *See Estate of Tucker ex rel. Tucker v. Interscope Records, Inc.*, 515 F.3d 1019, 1033 n.14 (9th Cir. 2008) (describing a demurrer as "the California equivalent of a motion to dismiss on the pleadings under Federal Rule of Civil Procedure 12(b)(6)"). Here, Plaintiff files a Demurrer to Defendants' Motion, and not to a pleading. Thus, the Court construes this portion of the filing as a further Opposition to Defendants' Motion rather than a Rule 12(b)(6) motion to dismiss and declines to consider it because it is untimely for the same reasons as set forth above. Plaintiff's Application to continue the hearing date for Defendants' Motion is moot because the hearing for the Motion has been vacated. Finally, the Court declines to consider Plaintiff's Applications for an order to show cause and for sanctions. It is not clear whether Plaintiff intended for these Applications to be motions or *ex parte* applications. To the extent Plaintiff intended to file motions, he did not notice the motions for a hearing date as required under Local Rule 6-1. To the extent Plaintiff intended to file *ex parte* applications, he did not follow the procedure for filing *ex parte* applications. *See* L.R. 7-19. Plaintiff also has not lodged a proposed order. Accordingly, the Court declines to consider the Demurrer and Applications.

IT IS SO ORDERED.

Initials of Preparer dl

ADAM J. TENSER, v. ROBERT JOSHUA RYAN, et al., No. 2:19-cv-05496-VBF-RAO (C.D. Cal. November 14, 2019)(order withdrawing report and recommendation; directing plaintiff to file application for permission for electronic filing _pro se_; and extending time to serve defendant Jollif)

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.: CV 19-5496 VBF (RAO) Date: November 14, 2019
Title: Adam J. Tenser et al. v. Robert Joshua Ryan et al.

Present: The Honorable **ROZELLA A. OLIVER, U.S. MAGISTRATE JUDGE**

Donnamarie Luengo	N/A
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiff(s):	Attorneys Present for Defendant(s):
N/A	N/A

Proceedings: **ORDER WITHDRAWING REPORT AND RECOMMENDATION [20]; DIRECTING PLAINTIFF TO FILE APPLICATION FOR PERMISSION FOR ELECTRONIC FILING; AND EXTENDING TIME TO SERVE DEFENDANT JOLLIF**

On June 24, 2019, Plaintiff Adam J. Tenser ("Plaintiff"), proceeding *pro se*, filed a civil rights complaint ("Complaint") pursuant to 42 U.S.C. § 1983 against Defendants Robert Joshua Ryan, Beth Silverman, Tannaz Mokayef, William Cotter, Robert Martindale, Maurice Jollif, Jay Velasquez, Elizabeth Dumais Miller, and multiple Does. Dkt. No. 1. Under Federal Rule of Procedure 4(m) ("Rule 4(m)"), Plaintiff was required to serve the defendants with the summons and complaint by September 23, 2019. Because Plaintiff failed to file sufficient proofs of service for any of the named Defendants as of September 25, 2019, the Court issued an Order to Show Cause ("OSC") as to why the case should not be dismissed for failure to serve. Dkt. No. 18. On October 15, 2019, the Court issued a Report and Recommendation ("Report") recommending the action be dismissed for failure to serve and for failure to prosecute. Dkt. No. 20. Objections to the Report were due by November 4, 2019. Dkt. No. 19.

On November 3, 2019, Plaintiff, an attorney representing himself, electronically filed nine proofs of service and an Objection to the Report ("Objection"). Dkt. Nos. 21-30. In the Objection, Plaintiff explains that he was out of the country between September 3 and October 30, 2019, and that he could only arrange for his office mail to be reviewed once a month because he no longer employs any support staff. Objection at 2. Plaintiff became aware of the OSC only on October 25, 2019. *Id.* Plaintiff had to apply for admission to this Court prior to gaining access to log into the Court's electronic case management system and did not receive any electronic communications. *Id.* Plaintiff has now filed proofs of service attesting to service of Defendants Ryan, Silverman, Mokayef and Martindale on October 23, 2019 and service of Defendants

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.: CV 19-5496 VBF (RAO) Date: November 14, 2019
Title: Adam J. Tenser et al. v. Robert Joshua Ryan et al.

Velasquez, Miller, and Cotter on November 1, 2019. *Id.* Defendant Jollif could not be served through LASD because he had retired, and Plaintiff's process server was unable to serve Defendant Jollif at his home. *Id.* at 3. Plaintiff requests that the Court instruct the Marshal to serve Defendant Jollif. *Id.* Plaintiff also provides in his Objection that his prior proofs of service for service on the the Solicitor General and Department of General Services of California and the County of Los Angeles Clerk, Sheriff and District Attorney were to show compliance with California statutory requirements. *Id.* at 3-4. Plaintiff contends that he has provided evidence to demonstrate good cause to extend time for service because seven of the eight named defendants have now been served, and Defendants have not been prejudiced by the delay of one month. *Id.* at 6. Plaintiff also argues that the OSC should be set aside pursuant to Federal Rule of Civil Procedure 60(b)(1) ("Rule 60(b)(1)") because of excusable neglect. *Id.* at 6-7.

Because Plaintiff has filed proofs of service and demonstrated his intent to prosecute this action, the Court will **WITHDRAW** its October 15, 2019 Report and **DISCHARGE** the September 25, 2019 OSC.[1]

With respect to the one unserved defendant, Defendant Jollif, the Court finds that it would not be appropriate to direct the U.S. Marshal's Service ("USMS") to expend its resources to serve this defendant. Plaintiff has paid the filing fee in this case and is not proceeding *in forma pauperis*. Plaintiff has not provided any other basis for the Court to direct USMS to serve Plaintiff's complaint. However, the Court finds that there is good cause under Rule 4(m) to extend the time for service given Plaintiff's attempts to serve Defendant Jollif. The time to serve Defendant Jollif is extended to **December 13, 2019**.

Finally, the Court addresses Plaintiff's contention that he is not receiving electronic notice of the Court's orders. Plaintiff filed his complaint *pro se*. Accordingly, he was required to present his documents for filing in paper format. *See* L.R. 5-4.2(a)(1). In order to file electronically, Plaintiff must seek leave of Court. *See* L.R. 5-4.1.1. It appears that Plaintiff was able to file his proofs of service and Objection by registering as a CM/ECF user as an attorney. However, because Plaintiff has not been granted leave of Court to file electronically as a *pro se* litigant in this matter, it is unclear if the Court may serve orders upon Plaintiff electronically or if Plaintiff may continue to file electronically without leave of Court. Accordingly, the Court orders Plaintiff to file an Application for Permission for Electronic Filing, CV-005, by **November 20, 2019**.

[1] Rule 60(b) is inapplicable because there has not been any final judgment, order or proceeding.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

Case No.: CV 19-5496 VBF (RAO) Date: November 14, 2019
Title: Adam J. Tenser et al. v. Robert Joshua Ryan et al.

The Clerk is directed to attach Form CV-005 to this order, and to serve this order and its attachment on Plaintiff at his address of record. The Clerk is also directed to email a copy of this order and its attachment to Plaintiff at JT@Tenserlaw.com.

IT IS SO ORDERED.

Attachment.

Initials of Preparer : dl

Name: _____

Address: _____

_____

Phone Number: _____

E-mail Address: _____

Pro Se

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PLAINTIFF(S) v. DEFENDANT(S)	CASE NUMBER **APPLICATION FOR PERMISSION FOR ELECTRONIC FILING**

As the (Plaintiff/Defendant) _____ ☑ in the above-captioned matter, I respectfully ask the Court for permission to participate in electronic filing ("e-filing") in this case. I hereby affirm that:

1. I have reviewed Local Rule 5-4.1.1 and the instructions available at the Pro Se E-Filing webpage located on the Court's website.
2. I understand that once I register for e-filing, I will receive notices and documents only by e-mail in this case and not by U.S. mail.
3. I understand that if my use of the CM/ECF system is unsatisfactory, my e-filing privileges may be revoked and I will be required to file documents in paper, but will continue to receive documents via e-mail.
4. I understand that I may not e-file on behalf of any other person in this or any other case.
5. I have regular access to the technical requirements necessary to e-file successfully:
   Check all that apply.
   - ☐ A Computer with internet access.
   - ☐ An e-mail account on a daily basis to receive notifications from the Court and notices from the e-filing system.
   - ☐ A scanner to convert documents that are only in paper format into electronic files.
   - ☐ A printer or copier to create required paper copies such as chambers copies.
   - ☐ A word-processing program to create documents; and
   - ☐ A PDF reader and a PDF writer to convert word processing documents into PDF format, the only electronic format in which documents can be e-filed.

Date: _____ Signature: _____

ADAM J. TENSER vs. ROBERT JOSHUA RYAN et al., No. 20SMCV01690 (July 7, 2021)(order entry of default against Beth Silverman; Tannaz Mokayef; William Cotter, Robert Martindale; Maurice Jollif; Elizabeth Dumais Miller)

CIV-100

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):
Adam J Tenser SBN 256022
Law Office of Jeremy Tenser
8844 W Olympic Blvd., Suite 200
Beverly Hills, CA 90211
TELEPHONE NO.: 310.734.2707 FAX NO. (Optional):
E-MAIL ADDRESS (Optional): JT@tenserlaw.com
ATTORNEY FOR (Name): Adam J Tenser

FOR COURT USE ONLY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES
STREET ADDRESS: 1725 Main Street
MAILING ADDRESS:
CITY AND ZIP CODE: Santa Monica 90401
BRANCH NAME: Santa Monica Courthouse West Division

PLAINTIFF/PETITIONER: Adam J Tenser
DEFENDANT/RESPONDENT: Robert Joshua Ryan et al

CASE NUMBER: 20SMCV01690

REQUEST FOR (Application) ☑ **Entry of Default** ☐ **Clerk's Judgment** ☐ **Court Judgment**

1. TO THE CLERK: On the complaint or cross-complaint filed
   a. on *(date):* May 5, 2021
   b. by *(name):* Adam J Tenser
   c. ☑ Enter default of defendant *(names):*
   Beth Silverman, Tannaz Mokayef, William Cotter, Robert Martindale, Maurice Jollif, Elizabeth Dumais Miller
   d. ☐ I request a court judgment under Code of Civil Procedure sections 585(b), 585(c), 989, etc., against defendant *(names):*

   (Testimony required. Apply to the clerk for a hearing date, unless the court will enter a judgment on an affidavit under Code Civ. Proc., § 585(d).)
   e. ☐ Enter clerk's judgment
   (1) ☐ for restitution of the premises only and issue a writ of execution on the judgment. Code of Civil Procedure section 1174(c) does not apply. (Code Civ. Proc., § 1169.)
   ☐ Include in the judgment all tenants, subtenants, named claimants, and other occupants of the premises. The *Prejudgment Claim of Right to Possession* was served in compliance with Code of Civil Procedure section 415.46.
   (2) ☐ under Code of Civil Procedure section 585(a). *(Complete the declaration under Code Civ. Proc., § 585.5 on the reverse (item 5).)*
   (3) ☐ for default previously entered on *(date):*

2. **Judgment to be entered.**

	Amount	Credits acknowledged	Balance
a. Demand of complaint	$ 5,065,000	$	$ 5,065,000
b. Statement of damages *			
(1) Special	$	$	$
(2) General	$	$	$
c. Interest	$	$	$
d. Costs *(see reverse)*	$	$	$
e. Attorney fees	$	$	$
f. **TOTALS**	$ 5,065,000	$	$ 5,065,000

g. **Daily damages** were demanded in complaint at the rate of: $ per day beginning *(date):*
(Personal injury or wrongful death actions; Code Civ. Proc., § 425.11.)*

3. ☐ *(Check if filed in an unlawful detainer case)* **Legal document assistant or unlawful detainer assistant** information is on the reverse *(complete item 4).*

Date: July 7, 2021
Adam J. Tenser
(TYPE OR PRINT NAME)

(SIGNATURE OF PLAINTIFF OR ATTORNEY FOR PLAINTIFF)

FOR COURT USE ONLY

(1) ☑ Default entered as requested on *(date):* 07/07/2021
(2) ☐ Default NOT entered as requested *(state reason):*

Clerk, by M. Mariscal, Deputy

Form Adopted for Mandatory Use
Judicial Council of California
CIV-100 [Rev. January 1, 2007]

REQUEST FOR ENTRY OF DEFAULT
(Application to Enter Default)

Code of Civil Procedure, §§ 585–587, 1169
www.courtinfo.ca.gov

PLAINTIFF/PETITIONER: Adam J Tenser	CASE NUMBER:
DEFENDANT/RESPONDENT: Robert Joshua Ryan et al	20SMCV01690

4. **Legal document assistant or unlawful detainer assistant (Bus. & Prof. Code, § 6400 et seq.).** A legal document assistant or unlawful detainer assistant ☐ did ☑ did **not** for compensation give advice or assistance with this form. *(If declarant has received **any** help or advice for pay from a legal document assistant or unlawful detainer assistant, state):*
   a. Assistant's name:
   b. Street address, city, and zip code:
   c. Telephone no.:
   d. County of registration:
   e. Registration no.:
   f. Expires on *(date):*

5. ☑ **Declaration under Code of Civil Procedure Section 585.5** *(required for entry of default under Code Civ. Proc., § 585(a)).* This action
   a. ☐ is ☑ is not on a contract or installment sale for goods or services subject to Civ. Code, § 1801 et seq. (Unruh Act).
   b. ☐ is ☑ is not on a conditional sales contract subject to Civ. Code, § 2981 et seq. (Rees-Levering Motor Vehicle Sales and Finance Act).
   c. ☐ is ☑ is not on an obligation for goods, services, loans, or extensions of credit subject to Code Civ. Proc., § 395(b).

6. **Declaration of mailing (Code Civ. Proc., § 587).** A copy of this *Request for Entry of Default* was
   a. ☐ **not mailed** to the following defendants, whose addresses are **unknown** to plaintiff or plaintiff's attorney *(names):*
   b. ☑ **mailed** first-class, postage prepaid, in a sealed envelope addressed to each defendant's attorney of record or, if none, to each defendant's last known address as follows:
      (1) Mailed on *(date):* July 7, 2021
      (2) To *(specify names and addresses shown on the envelopes):* Agents for Defendants: Erin Dunkerly & Amanda Papac
      790 E Colorado Blvd., Suite 600, Pasadena, CA 91101

I declare under penalty of perjury under the laws of the State of California that the foregoing items 4, 5, and 6 are true and correct.
Date: July 7, 2021

Adam J. Tenser
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF DECLARANT)

7. **Memorandum of costs** *(required if money judgment requested).* Costs and disbursements are as follows (Code Civ. Proc., § 1033.5):
   a. Clerk's filing fees ..... $
   b. Process server's fees ..... $
   c. Other *(specify):* ..... $
   d. ..... $
   e. **TOTAL** ..... $ _____
   f. ☑ Costs and disbursements are waived.
   g. I am the attorney, agent, or party who claims these costs. To the best of my knowledge and belief this memorandum of costs is correct and these costs were necessarily incurred in this case.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Date: July 7, 2021

Adam J. Tenser
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF DECLARANT)

8. ☑ **Declaration of nonmilitary status** *(required for a judgment).* No defendant named in item 1c of the application is in the military service so as to be entitled to the benefits of the Servicemembers Civil Relief Act (50 U.S.C. App. § 501 et seq.).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Date: July 7, 2021

Adam J. Tenser
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF DECLARANT)

ADAM J. TENSER vs. ROBERT JOSHUA RYAN et al., No. 20SMCV01690 (July 8, 2021)(order entry of default against Robert Joshua Ryan)

CIV-100

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):	FOR COURT USE ONLY
Adam J Tenser SBN 256022 Law Office of Jeremy Tenser 8844 W Olympic Blvd., Suite 200 Beverly Hills, CA 90211 TELEPHONE NO.: 310.734.2707 FAX NO. (Optional): E-MAIL ADDRESS (Optional): JT@tenserlaw.com ATTORNEY FOR (Name): Adam J Tenser	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES STREET ADDRESS: 1725 Main Street MAILING ADDRESS: CITY AND ZIP CODE: Santa Monica 90401 BRANCH NAME: Santa Monica Courthouse West Division	
PLAINTIFF/PETITIONER: Adam J Tenser DEFENDANT/RESPONDENT: Robert Joshua Ryan et al	
REQUEST FOR (Application) ☑ **Entry of Default** ☐ **Clerk's Judgment** ☐ **Court Judgment**	CASE NUMBER: 20SMCV01690

1. TO THE CLERK: On the complaint or cross-complaint filed
   a. on *(date):* May 5, 2021
   b. by *(name):* Adam J Tenser
   c. ☑ Enter default of defendant *(names):* Robert Joshua Ryan
   d. ☐ I request a court judgment under Code of Civil Procedure sections 585(b), 585(c), 989, etc., against defendant *(names):*

   (Testimony required. Apply to the clerk for a hearing date, unless the court will enter a judgment on an affidavit under Code Civ. Proc., § 585(d).)
   e. ☐ Enter clerk's judgment
      (1) ☐ for restitution of the premises only and issue a writ of execution on the judgment. Code of Civil Procedure section 1174(c) does not apply. (Code Civ. Proc., § 1169.)
         ☐ Include in the judgment all tenants, subtenants, named claimants, and other occupants of the premises. The *Prejudgment Claim of Right to Possession* was served in compliance with Code of Civil Procedure section 415.46.
      (2) ☐ under Code of Civil Procedure section 585(a). *(Complete the declaration under Code Civ. Proc., § 585.5 on the reverse (item 5).)*
      (3) ☐ for default previously entered on *(date):*

2. **Judgment to be entered.**

	Amount	Credits acknowledged	Balance
a. Demand of complaint	$ 5, 065,000	$	$ 5,065,000
b. Statement of damages *			
(1) Special	$	$	$
(2) General	$	$	$
c. Interest	$	$	$
d. Costs *(see reverse)*	$	$	$
e. Attorney fees	$	$	$
f. **TOTALS**	$ 5, 065,000	$	$ 5,065,000

   g. **Daily damages** were demanded in complaint at the rate of: $ per day beginning *(date):*
   (Personal injury or wrongful death actions; Code Civ. Proc., § 425.11.)*

3. ☐ *(Check if filed in an unlawful detainer case)* **Legal document assistant or unlawful detainer assistant** information is on the reverse *(complete item 4).*

Date: July 8, 2021
Adam J. Tenser
(TYPE OR PRINT NAME)

(SIGNATURE OF PLAINTIFF OR ATTORNEY FOR PLAINTIFF)

FOR COURT USE ONLY

(1) ☑ Default entered as requested on *(date):* 07/08/2021
(2) ☐ Default NOT entered as requested *(state reason):*

Sherri R. Carter Executive Officer / Clerk of Court Clerk, by S. Watson, Deputy

Form Adopted for Mandatory Use
Judicial Council of California
CIV-100 [Rev. January 1, 2007]

REQUEST FOR ENTRY OF DEFAULT
(Application to Enter Default)

Code of Civil Procedure, §§ 585–587, 1169
www.courtinfo.ca.gov

PLAINTIFF/PETITIONER: Adam J Tenser	CASE NUMBER:
DEFENDANT/RESPONDENT: Robert Joshua Ryan et al	20SMCV01690

4. **Legal document assistant or unlawful detainer assistant (Bus. & Prof. Code, § 6400 et seq.).** A legal document assistant or unlawful detainer assistant ☐ did ☑ did **not** for compensation give advice or assistance with this form. *(If declarant has received **any** help or advice for pay from a legal document assistant or unlawful detainer assistant, state):*
   a. Assistant's name:
   b. Street address, city, and zip code:
   c. Telephone no.:
   d. County of registration:
   e. Registration no.:
   f. Expires on *(date):*

5. ☑ **Declaration under Code of Civil Procedure Section 585.5** *(required for entry of default under Code Civ. Proc., § 585(a)).* This action
   a. ☐ is ☑ is not on a contract or installment sale for goods or services subject to Civ. Code, § 1801 et seq. (Unruh Act).
   b. ☐ is ☑ is not on a conditional sales contract subject to Civ. Code, § 2981 et seq. (Rees-Levering Motor Vehicle Sales and Finance Act).
   c. ☐ is ☑ is not on an obligation for goods, services, loans, or extensions of credit subject to Code Civ. Proc., § 395(b).

6. **Declaration of mailing (Code Civ. Proc., § 587).** A copy of this *Request for Entry of Default* was
   a. ☐ **not mailed** to the following defendants, whose addresses are **unknown** to plaintiff or plaintiff's attorney *(names):*
   b. ☑ **mailed** first-class, postage prepaid, in a sealed envelope addressed to each defendant's attorney of record or, if none, to each defendant's last known address as follows:
      (1) Mailed on *(date):* July 8, 2021
      (2) To *(specify names and addresses shown on the envelopes):*
      Robert Joshua Ryan
      849 McCadden Place, #2, Los Angeles, CA 90038

I declare under penalty of perjury under the laws of the State of California that the foregoing items 4, 5, and 6 are true and correct.
Date: July 8, 2021

Adam J. Tenser
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF DECLARANT)

7. **Memorandum of costs** *(required if money judgment requested).* Costs and disbursements are as follows (Code Civ. Proc., § 1033.5):
   a. Clerk's filing fees ..... $
   b. Process server's fees ..... $
   c. Other *(specify):* ..... $
   d. ..... $
   e. **TOTAL** ..... $ _____
   f. ☑ Costs and disbursements are waived.
   g. I am the attorney, agent, or party who claims these costs. To the best of my knowledge and belief this memorandum of costs is correct and these costs were necessarily incurred in this case.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Date: July 8, 2021

Adam J. Tenser
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF DECLARANT)

8. ☑ **Declaration of nonmilitary status** *(required for a judgment).* No defendant named in item 1c of the application is in the military service so as to be entitled to the benefits of the Servicemembers Civil Relief Act (50 U.S.C. App. § 501 et seq.).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Date: July 8, 2021

Adam J. Tenser
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF DECLARANT)

ADAM J. TENSER vs. ROBERT JOSHUA RYAN et al., No. 20SMCV01690, (July 12, 2021)(opinion: granting defendant the County of Los Angeles' motion to strike the second amended complaint; granting in part the special motion to strike the second amended complaint)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES - WEST DISTRICT

ADAM J. TENSER,

Plaintiff(s),

vs.

ROBERT JOSHUA RYAN; BETH SILVERMAN; TANNAZ MOKAYEF; ROBERT MARTINDALE; MAURICE JOLLIF; ELIZABETH DUMAIS MILLER; COUNTY OF LOS ANGELES and, DOES 1-10, inclusive,

Defendant(s).

CASE NO.: 20SMCV01690

ORDER: GRANTING DEFENDANT THE COUNTY OF LOS ANGELES' MOTION TO STRIKE THE SECOND AMENDED COMPLAINT; GRANTING IN PART THE SPECIAL MOTION TO STRIKE THE SECOND AMENDED COMPLAINT

Dept.: R
Hearing Date: 7/12/2021
Hearing Time: 9:00am

I. Facts and Relevant Procedural History

On November 6, 2020, plaintiff Adam J. Tenser ("plaintiff") filed this action against defendants Robert Joshua Ryan, Beth Silverman, Tannaz Mokayef, Robert Martindale, Maurice Jollif, Elizabeth Dumais Miller, and the County of Los Angeles (collectively "defendants") for issues arising out of an underlying criminal trial. On February 24, 2021, plaintiff filed his First Amended Complaint ("FAC"). According to the FAC, plaintiff is an entertainment attorney who represents Blake Leibel.[1] (FAC, ¶19.) On or around, May 26, 2016, Leibel was arrested and accused of murdering Iana Kasian. (*Id.* at ¶20.) The next day, plaintiff met with him at the Twin Towers Correctional Facility ("TTCF") for a confidential attorney-client visit and during that visit, Leibel requested that plaintiff arrange criminal counsel to represent him. (*Id.* at ¶23.) Plaintiff claims he found an attorney to represent Leibel but when they both appeared at TTCF to visit Leibel on June 7th, they were denied an attorney-client visitation. (*Id.* at ¶¶24, 26.) In late

[1] When considering an SMS, the Court typically does not cite from the operative pleading when summarizing the facts. However, neither party provided a proper evidentiary summary so the Court must rely on the FAC as providing the background.

July 2016, plaintiff asserts that he attended a criminal hearing in Leibel's case with a criminal attorney in an effort to be substituted in as counsel, but the request was denied. (*Id.* at ¶¶30-31.)

Plaintiff claims due to this failed attempt to become Leibel's attorney of record he was denied access to attorney-client visits with Leibel by TTCF staff starting around August 1, 2016. (FAC, ¶31.) Plaintiff alleges that he was directed to defendant Jollif, the supervisor of the TTCF legal intake unit. (*Ibid.*) Despite Leibel's request to the contrary, Jollif purportedly denied plaintiff attorney-client access to Leibel because plaintiff was not attorney of record in the criminal matter and did not have a Court order authorizing visitation. (*Ibid.*) Plaintiff claims Leibel signed an agreement stating that plaintiff was his attorney, but Jollif still denied plaintiff attorney-client visits and threatened legal action against plaintiff. (*Id.* at ¶¶32-33.) Plaintiff claims he contacted defendant Miller, an attorney in the Los Angeles County Counsel's office, but Miller also denied plaintiff's request to visit Leibel at TTCF absent a Court order granting him access to attorney-client visitation. (*Id.* at ¶34.) Plaintiff alleges that he was unable to obtain criminal counsel for Leibel and Leibel was therefore represented by a public defender. (*Id.* at ¶36.)

Early on during Leibel's trial, defendants and prosecutors Mokayef and Silverman allegedly drew untoward attention to plaintiff. (FAC, ¶¶37-38.) The attention was enough that one juror apparently asked about plaintiff during *voir dire*. (*Id.* at ¶38.) On June 13, 2018, the morning session of the trial adjourned for a lunch break and due to issues with the elevator, the hallway outside the courtroom became packed. (*Id.* at ¶44.) Plaintiff claims that members of the press, jury, and public all rubbed shoulders with trial witnesses and counsel. (*Ibid.*) According to plaintiff, defendants Silverman, Mokayef, and Martindale engaged in a loud and celebratory conversation between themselves, witnesses, the victim's mother, and another detective named Cotter about that morning's testimony and its effect on the case. (*Id.* at ¶45.) Plaintiff emphasizes that this discussion was apparently in audible distance of the jury and press, as plaintiff stood next to the nearest juror so as to discover what the jurors were hearing. (*Ibid.*) After some alleged verbal sparring, Silverman and Mokayef apparently called plaintiff a "stalker" in front of those nearby, which included members of the jury, witnesses, and press. (*Id.* at ¶47.)

Plaintiff alleges that after proceedings resumed, Mokayef informed the judge that plaintiff was "basically stalking the prosecution team[,]" and Silverman followed up by stating he should be ordered to leave the building for interfering with the case if he could not act professionally. (FAC, ¶48.) Plaintiff asserts that after the lunch break on June 14, 2018, a juror expressed fear about plaintiff and was excused from jury duty. (*Id.* at ¶¶52-53.) Plaintiff claims this was either due to Silverman and Mokayef's false statements that he was a stalker or juror misconduct. (*Id.* at ¶54.) Plaintiff claims that on June 18, 2018, the Court cited him for contempt for following a juror in his car, though he asserts that he did no such thing. (*Id.* at ¶58.) The Court ordered plaintiff to leave the courthouse for the remainder of the trial. (*Ibid.*) On June 20, 2018, Martindale allegedly filed a false unsworn declaration in court mischaracterizing various events. (*Id.* at ¶60.) This action followed.

Plaintiff asserts three causes of action against various defendants. Plaintiff alleges that defendant County of Los Angeles ("the County") is vicariously liable for the negligent acts of the individual defendants who are all County employees.[2] (FAC, ¶¶144-149.) Currently before the Court are two matters: the County's motion to strike the Second Amended Complaint and the County's special motion to strike the FAC. Plaintiff opposes both.

There is an initial issue and that is service of the oppositions. The County served notices of non-opposition on July 6th, claiming they were never served with the oppositions. They state they only downloaded them from the Court's website and would attempt to have a reply drafted by July 9th. Plaintiff promptly filed an objection to these notices and any late-filed replies, claiming he electronically served the oppositions to counsel for the County at their email addresses and attaches printouts of service confirmation. (7/6/21 Obj., Exh. A.) By review of these documents, service was not effectuated properly. Counsel for the County have email addresses ending with @ccllp.law. The service confirmation shows electronic service at email addresses ending in @ccmslaw.com. That is clearly wrong. The objection is OVERRULED. The County was able to file a late reply on July 9, 2021. While normally the Court would strike such

[2] The employees are Beth Silverman, Tannaz Mokayef, Robert Martindale, Maurice Jollif, and Elizabeth Dumais Miller.

a reply, here the County (1) established good cause for the timing; and (2) at least impliedly sought leave to file the late papers. The Court finds that there was good cause for the late filing and no cause whatsoever for Tenser's objections. Accordingly, the reply papers have been reviewed and considered.

The Court further admonishes plaintiff to be more careful in its pleadings. The Court will assume that the improper service was an honest error by plaintiff rather than a deliberate attempt to mislead the Court. That kind of thing happens from time to time, and (sadly) more so in the age of technology. But having said that, before jumping to the conclusion that the County was acting in bad faith concerning their statement that they had not received a timely opposition, plaintiff should have taken the County at its word and double-checked the service documents. Doing so would have disclosed the error and, presumably, the matter could have been dealt with in a more orderly manner.

II. Motion to Strike the Second Amended Complaint

The County's special motion to strike was filed on April 27, 2021. Days later, on May 5, 2021, plaintiff filed a Second Amended Complaint ("SAC"). The County thereafter moved to strike the SAC, arguing that such an amendment is not permitted after the filing of a special motion to strike. (See *Salma v. Cappon* (2008) 161 Cal.App.4th 1275.) It also stated that the SAC is also improper under Code of Civil Procedure section 472. Plaintiff disagrees in opposition. He first argues he has the right to amend under Code of Civil Procedure section 472. Plaintiff then states he also had the right to amend the pleading even after the special motion to strike is filed and none of the cases cited by the County are applicable in this exact factual scenario. He then contends that he has the right to add Cotter as a defendant.

The Court agrees with the County. Once the County filed its special motion to strike, the pleadings were frozen and plaintiff lost the ability to amend the pleading to escape the motion. " 'A plaintiff ... may not seek to subvert or avoid a ruling on an anti-SLAPP motion by amending the challenged complaint ... in response to the motion.' (*JKC3H8 v. Colton* (2013) 221 Cal.App.4th 468, 477-478.)" (*Contreras v. Dowling* (2016) 5 Cal.App.5th 394, 411, parallel citations omitted; see also, *Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1280 ["In this

procedural circumstance, we consider whether a plaintiff or cross-complainant may avoid a pleadings challenge pursuant to Code of Civil Procedure section 425.16 by amending the challenged complaint or cross-complaint before the motion to strike is heard. We conclude he may not[.]"].)

Even beyond that clear authority and even were there no SMS, Code of Civil Procedure section 472 does not provide plaintiff with the right to amend. Under that statute a plaintiff's right to amend without a Court order is limited to the original pleading. "Under the generic understanding of the term 'pleading,' section 472 is reasonably viewed as limiting the right to amend 'the complaint' as a matter of right to the complaint as originally filed, that is, the version of the complaint that commences the action." (*Hedwall v. PCMV, LLC* (2018) 22 Cal.App.5th 564, 574.) The *Hedwall* case provides a thorough discussion of its reasoning and the Court finds it persuasive. (And even were the Court to disagree, the Court is bound by appellate authority.) Here, plaintiff had the right to file his First Amended Complaint and he did. But that was his only chance to amend as a matter of right. Leave to amend is required after that.

It is for this reason that plaintiff's reliance on a variety of cases fails. To illustrate, *JKC3H8, supra*, 221 Cal.App.4th 468, 475 involved a plaintiff who exercised its right to amend under Code of Civil Procedure section 472 a few hours *before* the defendant's special motion to strike to the original complaint was filed. That is not the situation here. Plaintiff filed his SAC after the SMS was filed. As another example, in *Dickinson v. Cosby* (2017) 17 Cal.App.5th 655, 679, the plaintiff filed a FAC to add a new defendant. The Second Appellate District held that plaintiff exercised her right to amend as a matter of right and yet, that did not deprive the trial court of the right to hear the special motion. "[W]e take guidance from the courts which have interpreted *Simmons* as not actually preventing the plaintiff from filing an amended complaint; but instead permitting the plaintiff to file its amendment, without depriving the defendant of its right to have its anti-SLAPP motion adjudicated with respect to the initial complaint." (*Id.* at p. 678.) Again, that is not the situation here. Under section 472, the SAC adding Cotter as a defendant could only be filed with leave of the Court. No leave was requested or granted. The

motion to strike the SAC is GRANTED. And, in the teeth of the authority set forth above, the question is not a close one.

III. Special Motion to Strike

A. Legal Standards

The California legislature has authorized that a special motion to strike may be filed in lawsuits that seek to "chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (Code Civ. Proc., § 425.16, subd. (a).) Code of Civil Procedure section 425.16, subdivision (b)(1) provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."

Accordingly, section 425.16 posits a two-step process for determining whether a SMS should be granted. First, the court decides whether the defendant has made a threshold showing that the challenged claims or causes of action arise from a protected activity. (See Code Civ. Proc., § 425.16, subd. (b)(1).) "A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in [section 425.16,] subdivision (e)." (*Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1043.) If the defendant makes that threshold showing, the burden shifts to the plaintiff to establish a likelihood of prevailing on the complaint, which has sometimes been referred to as "minimal merit." (See Code Civ. Proc., § 425.16, subd. (b)(1).) The burden on the plaintiff is like the burden imposed to defeat a summary judgment motion: the plaintiff must submit admissible evidence showing that, if accepted, it can prevail. The Court does not weigh the evidence or determine issues of credibility, nor does the Court resolve any factual disputes. Rather, as in a summary judgment motion, if the plaintiff can put forward evidence that, if true, would establish its claim in light of all reasonable favorable inferences, then the SMS will be denied.[3]

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[3] As an initial matter, Tenser seems to argue that only the individual defendants can bring the SMS but that the County cannot. The Court does not understand that logic. The County can assert immunity based on the acts of its employees

B. Acts in Furtherance of the Right of Petition or Free Speech

To invoke Code of Civil Procedure section 425.16, a defendant need only demonstrate that a suit arises from the defendant's exercise of free speech or petition rights. (See Code Civ. Proc., § 425.16, subd. (b); *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) This is determined by "the gravamen or principal thrust of the action." (See *In re Episcopal Church Cases* (2009) 45 Cal.4th 467, 477.) "In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech." (*City of Cotati, supra*, 29 Cal.4th at p. 78, emphasis in original.) "In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (Code Civ. Proc., § 425.16, subd. (b)(2).)

The County agrees that per the FAC it is (as a general matter) vicariously liable for the acts of its employees. It claims, however, that the alleged acts by its employees are protected as statements made during and in connection with a judicial proceeding. (See Code Civ. Proc., § 425.16, subds. (e)(1)-(2).) Because, the logic goes, the employees engaged in protected and privileged conduct there can be no liability as to them and thus no liability to the County.

Preliminarily, plaintiff challenges whether the SMS is appropriate here at all. He contends that the gravamen of the claim against the County is simply the fact that it employed defendants. Plaintiff insists that such activity is not protected activity under the First Amendment so the motion must fail at this initial step.

The Court disagrees. The County's liability is expressly predicated on its employees' acts. (FAC, ¶144 ["Defendant COUNTY OF LOS ANGELES is liable for the injuries proximately caused by the conduct of its employees within the scope of employment[.]"].) "[T]he focus is on determining what 'the defendant's activity [is] that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning.' (*Navellier*, at p. 92, italics omitted.) 'The only means specified in section 425.16 by which a moving defendant can satisfy

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if they are immune, and the County can only act through its agents or employees. (Gov't. Code sec. 815.2; *Peter W. v. San Francisco Unified School Dist.* (1976) 60 Cal.App.3d 814.) The motion is therefore proper.

the ["arising from"] requirement is to demonstrate that *the defendant's conduct by which plaintiff claims to have been injured* falls within one of the four categories described in subdivision (e)....' (*Equilon Enterprises*, at p. 66, italics added.)" (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1063, parallel citations omitted.) Here, plaintiff does not claim to be injured by the County's employment of the individual defendants beyond his claim that the employees caused him injury—in other words, the acts giving rise to liability are one and the same. Even were plaintiff to attempt to couch this as a negligent hiring case (which it is not), the result would be the same. The injury is due to the employees' acts.

Accordingly, it is the theory of vicarious liability inherent in the FAC that is used to impute liability for the individual defendants' acts to the County. "[T]he doctrine of respondeat superior imposes liability irrespective of proof of the employer's fault. Liability is imposed on the employer as a rule of policy, a deliberate allocation of a risk. Thus, [v]icarious liability means that the act or omission of one person ... is *imputed by operation of law* to another[.]" (*Henry v. Superior Court* (2008) 160 Cal.App.4th 440, 456, internal quotes and parallel citations omitted, citing *Miller v. Stouffer* (1992) 9 Cal.App.4th 70.) The County essentially stands in the individual defendants' shoes[4] and whatever defenses are available to them are available to the County to the same extent. Indeed, were it otherwise, the SMS statute would have no vitality as applied to governmental entities or to any employer for that matter. The Legislature intended the SMS process to be a robust one, capable of protecting the rights of parties engaged in protected conduct within its ambit. Adopting plaintiff's position would sharply undercut the Legislature's purpose and would be inconsistent with the SMS's scopeThe Court therefore turns to the underlying conduct.

[4] "When a plaintiff seeks to hold a defendant vicariously liable for another party's tortious conduct, the court's anti-SLAPP analysis focuses on the underlying tort, not the conduct by which the defendant is allegedly vicariously liable." (*Ratcliff v. Roman Catholic Archbishop of Los Angeles* (2021) 63 Cal.App.5th 869, 887, reh'g denied (May 19, 2021), review filed (June 9, 2021).) The Court adds that it cites this case for its persuasive value only. (See Cal. Rules of Court, Rule 8.1115(e)(1).)

1. Silverman and Mokayef's "Stalker" Comments

In the second and third causes of action, plaintiff seeks to hold Silverman and Mokayef liable for calling him a "stalker." (FAC, ¶¶78-79, 132.) The County claims that Silverman and Mokayef's alleged defamatory remarks made to the Court during the underlying criminal and contempt proceedings are protected. The thrust of plaintiff's claims against these individuals focuses on the two distinct events: (1) calling him a stalker outside the courtroom in front of the jury and public; and (2) repeating the comment to the judge. (*Id.* at ¶¶48-49, 79, 132.) Pointing to the actual second cause of action, though plaintiff states that he carefully refrained from suing Silverman and Mokayef for anything that they said to the judge; he is suing them only for comments made in the hallway. Lest there be doubt, the Court will consider both aspects.

The latter comments made to the judge are protected. "Under the plain language of section 425.16, subdivisions (e)(1) and (e)(2), as well as the case law interpreting those provisions, all communicative acts performed by attorneys as part of their representation of a client in a judicial proceeding or other petitioning context are per se protected as petitioning activity by the anti-SLAPP statute." (*Cabral v. Martins* (2009) 177 Cal.App.4th 471, 479–480.) Those statements were made directly to the Court and are protected. (See Code Civ. Proc., § 425.16, subd. (e)(1); *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1116.)

In opposition, plaintiff argues that there is no logical connection between the statements to the judge referring to him as a stalker and the Leibel criminal proceeding. Plaintiff is referring to the "connection" requirement that is required as to subdivision (e)(2), which is discussed in more detail below. Plaintiff claims that the statements were unrelated to the substance of the litigation as no claim was filed against him. As to the comments calling him a stalker that were made to the judge, the Court must disagree. First, Silverman and Mokayef's comments to the judge in the criminal trial are protected as "any...oral statement...made before a...judicial proceeding." (Code Civ. Proc., § 425.16, subd. (e)(1).) There is authority holding as much. """"Under the plain language of section 425.16, subdivisions (e)(1) and (2), as well as the case law interpreting those provisions, *all* communicative acts performed by attorneys as part of their representation of a client in a judicial proceeding or other petitioning context are per se protected

as petitioning activity by the anti-SLAPP statute.'" (*Finton Construction, supra*, 238 Cal.App.4th at p. 210, italics added.)" (*Optional Capital, Inc. v. Akin Gump Strauss, Hauer & Feld LLP* (2017) 18 Cal.App.5th 95, 113, parallel citations, emphasis by *Optional* Court.) Second, plaintiff himself alleges that Silverman and Mokayef intentionally made these comments to the judge so that he would issue a no-contact order, which he did. (FAC, ¶¶48-50.) Assuming a connection is required, plaintiff himself alleged it. That is enough to satisfy the County's first prong burden.

That leaves the statements made outside the courtroom. (FAC, ¶¶45-47.) Silverman, Mokayef, and Martindale were allegedly engaged in a conversation about the morning testimony and its effect on the case within hearing range of the jury and press. (*Id.* at ¶45.) Plaintiff confronted them about their inappropriate behavior and then Silverman and Mokayef called him a stalker in front of everyone. (*Id.* at ¶47.) The statements were not made to the judge and so can only qualify as protected under subdivision (e)(2).

Subdivision (e)(2) protects, "any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law[.]" (Code Civ. Proc., § 425.16, subd. (e)(2).) Plaintiff's argument that there is no nexus is persuasive. "As used in section 425.16(e)(2), a matter is 'under consideration' if it 'is one kept "before the mind," given "attentive thought, reflection, meditation." [Citation.] A matter under review is one subject to "an inspection, examination."' (*Braun, supra,* 52 Cal.App.4th at p. 1049.)" (*Maranatha Corrections, LLC v. Dept. of Corrections & Rehabilitation* (2008) 158 Cal.App.4th 1075, 1085, parallel citations omitted.) A statement or omission is considered "in connection with" the issue under review if it relates to the *substantive* issues and is directed at people who have an interest in that issue. (See *City of Costa Mesa v. D'Alessio Investments, LLC* (2013) 214 Cal.App.4th 358, 374; *Maranatha, supra,* 158 Cal.App.4th at p. 1085.)

As plaintiff argues in opposition, the County fails to explain how calling plaintiff a "stalker" within the hearing of the jury, press, and witnesses relates to the substantive issues of criminal trial. The County generally asserts that these "interactions" with the jurors concern the murder trial. That is not convincing. As alleged, Silverman and Mokayef were not making the

statement to the jurors so it cannot be said this was an interaction with the jury.[5] At the time the comments were made, plaintiff had no actual participation in the criminal matter except for failing to be appointed counsel of record. "The privilege does not extend, however, to statements regarding the litigation made 'to non-participants in the action ... [which] are thus actionable unless privileged on some other basis.'" (*TSMC North America v. Semiconductor Manufacturing Internat. Corp.* (2008) 161 Cal.App.4th 581, 599, citing *Silberg v. Anderson* (1990) 50 Cal.3d 205, 219.)

The County also states the comments were made in relation to the contempt proceeding. But based on the Court's review of the allegations, the contempt proceeding came days *after* Silverman and Mokayef called plaintiff a stalker outside the courtroom (in front of the jury). (FAC, ¶48; *id.* at ¶¶49-58 [lead up to citation for contempt].) This temporal anomaly is fatal to the County's position. The motion is DENIED as to these allegations.

Were it the case that plaintiff were suing Silverman or Mokayef for anything they said to the judge or in court, the County would have established what it needs to establish for this prong. Only because plaintiff expressly disclaims such an allegation, and because the charging allegations in the second cause of action support plaintiff's claim, the Court does not formally rule on that issue.

2. Martindale's Declaration

The County asserts that the declaration submitted to the criminal court in support of contempt proceedings against plaintiff is protected. (See FAC, Exh. Z.) The Court agrees. Filing

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[5] Arguing that these comments were "interactions" with the jury is problematic for the County, to say the least. No attorney should be speaking about a pending trial outside the courtroom within hearing distance of jurors. Rule 3.5(e) of the Rules of Processional Conduct states that "[d]uring trial, a lawyer connected with the case shall not communicate directly or indirectly with any juror." Rule 3.6(a) makes clear that "[a] lawyer who is participating...in the...litigation of a matter shall not make an extrajudicial statement that the lawyer knows[] or reasonably should know[] will (i) be disseminated by means of public communication and (ii) have a substantial[] likelihood of materially prejudicing an adjudicative proceeding in the matter." And of special note, rule 3.8(e) states that "[t]he prosecutor in a criminal case shall... exercise reasonable[] care to prevent persons[] under the supervision or direction of the prosecutor, including investigators, law enforcement personnel, employees or other persons[] assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under rule 3.6." The Court emphasizes that it is not making a factual finding that any misconduct occurred; only that the County does not get very far arguing that the prosecutors had a constitutional or statutory right to make comments related to the case to members of the jury outside of Court or that such an action, if it occurred, is protected activity under the first prong of the SMS analysis.

documents with the Court for an issue under review is protected by the litigation privilege and that is what is alleged to have occurred here. Plaintiff alleges Martindale filed a false declaration that stated plaintiff had repeated ethical and professional lapses. (*Id.* at ¶¶113-130.) "[D]eclaration[s] function[] as written testimony and thus constitutes communication, not conduct. This is exactly the sort of communication the privilege is designed to protect." (*Pollock v. University of Southern California* (2003) 112 Cal.App.4th 1416, 1430–1431.)

In opposition, plaintiff argues that the declaration illegally discloses his protected DMV information and therefore violated Vehicle Code § 1800 and Civil Code §§ 1798.24 and 1798.56. He impliedly notes that when a defendant concedes or it is conclusively established that the protected speech was illegal, then the motion must fail. (*Zucchet v. Galardi* (2014) 229 Cal.App.4th 1466, 1478; *Flatley v. Mauro* (2006) 39 Cal.4th 299, 320.) But plaintiff's FAC makes no mention of the DMV information or picture attached the declaration. He never alleges the declaration was illegal or included information in violation of the law; he just claims it was false. " 'As is true with summary judgment motions, the issues in an anti-SLAPP motion are framed by the pleadings.' (*Paulus v. Bob Lynch Ford, Inc.* (2006) 139 Cal.App.4th 659, 672; *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 655 [the pleadings 'frame the issues to be decided'].)" (*Medical Marijuana, Inc. v. ProjectCBD.com* (2020) 46 Cal.App.5th 869, 883, parallel citations omitted.) Because that is not the wrong complained of in the FAC, there is no need for the Court to discuss these arguments. The County satisfies its burden on the first prong as to Martindale.

3. Jollif and Miller's Statements about Court Orders for Confidential Visits

The County argues that Jollif and Miller's statements that a Court order was required are also protected because they were made in connection with the criminal trial. (See *City of Costa Mesa, supra,* 214 Cal.App.4th at p. 374; *Maranatha, supra,* 158 Cal.App.4th at p. 1085.) Plaintiff alleges that Jollif and Miller knew that he was not attorney of record for Leibel in the criminal action so he could not have a confidential visit until he provided them with a Court order. (FAC, ¶¶31-34.) In opposition, plaintiff claims that the gravamen of the claim is the denial of access, not

the communications regarding the required Court orders. (FAC, ¶¶68-72.) Case law on the litigation privilege provides guidance.

Noncommunicative conduct independent of any privileged communication is not protected by the litigation privilege. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1058.) "Whether conduct is considered communicative or noncommunicative depends on the gravamen of the cause of action. [Citations.] The question is whether the conduct allegedly resulting in the plaintiff's injury was essentially communicative in nature. [Citations.] If so, the privilege also 'extends to noncommunicative acts that are necessarily related to the communicative conduct.'" (*Kerner v. Superior Court* (2012) 206 Cal.App.4th 84, 12, citing *Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1248-1249 and *Rusheen, supra*, 37 Cal.4th at pp. 1058, 1065.) Here, the denial was effectuated through the communication that a Court order was required. That much is clear from plaintiff's allegations. But that is not enough. The activity is the denial of access. The *reason* for the denial is the lack of a court order, but the *reason* is not the gravamen of the claim and neither is the fact that the reasons were uttered. The Court therefore agrees with plaintiff that the claims against Jollif and Miller are not within the SMS statute.

C. Likelihood of Success

If defendant makes a threshold showing that the challenged cause of action is one arising from protected activity, the burden shifts to the plaintiff to establish a likelihood of prevailing on the complaint. (See Code Civ. Proc., § 425.16, subd. (b)(1).) "[T]he plaintiff 'must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.' (*Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 548.)" (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821, parallel citation omitted.) A trial court does not weigh the evidence or its comparative strength. (*Ibid.*) However, a trial court "should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim." (*Ibid.*)

1. Martindale

In its moving papers, the County argues that Martindale's conduct Martindale is protected by the litigation privilege. The litigation privilege is an affirmative defense and therefore, to demonstrate a probability of prevailing on the merits, once a prima facie showing is made that the privilege applies, plaintiff must produce admissible evidence sufficient to overcome it. (See *Flatley, supra,* 39 Cal.4th at p. 323.) The litigation privilege (also referred to as the "absolute" privilege) is codified in Civil Code section 47, subdivision (b) and "immuniz[es] participants from liability for torts arising from communications made during judicial proceedings[.]" (*Silberg, supra,* 50 Cal.3d at p. 214.) The privilege applies to any "communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action." (*Id.* at p. 212.) "The privilege is 'absolute in nature, applying "to *all* publications, irrespective of their maliciousness." ' (*Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1241.) ' "Any doubt about whether the privilege applies is resolved in favor of applying it." ' (*Finton Construction, supra*, 238 Cal.App.4th at p. 212.)" (*Optional Capital, supra,* 18 Cal.App.5th at p. 116, parallel citations omitted, emphasis by *Action Apartment* Court.)

The Court agrees with the County as to the Martindale statements. Those statements and writings were made to the judge and are privileged. Plaintiff argues in opposition that a contempt proceeding is not a judicial or quasi-judicial proceeding. The Court disagrees. The litigation privilege "applies not only to judicial proceedings but to all truth-seeking inquiries, including legislative and other official proceedings[.]" (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 695.) A contempt proceeding is an official judicial proceeding authorized by statute and more particularly, it is a criminal or quasi-criminal one. A contempt "proceeding is considered quasi-criminal, and the defendant possesses some of the rights of a criminal defendant." (*People v. Gonzalez* (1996) 12 Cal.4th 804, 816, collecting cases.) The Court believes that a contempt proceeding is a judicial proceeding. The Court is aware that the proceeding never went forward to the substantive hearing stage. But that does not change the nature of the contempt action. And even were it not a judicial

proceeding, it is part of a truth-seeking inquiry at a minimum. The litigation privilege applies to Martindale's statements.

The County raises an additional argument; it claims they are immune under Government Code section 821.6.[6] "Turning to Government Code sections 821.6 and 815.2, they immunize the County and its employees 'from liability for the actions or omissions of the investigating officers if: (1) the officers were employees of the County; (2) [the plaintiffs'] injuries were caused by acts committed by the officers to institute or prosecute a judicial or administrative proceeding; and (3) the conduct of the officers while instituting or prosecuting the proceeding was within the scope of their employment.' (*Amylou R. v. County of Riverside* (1994) 28 Cal.App.4th 1205, 1209.)" (*County of Los Angeles v. Superior Court* (2009) 181 Cal.App.4th 218, 228, parallel citations omitted.) "Courts have held that the institution and prosecution of judicial proceeding in Government Code section 821.6 is not limited to the act of filing a criminal complaint. Acts taken during an investigation prior to the institution of a judicial proceeding are also protected by section 821.6 because investigations are an essential step toward the institution of formal proceedings." (*Id.* at p. 229, collecting cases.) "When the prosecutorial immunity under Government Code section 821.6 applies, it extends to immunize against claims by those suffering the injury who are not the target of the prosecution. (*Amylou R., supra,* 28 Cal.App.4th at p. 1214.)" (*Ibid.*, parallel citations omitted.) "The test of immunity is not the timing of the offending conduct but whether there is a causal relationship between the act and the prosecution process. Thus, if the act is taken as part of the process, it is protected by the immunity in section 821.6. (*Cappuccio, Inc. v. Harmon, supra,* at pp. 1498–1500.)" (*Ibid.*, parallel citations omitted.)

The County claims that the comments and declarations at issue arose out of the judicial proceeding against Leibel and the related contempt proceeding against plaintiff. The County points to the transcript of the Court hearings, noting that Silverman and Mokayef informed the criminal court about plaintiff because he was interfering with their prosecution of Leibel. (Papac Decl., Exh. A, pp. 1-17.) The County claims that these comments and declarations were used to

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[6] That section provides that "[a] public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause."

initiate a contempt proceeding against plaintiff for his interference in the criminal proceeding, and any declarations were submitted to support that proceeding. Again, the acts are immune as to Martindale.

In opposition, plaintiff argues the communications are not immune because there is no showing that he was being investigated as part of a formal investigation and he was not being prosecuted at the trial either. These arguments seem focused on the Martindale declaration. Plaintiff cites to *Roger v. County of Riverside* (2020) 44 Cal.App.5th 510 and *Leon v. County of Riverside* (2021) 64 Cal.App.5th 837 in support. But neither help him because the focus of his argument is wrong. The wrongful act alleged against Martindale is filing the declaration that contained defamatory statements. (FAC, ¶¶113-130.) There is nothing about an investigation. As previously stated, the pleadings control the scope of issues and plaintiff cannot defeat an SMS based on allegations that are not pled.

Beyond that, although plaintiff was not the subject of the prosecution the County has established via transcripts that the comments and declarations submitted to the criminal court were to stop plaintiff's interference in an ongoing criminal prosecution. His contempt citation then followed. Per the above-cited authority, the County is immune from liability for these acts.

The same would apply to Silverman and Mokayef except that a close reading of the FAC discloses (as plaintiff stated at oral argument) he is only suing them for the statements made in the hallway in the jury's presence, not for anything said in Court.

2. Defendants Jollif and Miller

Because the County was not able to satisfy the first prong of the SMS analysis, the Court need not consider the second.

IV. Sanctions

"[A] prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5." (Code Civ. Proc., § 425.16, subd. (c)(1).) Where a defendant is partially successful, he or she is generally considered the

prevailing party "unless the results of the motion were so insignificant that the party did not achieve any practical benefit from bringing the motion." (*Mann v. Quality Old Time Service, Inc.* (2006) 139 Cal.App.4th 328, 340.) Here, the County substantially prevailed on the motion as they have defeated some of plaintiff's claims as to at least three of their employees at least in part. The County seeks $3,500 in attorneys' fees and costs. However, the Court would like the County to provide additional evidence as to the portion of the fees relating to the successful portion of the motion. That should be done via supplemental motion. Plaintiff may oppose the motion on the ground that the fee is excessive, but on no other ground as all other aspects have been decided above.

V. Conclusion

The Court GRANTS the County's SMS as to its vicarious liability for the acts of Martindale. The SMS is DENIED as to the County's liability for Silverman and Mokayef's comments made outside the courtroom and as to the acts of Jollif and Miller. (The Court re-emphasizes that were plaintiff seeking to sue Silverman or Mokayef for anything said other than the comments in the hall, the SMS would have been granted to that extent). The County's request for fees is GRANTED, but the amount of fees will be decided by separate motion. Clerk to provide notice.

DATED: July 12, 2021

Hon. Mark H. Epstein
Judge of the Superior Court

ADAM J. TENSER vs. ROBERT JOSHUA RYAN et al., No. 20SMCV01690, (July 16, 2021)(opinion: sustaining defendant the County of Los Angeles' demurrer to the first amended complaint)

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES - WEST DISTRICT

ADAM J. TENSER,

Plaintiff(s),

vs.

ROBERT JOSHUA RYAN; BETH SILVERMAN; TANNAZ MOKAYEF; ROBERT MARTINDALE; MAURICE JOLLIF; ELIZABETH DUMAIS MILLER; COUNTY OF LOS ANGELES and, DOES 1-10, inclusive,

Defendant(s).

CASE NO.: 20SMCV01690

ORDER: SUSTAINING DEFENDANT THE COUNTY OF LOS ANGELES' DEMURRER TO THE FIRST AMENDED COMPLAINT

Dept.: R
Hearing Date: 7/16/2021
Hearing Time: 9:00am

I. Facts and Relevant Procedural History

On November 6, 2020, plaintiff Adam J. Tenser ("plaintiff") filed this action against defendants Robert Joshua Ryan, Beth Silverman, Tannaz Mokayef, Robert Martindale, Maurice Jollif, Elizabeth Dumais Miller, and the County of Los Angeles (collectively "defendants") for issues arising out of an underlying criminal trial. On February 24, 2021, plaintiff filed his operative First Amended Complaint ("FAC"). According to the FAC, plaintiff is an entertainment attorney who represents Blake Leibel. (FAC, ¶19.) On or around May 26, 2016, Leibel was arrested for murdering Iana Kasian. (*Id.* at ¶20.) The next day, plaintiff met with Leibel at the Twin Towers Correctional Facility ("TTCF") for a confidential attorney-client visit and during that visit Leibel requested that plaintiff arrange criminal counsel for him. (*Id.* at ¶23.) Plaintiff found an attorney to represent Leibel but when they both appeared at TTCG to visit Leibel on June 7th, they were denied an attorney-client visitation. (*Id.* at ¶¶24, 26.) In late July 2016, plaintiff attended a criminal hearing in Leibel's case with a criminal attorney in an effort to be substituted in as counsel but the request was denied. (*Id.* at ¶¶30-31.)

Plaintiff claims due to this failed attempt to become Leibel's attorney of record he was denied access to attorney-client visits with Leibel by TTCF staff starting around August 1, 2016. (FAC, ¶31.) Plaintiff was directed to defendant Jollif, the supervisor of the TTCF legal intake unit. (*Ibid.*) Despite Leibel's request to the contrary, Jollif denied plaintiff attorney-client access to Leibel because plaintiff was not attorney of record in the criminal case and did not have a Court order authorizing visitation. (*Ibid.*) Plaintiff claims Leibel signed an agreement stating that plaintiff was his attorney but Jollif still denied plaintiff attorney-client visits and purportedly threatened legal action against plaintiff. (*Id.* at ¶¶32-33.) Plaintiff claims he later contacted defendant Miller, an attorney in the Los Angeles County Counsel's office, but Miller also denied plaintiff's request to visit Leibel at TTCF absent a Court order granting him access to attorney-client visitation. (*Id.* at ¶34.) Plaintiff alleges that he was unable to obtain criminal counsel for Leibel and Leibel had to use a public defender. (*Id.* at ¶36.)

Leibel's trial began and from the outset defendants and prosecutors Mokayef and Silverman allegedly drew untoward attention to plaintiff. (FAC, ¶¶37-38.) The attention was enough that one juror asked about plaintiff during *voir dire*. (*Id.* at ¶38.) On June 13, 2018, the morning session of the trial adjourned for a lunch break and due to issues with the elevator the hallway outside the courtroom became packed. (*Id.* at ¶44.) Plaintiff claims that members of the press, jury, and public all rubbed shoulders with trial witnesses and counsel. (*Ibid.*) According to plaintiff, defendants Silverman, Mokayef, and Martindale engaged in a loud and celebratory conversation between themselves, witnesses, the victim's mother, and another detective named Cotter about that morning's testimony and its effect on the case. (*Id.* at ¶45.) Plaintiff emphasizes that this discussion was in audible distance of the jury and press. He alleges that he knows this because he stood next to the nearest juror so as to hear what the jurors were hearing. (*Ibid.*) Plaintiff confronted Silverman and Mokayef about their comments and after some alleged verbal sparring they assertedly called plaintiff a "stalker" in front of the jury, witnesses, and press. (*Id.* at ¶47.)

Plaintiff alleges that after proceedings resumed Mokayef informed the judge that plaintiff was "basically stalking the prosecution team[,]" and Silverman followed up by stating he should

be ordered to leave the building for interfering with the case if he could not act professionally. (FAC, ¶48.) Plaintiff asserts that after the lunch break on June 14, 2018, a juror expressed fear about plaintiff and was excused from jury duty. (*Id.* at ¶¶52-53.) Plaintiff claims this was either due to Silverman and Mokayef's false statements that he was a stalker or juror misconduct. (*Id.* at ¶54.) Plaintiff claims that on June 18, 2018, the Court cited him for contempt for following a juror in his car although plaintiff claims that he did no such thing. (*Id.* at ¶58.) The Court ordered plaintiff to leave the courthouse for the remainder of the trial. (*Ibid.*) On June 20, 2018, Detective Martindale filed an allegedly false unsworn declaration mischaracterizing various events. (*Id.* at ¶60.)

Plaintiff asserts the following claims against defendants (some of which have multiple counts): (1) violation of the UCL; (2) defamation; and (3) negligence. The third cause of action contains a count for vicarious liability against the County for all of its employees' (Silverman, Mokayef, Martindale, Jollif, and Miller) acts. Currently before the Court is the County's demurrer to the FAC. Plaintiff opposes.

Preliminarily, defendant contends that plaintiff's opposition is over the page limit. This is correct. The memorandum of points and authorities starts on 7 and goes to page 27. That equals 20 pages. CRC 3.1113(d) only permits a 15-page memorandum. The Court has reviewed those pages but cautions plaintiff to be more careful in the future, as in the future overlength briefs filed without leave of Court will be stricken. The Court reserves the right either to strike the overlength portion or to strike the brief in its entirety.

II. Analysis

A. Claim Filing Requirement

Our Supreme Court has held, "'submission of a claim to a public entity pursuant to section 900 et seq. "is a condition precedent to a tort action and the failure to present the claim bars the action."' (*Phillips v. Desert Hospital Dist.*(1989) 49 Cal.3d 699, 708, quoting *Lutz v. Tri–City Hospital* (1986) 179 Cal.App.3d 807, 812.)" (*State of California v. Superior Court* (2004) 32 Cal.4th 1234, 1240, parallel citations omitted.) "[A] plaintiff must allege facts demonstrating or excusing compliance with the claim presentation requirement. Otherwise, his complaint is subject

to a general demurrer for failure to state facts sufficient to constitute a cause of action." (*Id.* at p. 1243.)

Plaintiff alleges that he mailed his federal complaint to the State of California's Department of General Services and the Los Angeles County Board of Supervisors, and that was sufficient to indicate compliance with the claim filing requirement.[1] (See FAC, ¶¶15-18, Exhs. A-E.) In the demurrer and reply, the County challenges whether serving the federal complaint satisfies the claim notice requirement. Plaintiff opposes on the theory that the federal complaint substantially complied the requirements of Government Code section 910 and it constitutes a "claim as presented."[2]

In its tentative, the Court considered whether serving the federal complaint on the County would be sufficient. The Court was unaware of a few pertinent things about that federal complaint, but one more important point was brought up during oral argument.

Exhibits B and C to the FAC demonstrate service of the federal complaint. Exhibit B shows service on June 29, 2019 and Exhibit C shows service on November 2, 2019. Exhibit B is service only on two state agencies. There is no service on the County. Exhibit C is service on the County.

The County argues that Exhibit B should not be considered service. Assuming without deciding that service of the federal complaint would constitute a valid form of notice, the service still must be on the appropriate entity. One does not give the County notice of something by serving the State. The Court agrees. A claim against the County must be presented to the clerk, secretary, or auditor of the entity or mailing it to the clerk, secretary, or auditor or to the governing body at its principal office. (Gov't. Code sec. 915(a).) The law is quite clear that delivering the

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[1] Plaintiff filed a federal action. That action has been adjudicated against him and is now on appeal. Both parties agree, however, that the outcome of the federal action has no effect on this case. Were it otherwise, the Court would at least consider staying this action to allow the Ninth Circuit to rule.

[2] For purposes of this demurrer, the Court assumes that by "mailing the federal complaint" the parties essentially means serving it. If the federal complaint was mailed as a proposed complaint—that is, it had not yet been filed and, for example, was accompanied by a letter stating that unless a resolution could be reached it would be filed—the analysis would be very different.

notice to the State is not sufficient. (*Wood v. Riverside General Hosp.* (1994) 25 Cal.App.4th 1113, 1117.)

However, all agree that the November 2, 2019, notice was sent to the right place. Again, assuming without deciding that the federal complaint could constitute a valid notice of claim, the problem is that it is out of time, and, if so, it is vulnerable to demurrer. (*California v. Superior Court* (2004) 32 Cal.4th 1234, 1243.).

The time to file a claim of right is six months. (Gov't. Code sec. 911.2.) However, a person missing the six-month deadline may still apply to the County to file a late claim. (Gov't. Code sec. 911.4.) The application must be within "a reasonable time not to exceed one year after the accrual of the cause of action." The time is jurisdictional. (*Greyhound Lines v. Santa Clara* (1986) 187 Cal.App.3d 480, 488; *Munoz v. California* (1995) 33 Cal.App.4th 1767, 1779.)

The specific acts of which plaintiff complains essentially took place in June 2018, although plaintiff asserts that they continued through July 2018. Either way, the six month period had long expired. And even were the Court willing to construe the federal complaint as constituting notice and constituting an application to file a late claim, it would still be outside the one year period.

It is true that "[w]here there has been an attempt to comply but the compliance is defective, the test of substantial compliance controls. Under this test, the court must ask whether sufficient information is disclosed on the face of the filed claim 'to reasonably enable the public entity to make an adequate investigation of the merits of the claim and to settle it without the expense of a lawsuit.'" (*Pacific Tel. & Tel. Co. v. County of Riverside* (1980) 106 Cal.App.3d 183, 188, citing *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 456.) But that requires an actual effort to comply in a timely fashion. Where such an effort is made but the effort does not meet the strictures of the claims statute, there are procedures to be followed regarding notice and the like. Further, where the strictures are not followed precisely but there has been substantial compliance, that is enough. But the Court is not aware of any case in which notice can simply be filed late with no explanation and yet have that deemed compliance.

Plaintiff is correct that the claims process is not intended to be a trap for the unwary or a process to snag those who are not extremely careful. But neither is it so elastic that the Court can overlook it entirely. Here, the County is correct. The allegations in the FAC itself demonstrate that timely notice of the claim was not given. That is a jurisdictional failure and the case simply cannot proceed against the County.

B. Government Code section 815.2

The County argues in the alternative that it is immune from liability under Government Code section 815.2 for the acts of its employees because the individual defendants are immune. The Court need not, and does not, reach that issue.

III. Leave to Amend

The Court recognizes that in its tentative, it had given plaintiff leave to amend. However, in light of the actual notice, the Court sees no way that any amendment could be anything but futile.

And even were plaintiff to somehow overcome the timeliness problem, there are a host of other problems. The Court is far from convinced that serving the federal complaint on the County would constitute notice (although the Court is not holding that it would not constitute substantial compliance were it timely).

And then there is the problem of immunity. In the Special Motion to Strike, the Court granted the motion as to Detective Martindale. The motion was denied as to the two prosecutors, though. The Court found that the allegation that they were talking about plaintiff outside the courtroom in front of the jury was not sufficient to meet the first prong of the SMS test. Chatting in the hallway (in front of the jury) hardly seems to be a protected right within the SMS statute. To be sure, the prosecution would be protected, but it is harder to see how the hallway talk in the jury's presence could be a constitutional right or any right within the statute's ambit. But that does not fully answer the question. Failing the first prong of the SMS does not mean that the conduct is not immune. The Court's tentative view was that immunity would not apply because either the conversation about plaintiff was too far removed from the actual prosecution or, to the extent that it was not, there is no protection for talking about an ongoing criminal case in front

of the criminal jury. But the issues was not fully clear (and, in light of the foregoing analysis, the Court need not, and does not, come to ground on the point).

And as to plaintiff's access to his client at the County jail, the Court was tentatively of the view that the alleged Penal Code violation was not one for which plaintiff had standing and that he had no ability to bring a 17200 claim either because he was entitled to no equitable relief (and perhaps because the underlying actions did not give rise to an unfair competition claim at all). Again, in light of the notice problem, the Court need not, and does not, reach those issues.

The point is that the notice issue appears to the Court to be insurmountable. And even could it be surmounted, all that would do is lead to the next series of likely insurmountable problems. In short, no purpose is to be served by giving leave to amend. If the Court is wrong, it is wrong on the law, not the facts as alleged.

IV. Conclusion

The County's demurrer is SUSTAINED WITHOUT LEAVE TO AMEND. Clerk to give notice.

DATED: July 16, 2021

Hon. Mark H. Epstein
Judge of the Superior Court

ADAM J. TENSER vs. ROBERT JOSHUA RYAN et al., No. 20SMCV01690 (September 3, 2021)(opinion: motion for reconsideration of demurrer denied)

Tenser v. Ryan

20SMCV01690

The motion for reconsideration of the order sustaining the demurrer without leave to amend is DENIED.

A motion for reconsideration is governed by Code of Civil Procedure section 1008. It requires that the moving party present new facts, circumstances, or law of which it was unaware (and of which it reasonably was unaware) at the time of the prior hearing. Its requirements are jurisdictional. Although the Court has the inherent power to reconsider a prior order, there is a distinction between the Court *sua sponte* reconsidering an order and a party moving for reconsideration.

The gist of the Court's order sustaining the prior demurrer was that plaintiff had not provided the County with notice of its claim within a year from the date when the claim arose. The Court reasoned that the statute at issue is very clear that a notice of claim can be served as a matter of right within six months and with permission within a year. After a year, however, the notice is untimely. Plaintiff attempted to argue that the County had waived the issue because it did not raise the time issue in its response to the claim (assuming, for these purposes that what plaintiff sent to the County on November 2, 2021 constitutes a notice of claim). The Court rejected that argument because the Court believed that the waiver doctrine only applied during the six month window between the time one could provide notice of a claim as of right and the one year period where permission was required. Providing notice during that period (as the statute does require) would notify the claimant that she or he needed to request permission to file a late claim and would allow such a request to be made within that window—a time when permission could still be given and refusal to give permission could still be challenged. This seems obvious from the notice plaintiff contends should have been, but was not, given. That notice is a warning that the claimant's only recourse is to apply to

present a late claim—a warning that under these facts would be without meaning because the time to file a late claim with permission had already expired. After the window closed, no purpose would be served and the law does not require futile acts. (*Estill v. County of Shasta* (2018) 25 Cal.App.5th 702, 712.) Right or wrong, that was the Court's understanding of the law. Moreover, because based on that understanding there was no way for plaintiff to plead around the issue, leave to amend was not granted. (The Court agrees that the issue is not jurisdictional, but that does not change the outcome.)

Plaintiff presents no new facts, circumstances, or law that would justify reconsideration of the prior ruling. Rather, plaintiff simply re-argues the point. The closest plaintiff comes is to advert to the County's objections to a Magistrate's Report in a federal action (in which the County is not a party). But those objections were filed in June 2020—hardly something of which plaintiff was unaware at the demurrer hearing. Plaintiff also refers to a letter from plaintiff to the clerk and others who were entitled to notice of a claim. But that letter was dated November 2, 2019—again something of which plaintiff has been long aware and also a letter that post-dates the one year period set forth in the Government Code. Accordingly, the motion is jurisdictionally deficient and is denied on that basis. The Court notes that in light of the way the case progressed at argument, if either of those documents were sufficient to cause the Court to question its prior decision, it might have granted the motion for reconsideration or, on its own motion, elected to reconsider to take that evidence into account. But after reviewing those documents, the Court does not see how they would change the Court's mind.

As is probably apparent from the foregoing discussion, even were the Court to grant the motion for reconsideration, it would reach the same conclusion on the merits. The Court remains unpersuaded that its ruling was wrong. The same applies to the UCL claim. The Court is unpersuaded that the UCL claim was timely presented, nor is the Court persuaded that a UCL claim lies against the

County or its employees who are acting within the course and scope of their duties.

ADAM J. TENSER vs. ROBERT JOSHUA RYAN et al., No. 20SMCV01690 (September 10, 2021)(opinion: motion for reconsideration of special motion to strike denied)

Tentative Ruling
20SMCV01690

The motion for reconsideration is DENIED.

This is a motion for reconsideration of the Court's order partially granting defendant Martindale's Special Motion to Strike (SMS) on July 16, 2021. Plaintiff largely agrees that nothing in his motion is "new" or "different" evidence not available to him at the time of the SMS hearing, and thus he does not argue too strenuously that he meets the jurisdictional requirements for a 1008 motion. He asks, though, that the Court exercise its discretion to reconsider its order because, in his view, the order was in error.

The Court disagrees. First, the motion is denied for failing to meet the requirements of section 1008. Second, even were the Court to reconsider its ruling, it would come to the same result. The *major* thrust of plaintiff's argument is that Martindale's statement to the Court was not sworn. In other words, it was not a declaration because it was not under oath. Instead, it was just a statement. The Court does not believe that the failure to make the statement under oath is material enough to warrant a different result. Even if not under oath, it was still a statement made to the Court as part of a judicial process (broadly construed) and that is true whether the proceeding was a contempt proceeding or a proceeding under section 177.5. It is enough to come within the privilege. Indeed, many privileged statements are not made under oath. Pre-litigation settlement letters, press conferences, and other statements are not made under oath but yet are protected. Plaintiff argues that giving a DMV report to the Court was a crime, and thus was unprotected. The Court is not so sure. The background is (allegedly) that a juror was concerned that a car was following her. Martindale located the car from the juror's description and ran a DMV search on the license plate. Through that search, he discovered that plaintiff owned the car and he provided that information to the Court. Although plaintiff was cited for contempt, the contempt hearing was never actually held. Detective Martindale made the statement in question two days before the contempt hearing was scheduled. That is enough for the Court to believe that its prior reasoning was sound.

The Court has also considered the judicial estoppel argument plaintiff now raises. The Court does not believe that the elements of judicial estoppel have been met.

In short, the Court DENIES the motion for reconsideration, and, even were the motion granted, the result would be the same. (The Court notes that there would still be a problem as to whether plaintiff filed a timely notice of claim with the County, which was the subject of the demurrer, mooted out by the SMS ruling as to Detective Martindale.) Plaintiff's remedy lies with the Court of Appeal if this Court erred.

ADAM J. TENSER vs. ROBERT JOSHUA RYAN et al., No. 20SMCV01690
(October 12, 2021)(Order Fee Waiver)

FW-003 Order on Court Fee Waiver (Superior Court)

Clerk stamps date here when form is filed.

FILED
Superior Court of California
County of Los Angeles
10/12/2021
Sherri R. Carter, Executive Officer / Clerk of Court
By: M. Mariscal Deputy

Fill in court name and street address:

Superior Court of California, County of Los Angeles
Santa Monica Courthouse
1725 Main Street
Santa Monica CA 90401

Fill in case number and name:

Case Number: 20SMCV01690

Case Name: ADAM J TENSER vs ROBERT JOSHUA RYAN, et al.

(1) Person who asked the court to waive court fees:

Name: Adam J Tenser
Street or mailing address: 8844 W. Olympic Blvd.
City: Beverly Hills State: CA Zip: 90211

(2) Lawyer, if person in (1) has one *(name, firm name, address, phone number, e-mail, and State Bar number):*

Adam J Tenser
8844 W. Olympic Blvd Beverly Hills, CA 90211
(310) 721-2187, (310) 721-2187
jt@tenserlaw.com, jt@tenserlaw.com
256022

(3) A request to waive court fees was filed on *(date):* 10/12/2021

☐ The court made a previous fee waiver order in this case on *(date):*

Read this form carefully. All checked boxes ☑ are court orders.

Notice: The court may order you to answer questions about your finances and later order you to pay back the waived fees. If this happens and you do not pay, the court can make you pay the fees and also charge you collection fees. If there is a change in your financial circumstances during this case that increases your ability to pay fees and costs, you must notify the trial court within five days. (Use form FW-010.) If you win your case, the trial court may order the other side to pay the fees. If you settle your civil case for **$10,000** or more, the trial court will have a lien on the settlement in the amount of the waived fees. The trial court may not dismiss the case until the lien is paid.

(4) After reviewing your: ☑ *Request to Waive Court Fees* ☐ *Request to Waive Additional Court Fees*
the court makes the following orders:

a. ☑ The court **grants** your request, as follows:

(1) ☑ **Fee Waiver.** The court grants your request and waives your court fees and costs listed below. *(Cal. Rules of Court, rules 3.55 and 8.818.)* You do not have to pay the court fees for the following:

- Filing papers in superior court
- Making copies and certifying copies
- Sheriff's fee to give notice
- Court fee for phone hearing
- Giving notice and certificates
- Sending papers to another court department
- Reporter's fee for attendance at hearing or trial, if the court is not electronically recording the proceeding and you request that the court provide an official reporter
- Assessment for court investigations under Probate Code section 1513, 1826, or 1851
- Preparing, certifying, copying, and sending the clerk's transcript on appeal
- Holding in trust the deposit for a reporter's transcript on appeal under rule 8.130 or 8.834
- Making a transcript or copy of an official electronic recording under rule 8.835

(2) ☐ **Additional Fee Waiver.** The court grants your request and waives your additional superior court fees and costs that are checked below. *(Cal. Rules of Court, rule 3.56.)* You do not have to pay for the checked items.

☐ Jury fees and expenses
☐ Fees for court-appointed experts
☐ Other *(specify):* _____
☐ Fees for a peace officer to testify in court
☐ Court-appointed interpreter fees for a witness

b. ☐ The court **denies** your fee waiver request because:

Warning! If you miss the deadline below, the court cannot process your request for hearing or the court papers you filed with your original request. If the papers were a notice of appeal, the appeal may be dismissed.

(1) Your request is incomplete. You have **10 days** after the clerk gives notice of this Order (see date of service ☐ on next page) to:

- Pay your fees and costs, or
- File a new revised request that includes the incomplete items listed:
  ☐ Below ☐ On Attachment 4b(1)

(2) ☐ The information you provided on the request shows that you are not eligible for the fee waiver you requested for the reasons stated: ☐ Below ☐ On Attachment 4b(2)

The court has enclosed a blank *Request for Hearing About Court Fee Waiver Order (Superior Court)* (form FW-006). You have **10 days** after the clerk gives notice of this order (see date of service below) to:

- Pay your fees and costs in full or the amount listed in c below, or
- Ask for a hearing in order to show the court more information. *(Use form FW-006 to request hearing.)*

c. (1) ☐ The court needs more information to decide whether to grant your request. You must go to court on the date on page 3. The hearing will be about the questions regarding your eligibility that are stated:
☐ Below ☐ On Attachment 4c(1)

(2) ☐ Bring the items of proof to support your request, if reasonably available, that are listed:
☐ Below ☐ On Attachment 4c(2)

Your name: Adam J Tenser

Case Number: 20SMCV01690

Name and address of court if different from above:

Hearing Date → Date: _____ Time: _____
Dept.: _____ Room: _____

Warning! If item c(1) is checked, and you do not go to court on your hearing date, the judge will deny your request to waive court fees, and you will have 10 days to pay your fees. If you miss that deadline, the court cannot process the court papers you filed with your request. If the papers were a notice of appeal, the appeal may be dismissed.

Sherri R. Carter, Executive Officer / Clerk of Court
M. Mariscal

Date: 10/12/2021

Signature of (check one): ☐ *Judicial Officer* ☑ *Clerk, Deputy*

Request for Accommodations

Assistive listening systems, computer-assisted real-time captioning, or sign language interpreter services are available if you ask at least five days before the hearing. Contact the clerk's office for *Request for Accommodations by Persons With Disabilities and Response* (form MC-410). (Civ. Code, § 54.8.)

Clerk's Certificate of Service

I certify that I am not involved in this case and *(check one)*:

☐ I handed a copy of this Order to the party and attorney, if any, listed in (1) and (2), at the court, on the date below.

☐ This order was mailed first class, postage paid, to the party and attorney, if any, at the addresses listed in (1) and (2), from *(city)*: Santa Monica, California, on the date below.

☐ A certificate of mailing is attached.

Date: 10/12/2021

Sherri R. Carter, Executive Officer / Clerk of Court

Clerk, by M. Mariscal, Deputy

Name: _____

This is a Court Order.

CLERK'S CERTIFICATE OF ELECTRONIC SERVICE ON FEE WAIVER ORDER

I certify that I am not a party to this cause and that the document: FW-003 - Order on Court Fee Waiver (Superior Court), has been transmitted electronically by the Los Angeles Superior Court from Santa Monica, CA to the electronic service provider that submitted the transaction. The transmission originated from Los Angeles Superior Court on 10/12/2021 at 02:09:17 PM PDT. The electronically transmitted document(s) is in accordance with Rule 2.251 of the California Rules of Court. The list of electronically served recipient(s) are listed below:

Party: Adam J Tenser