No. 24-

IN THE

Supreme Court of the United States

DR. NILI N. ALAI, M.D., J.D.,

Petitioner,

v.

MARK B. PLUMMER AND
LAW OFFICES OF MARK B. PLUMMER, P.C.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FOURTH DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Practicing physician Nili N. Alai, M.D. is a front-line worker who has operated a small medical practice in Southern California for 25 years. She had never been sued and hired a local attorney, Respondent Mark Plummer to defend an employment matter. Unbeknownst to her, Plummer was a high frequency, self-represented plaintiff who had filed numerous unsuccessful suits against his former clients and associate counsel—several against the same individuals.

In Plummer's 2018 fee dispute lawsuit against Dr. Alai, she sought to deem Plummer and his alleged alter ego law firm vexatious litigants under California's statute. She also filed an amicus brief in another of Plummer's *pro se* cases. In response—in 2020, Plummer filed this instant defamation suit against Dr. Alai and a web platform that posted various court pleadings. The California courts (1) decided that alleged statements about Plummer's "vexatious" litigation conduct were not protected speech, and (2) failed to recognize or address Plummer's limited-purpose public figure status or the public interest surrounding such speech about professional conduct. The appellate court astonishingly summarily dismissed Dr. Alai's federal claims as 'moot' based entirely on a co-defendant's appeal, effectively silencing her speech.

The questions presented are:

1. Whether failing to consider a public figure classification under *Gertz* and its progeny improperly lowers this Court's standard for

defamation and violates the Free Speech Clause of the First Amendment.

2. Whether a public website referring to an attorney's pleadings as 'vexatious' or "meritless" necessarily constitutes 'libel' in the statutory context as an explicit "legal term of art", or whether it is considered public discourse and protected First Amendment expression of opinion, given the ordinary reader.

3. Whether a state court's application of res judicata to deem an appeal as moot based on another defendant's appeal violates the Due Process Clause of the Fourteenth Amendment.

The ultimate question presented is whether this Court should uphold and refine, or reverse the "actual malice" requirement it imposed on public figure defamation plaintiffs under Gertz and its progeny, and whether it will clarify standards relevant to the modern Internet era.

PARTIES TO THE PROCEEDING

Petitioner: Dr. Nili N. Alai, M.D., J.D., the defendant in the underlying action respectfully petitions to review the judgment of the California Court of Appeals.

Respondents: Law Offices of Mark B. Plummer, and Mark B. Plummer, plaintiffs.

RELATED PROCEEDINGS

Law Offices of Mark Plummer v. Nili Alai et al., Cal. Supreme Court Supreme Court of California Case No. S285405, Decision entered August14, 2024

Law Offices of Mark Plummer v. Nili Alai et al., Case No. G062355, California Court of Appeals, Fourth District Third Division, Opinion entered May 2, 2024.

Law Offices of Mark Plummer v. Nili Alai et al., Case No. G057721, California Court of Appeals, Fourth District Third Division, Opinion entered September 10, 2020.

Law Offices of Mark Plummer v. Siamak Nabili et al. Case No. G061310, California Court of Appeals, Fourth District Third Division, Opinion entered May 4, 2022.

Law Offices of Mark Plummer v. Siamak Nabili et al. Case No. G060354 California Court of Appeals, Fourth District Third Division, Opinion entered October 6, 2022.

Law Offices of Mark Plummer v. Nili Alai et al. Case No. G063811 California Court of Appeals, Fourth District Third Division, Oral argument calendared November 21, 2024.

Law Offices of Mark Plummer v. Nili Alai et al. 30-2018-01002061 Orange County Superior Court, no judgment entered.

Law Offices of Mark Plummer v. Nili Alai et al. 30-2020-01141868 Orange County Superior Court, no judgment entered.

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OPINIONS BELOW

The opinion of the California Court of Appeals for the Fourth District, Third Division is reported at No. G062355 (Cal. Ct. App. May 2024) and reprinted at App.2a-16a, and 30a-52a. The California Supreme Court took the matter under an extended submission. Ultimately it denied review, reprinted at App.1a. The California Superior Court orders are unreported, and reprinted at App.17a-29a,53a-60a.

JURISDICTION

The appellate court entered judgment on May 2, 2024. The California Supreme Court denied review on August 14, 2024. This Court has jurisdiction under 28 U.S.C. § 1257(a).

PERTINENT CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides, in relevant part: "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 I.

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend XIV.

INTRODUCTION

This case is part of two incipient trends in the modern Internet era: defamation suits filed by professionals and 'vexatious' litigation. Increasingly, public officials, corporations and their owners, and professionals like attorneys, dentists, and doctors, are filing defamation lawsuits in droves in retaliation for statements made about them by individuals on websites and Internet message boards. *Lidsky, Silencing John Doe: Defamation & Discourse in Cyberspace* (2000) 49 Duke L.J. 855,858 (*Lidsky*). These lawsuits "are not even arguably about recovering money damages" from the relatively impecunious defendants, but "are largely symbolic, the primary goal being to silence John Doe and others like him." *Id.*/pp.858-859. This trend threatens to "chill the use of the Internet as a medium for free-ranging debate and experimentation with unpopular or novel ideas" (*id.*/p.890) and "blunt the effectiveness of the Internet as a medium for empowering ordinary citizens to play a meaningful role in public discourse". *Id.*/p.945. Hence, this is leading to a substantial uptick in litigation intended to chill speech.

Practicing physician Nili Alai, M.D. is a front-line worker who has operated a small medical practice in Southern California for 25 years. She had never been sued until a paralegal filed suit claiming wrongful termination. She hired a local lawyer, Respondent Mark Plummer, to defend the matter. Unbeknownst to her, Plummer was a high frequency, self-represented plaintiff who had filed numerous unsuccessful suits in various venues against his former clients and associate counsel—several multiple times against the same individuals.

On the eve of trial, Plummer surreptitiously 'disassociated' as counsel and then sued Alai for alleged 'unpaid fees'. Prompted by his course of conduct, Alai requested an investigation of Plummer's past cases. As a result, she filed a motion to deem Plummer and his alleged alter ego law firm a vexatious litigant under California's statute. She also filed an amicus brief in another of Plummer's cases making that court aware of his various litigation and conflicting declarations.

During pendency of Plummer's first lawsuit, he filed this current suit claiming 'defamation' and "false personation" in connection with Alai's litigation statements.

The California Court of Appeals, Fourth District (California) refused to strike Plummer's libel suit despite Alai's asserted qualified privilege. Further, it neither recognized nor addressed Alai's assertions of limited-purpose public figure as to Plummer's litigation conduct, federal defenses raised both in the lower and appellate court (App.131a,149a-150a,164a-165a), and explicitly rejected that a self-represented attorney's litigation and trial conduct *was* a matter of public interest. App.7a,15a.

California took the remarkable stance that Alai's admitted petitioning activity and alleged online speech about 'vexatious and meritless' litigation and unsafe office premises were neither of public interest, nor a public matter. What's more, it took the position that it could restrict opinion speech about professional conduct, even when that risks excising certain ideas or view-points from the public dialogue on a third-party public website. *Id.*

California's free-speech analysis is also deeply flawed. The decision cements a three-way circuit split over tensions between free speech and public figure analysis under *Sullivan*[1] and *Gertz*[2], pitting California and several state courts of last resort against the other circuits. AB. Long, *The Lawyer as Public Figure for First Amendment. Purposes*, 57 B.C. L. Rev. 1560, 1588 (2016) (*Long*).

At the same time, California contradicts this Court's free-speech precedents, which have repeatedly declared as anathemas to the First Amendment all government attempts to restrict speech, to regulate speech based on content, and to stamp out disfavored speech.

California further conflicts directly with the Third and Sixth Circuits, and the New Mexico Supreme Court, all of which have held different 'tests' as to public figure status and public matters. This entrenched split cannot stand. *It means that the First Amendment rights of our citizenry depend on the state in which they live.* And the decisions that give their imprimatur to courts who restrict or compel speech conflict starkly with this Court's decisions.

If California's analysis and holding here are not erroneous, then *Gertz* should be overturned.

Lastly, in an unprecedented manner, California applied res judicata and explicitly ruled that Alai's

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1. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (*Sullivan*).

2. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (*Gertz*)

appeal was 'moot' based on another appellant's appeal. App.9a,16a. To be certain, the appellate court didn't examine Alai's evidence or substantive briefing, because instead it conceded that it exclusively relied on its own prior *unpublished* decision as to a co-defendant's vastly different briefing. App.6a-7a.

Stemming from these experiences, Dr. Alai desired to gain legal knowledge, and eventually earned her juris doctorate. She has been a California licensed attorney since 2022. App.2a/fn. She remains a front-line health worker and philanthropist and plans to support speech consistent with her beliefs in consumer protection and public safety. She seeks only to speak responsibly in a truthful manner consistent with her convictions, and this case substantially restricts her speech. She petitioned California courts through appropriate channels to deem Plummer a vexatious litigant in his two lawsuits against her—as a legitimate defense and for consumer protection—not to defame him. App.56a-58a,171a,176a-178a. Under *Sullivan*, even if her petitioning activity or alleged speech was deemed 'offensive or disparaging' by California, this Court has never punished legitimate petitioning activity or disparaging speech. *Matal v. Tam*, S. Ct. 1744, 198 L. Ed. 2d 366 (2017)(*Matal*).

Here, she seeks to uphold her First and Fourteenth Amendment rights under the United States Constitution. This Court's review is urgently needed to reaffirm the Free Speech Clause and clarify the public figure standard under *Gertz* and its progeny in the context of the modern Internet era. The petition should be *granted.*

STATEMENT OF THE CASE

The underlying action arises from a professional conflict between two former physician clients Dr. Alai and Dr. Nabili—on the one side, and attorney Plummer on the other side. Plummer sued the physicians twice—once for an alleged fee dispute and the *second time* for purported "defamation".

Litigation necessarily involves conflict and often leads to offensive or hurtful speech or claims, but words alone rarely cause genuine damage. Most of us simply exchange our barbs and then turn away. "The history of the law of free expression is one of vindication in cases involving speech that many citizens may find shabby, offensive, or even ugly." U.*S. v. Playboy Entertainment Group, Inc.* 529 U.S.803,826 (2000). California's decision struck stunning blows to the efficacy of the Free Speech Clause, the integrity of the Internet as a medium of free expression, the constitutional prohibition against such restraints, and the due process clause. California's decision affords the ideal opportunity for this Court to vindicate of the right of free expression, protect amicus briefs as petitioning activity, as well as to clarify the current ambiguity in public figures under *Gertz* and its progeny.

A. Petitioner Dr. Nili N. Alai, M.D., J.D.

Dr. Alai is a front-line worker, philanthropist, and attorney. App.2a,fn. She has achieved recognition in the medical field but eventually found herself wanting additional skills to promote public interests, consumer protection issues, and supporting nonprofits—all of

which she deeply cares about. Alai has largely realized her dreams. She began reading for the law and became a licensed California attorney two years prior. As a physician, she strives to act in the interests of the community. As an attorney, she perceives a compelling need for reform within the legal profession, seeking enhanced accountability.

Respondent Plummer, her former attorney, has frequently represented himself in a series of contentious lawsuits, often against former clients. His litigation pattern, particularly in cases involving his own matters, had drawn the attention of courts and community attorneys. *See e.g.* App.158a,164a. Alarmed by Plummer's impact on consumers, Alai sought to have him declared a vexatious litigant based on public records. App.53a-58a.

In response to Alai's vexatious litigant briefing and amicus brief (App.46a,98a-99a,102a), and these court pleadings being linked on the Internet, Plummer filed this suit.

B. California's anti-SLAPP statute

Thirty years ago, California addressed the problem of Strategic Lawsuits Against Public Participation (SLAPP) by enacting one of the nation's first anti-SLAPP[3] laws in 1992. This bold step aimed to counteract

3. Many other states have enacted anti-SLAPP statutes. New York imposes a substantive requirement on libel defendants to establish actual malice in any case challenging a statement made "in connection with an issue of public interest." *Palin v.*

the chilling effect of meritless suits intended to deter individuals from exercising their rights. The primary goal of California's anti-SLAPP statute (Code of Civil Procedure[4] § 425.16) was to swiftly and cost-effectively dispose of meritless lawsuits filed in retaliation for defendants exercising their right to petition and free speech. The statute protects "any act ... in furtherance of the ... right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue." App.61a. Under this statute, defendants may move to strike causes of action arising from protected free speech on public matters. App.11a.

C. California's vexatious litigant statute

Sixty years ago, California enacted the nation's first vexatious litigant statute with the primary goal of protecting defendants from certain self-represented litigants who "dog the defendants and clog the courts" with excessive, meritless lawsuits. In 1963, California codified section 391, intending to address the problems "created by the persistent and obsessive litigant, who has constantly pending a number of groundless actions." App.65a.

"This statute allows courts to restrict such litigants from filing new actions without prior court approval ... " App.7a,fn. Under California law, such a litigant is generally defined as a self-represented plaintiff

N.Y. Times Co., 2020 WL 7711593, (S.D.N.Y. 2020).

4. All further statutory references are to the California Code of Civil Procedure unless otherwise stated.

who has five unsuccessful actions in the prior seven years. A defendant may move to deem a plaintiff a vexatious litigant at any stage in the proceedings, and *under section 391.6 the entire litigation is immediately, statutorily stayed upon the filing of such a motion.* App.80a. The courts therefore lack jurisdiction to enter any other orders during pendency of a section 391 motion, and for a full ten days after entry of the vexatious order. App.76a.

D. Proceedings below

Pummer sued Dr. Alai and Dr. Nabili for defamation. The earlier *sequence* of Petitioner Dr. Alai's filings at the trial court is critical to the core issues in this writ. App.6a.

In January 2021, Alai sought an order declaring Plummer a vexatious litigant, which under section 391.6 statutorily stayed the action and divested the court of jurisdiction to enter any other rulings until 10 days after entry of the vexatious order. App.171a-184a. During pendency of the vexatious motion, in February 2021 Alai filed her anti-SLAPP motion to strike Plummer's defamation complaint. App.156a-170a. In March 2021, co-defendant Nabili filed his anti-SLAPP. However, Alai's two motions fell off calendar and were not heard or decided until 2023 (App.17a-29a), a full two years after Nabili's anti-SLAPP was decided based on vastly different arguments than Alai's. App.3a. The trial court refused to observe the statutory section 391.6 stay during pendency of Alai's vexatious litigant motion, and ruled on the Nabili anti-SLAPP first. Ultimately, the trial court denied Alai's anti-SLAPP as *moot*, fully

relying on the Nabili *unpublished* appellate ruling. App.3a,16a.

On appeal, California summarily also denied Alai's petition to reverse the trial court. It later denied Alai's petition for rehearing which critically briefed the federal due process issue and the section 391.6 jurisdictional defect. App.79a-110a. Ultimately, the California Supreme Court denied review. App.1a.

REASONS FOR GRANTING THE WRIT

This Court has not hesitated to overrule decisions offensive to the First Amendment "(a fixed star in our constitutional constellation, if there is one)." *Janus v. American Federation of State, Cnty., and Municipal Employees*, 138 S. Ct. 2448, 2478 (2018)

Thomas Jefferson endorsed the First Amendment's guarantee of freedom of expression subject to the reservation that "[t]he people shall not be deprived of their right to speak, to write, or other- wise to publish anything but false facts affecting injuriously the life, liberty or reputation of others." F. Mott, *Jefferson and the Press* 14 (1943) (quoted in *Gertz*, 481.)

This Court expanded *Sullivan's* treatment of "public official" defamation plaintiffs as raising a First Amendment concern onto the treatment to be accorded *any* defamation plaintiff deemed a "public figure" (whether a football coach—as in *Curtis Publishing*—or a demonstrator at a college campus as in the companion case, *Associated Press v. Walker*, 389 U.S. 28 (1967)). *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S. Ct.

1975 (1967). It has thereafter expanded *Sullivan's* "actual malice" to "limited" or "involuntary" public figures". *Gertz*, at 345, 351.

California's decision perpetuated a wrong result on a recurring and important constitutional question, and this case presents an ideal vehicle for this Court to resolve these. The various circuits have now embraced at least three competing views over whether limited-purpose public figure classification applies to attorneys or businesspersons involved in litigation, and what type of test applies for public figure determination. *Long* at 1588. California's decision deepens that entrenched conflict and flatly contradicts this Court's free-speech precedents six ways from Sunday.

California took the extreme position that it would effectively 'silence John Doe'. *Lidsky, supra.* It would restrict a litigant—any individual—from expressive speech or public website content, even if that content is in line with First Amendment speech. It took the stance that an attorney with extensive pro se litigation—may bring a defamation suit explicitly regarding his 'vexatious litigation' conduct without being deemed at a minimum—a limited-purpose public figure, thereby sidestepping the actual malice standard necessary under *Gertz.*

This ruling aligns with decisions from other jurisdictions, such as the New Mexico Supreme Court, which have, at times, treated attorneys as private figures in defamation cases. However, the ruling controverts many well-reasoned decisions from other jurisdictions, such as the Idaho Supreme Court, which

have treated attorneys as limited-purpose public figures in defamation cases. *Bandelin v. Pietsch*, 98 Idaho 337, 563 P.2d 395 (1977).

However, this approach contrasts sharply with rulings from the Eighth, Ninth, and Eleventh Circuits where courts have consistently recognized that attorneys involved in significant public controversies, or who are frequently engaged in litigation, assume limited-purpose public figure status. For instance, the Eleventh Circuit applied the actual malice standard to an attorney plaintiff deemed a public figure. *Berisha v. Lawson, 973 F.3d 1304 (11th Cir. 2020).* Likewise, the Ninth Circuit applied a rigorous actual malice standard in cases involving individuals enmeshed in public litigation. *Makaeff v. Trump University, LLC*, 715 F.3d 254 (9thCir. 2013) (*Trump*). The divergence among circuits and state courts demonstrates an urgent need for clarification on whether professionals involved in public controversies are afforded First Amendment protections under the actual malice standard.

These decisions further conflict directly with the Third and Sixth Circuits, and the New Mexico Supreme Court, all of which have held different 'tests' as to public figure status and public matters. This entrenched split cannot stand. It means that the *First Amendment rights of our citizenry depend on the state in which they live.* And the decisions that give their imprimatur to courts who restrict or compel speech conflict starkly with this Court's decisions.

This Court should also grant certiorari to clarify *Gertz* for the modern Internet era and resolve these

circuit splits. It should provide guidance on limited-purpose public figure determination as generally applicable to professionals like attorneys and others with similar community presence, or reconsider *Gertz*. California's decision has deepened a circuit split and substantially weakened *Gertz* by neither recognizing nor addressing the malice standard to public figures. This Court should *grant* review on the questions presented.

I. The California decision exacerbates a three-way circuit split

The California appellate court held that an individual's speech could be restrained based on opinions expressed about "vexatious and meritless lawsuits," "having an unsafe office," and petitioning activity, including filing an 'amicus brief.' App.46a. This remarkable holding conflicts with *Sullivan*, *Gertz* and other First Amendment protections by punishing opinion-based speech. The decision also conflicts with the Ninth Circuit's stance in *Standing Committee on Discipline v. Yagman*, 55 F.3d 1430 (9th Cir. 1995), where the court found that a declarant's statement is non-actionable if its factual basis is explicitly disclosed. Here, Alai's opinions about Plummer were supported by factual foundation and context under *Yagman*. App.56a-58a.

Without correction, California's decision risks eroding essential free-speech protections and emboldening courts and attorney-plaintiffs to punish speakers with whom they disagree.

A. The circuits require a consistent test

This Court has not yet fleshed out the skeletal descriptions of public figures and private persons enunciated in *Gertz*. One court observed that "*indeed, defining a public figure has been likened to trying to nail a jellyfish to the wall*." *Rosanova v. Playboy Enterprises, Inc.*, 580 F.2d 859, 861 (5th Cir. 1978). The circuits thus apply inconsistent tests for public figure status and protected public interests.

The Fifth Circuit applies a *five-factor test* which assesses whether the statement is germane to the controversy. It affirmed dismissal, concluding that Trotter (an attorney) was a public figure and failed to prove actual malice. *Trotter v. Jack Anderson Enterprises, Inc.*, 818 F.2d 431 (5thCir. 1987)(*Trotter*).

Conversely, the District of Columbia Circuit has developed a *three-step* test to identify the limited-purpose public figures. *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980) (*Waldbaum).* In *Tavoulareas v. Piro*, 817 F.2d 762 (D.C. Cir. 1987), the court held that the defamation plaintiff was a public figure in part because he and his company "played substantial roles in spearheading a public counterattack ... "

The Eleventh Circuit's *four-factor approach* focuses on both the nature of the controversy and the plaintiff 's role, but contrasts with both three-factor and five-factor tests elsewhere. It found defendants to be public figures because they "had ready access to the media for many years ... and they voluntarily placed themselves

in a position and acted in a manner which invited public scrutiny and comment" *Silvester v. American Broadcasting Companies, Inc.*, 839 F.2d 1491 (11th Cir. 1988)

The Sixth Circuit emphasizes a media access and reputational approach, holding that a defamation plaintiff who voluntarily seeks publicity satisfies the requirement. *Clark v. American Broadcasting Companies, Inc.*, 684 F.2d 1208 (6th Cir. 1982).

Other courts hold varying tests. In *Sisler v. Gannett Co., Inc.*, 516 A.2d 1083, 1095 (N.J. 1986), the court held that actual malice standard applies "when a private person with sufficient experience, understanding and knowledge enters into a personal transaction or conducts his personal affairs in a manner that one in his position would reasonably expect implicates a legitimate public interest with an attendant risk of publicity." In *Great Lakes Capital Partners Ltd. v. Plain Dealer Publishing Co.*, 2008 WL 5182819,*4 (Ohio App.8 Dist., 2008), the court held that individuals who enter into certain lines of work may become public figures. In *Chuy v. Philadelphia Eagles Football Club*, 431 F. Supp. 254, 267 (E.D.Pa.1977), aff'd, 595 F.2d 1265 (3d Cir.1979) the court held that an individual who has "chosen to engage in a profession which draws him regularly into regional and national view and leads to 'fame and notoriety in the community" is a public figure.

The Ninth Circuit often requires a more explicit, voluntary injection into a public controversy to classify a limited-purpose public figure. *Trump, supra.* This contrasts with the D.C. Circuit's broader framework creating a less stringent standard.

The New Mexico Supreme Court holds a *three-factor test* distinguishes a statement of opinion from fact. "In resolving the distinction, the following should be considered: (1) the entirety of the publication; (2) the extent that the truth or falsity may be determined without resort to speculation; and (3) whether reasonably prudent persons reading the publication would consider the statement as an expression of opinion or a statement of fact." *Marchiondo v. Brown*, 98 N.M. 394, 649 P.2d 462 (1982)

Lastly, the Fourth Circuit interprets the scope of protected opinion more restrictively than other circuits, particularly when statements could imply factual assertions. In *Erickson v. Jones Street Publishers, LLC*, 629 S.E.2d 653 (S.C. 2006), the court held that speech critical of a private business could be defamatory if it implies false facts rather than pure opinion. This contrasts with more lenient interpretations, like those in the Second and Ninth Circuits, where similar disparaging speech is often protected as opinion under the First Amendment.

An individual's freedom to speak freely according to her conscience thus depends entirely on her jurisdiction. It is long overdue for this entrenched conflict to be resolved.

B. The California appellate court and Ninth Circuit agree on protected speech about professional competence

California recognized that alleged speech about professional 'incompetence' and 'dishonesty' cannot

form the basis of a colorable defamation claim. App.39a. So far, so good.

It then went off the rails, holding that the explicit website verbiage 'f*iles vexatious and meritless lawsuits*" (App.34a) is instead inferring that Plummer is "a vexatious litigant" under section 391, hence libelous as a 'legal term of art.'

To get there, it held that the term 'vexatious' (Merriam-Webster's Dictionary meaning "annoying, distressing") was not applicable to the ordinary reader but instead was construed extremely narrowly as to section 391. That legal context is also utter nonsense, given that California conceded the disputed site *markplummerattorney.com* was a 'public website'—with ordinary readers. App.7a.

California's bizarre reasoning turns free-speech protections on their head. It explained that speech about an attorney's "vexatious" conduct and the safety of his office premises does not affect the public interests, and only affects himself and his ability to file lawsuits on his own behalf. App.15a,40a-41a. On that basis, it deemed the alleged speech actionable. "However, as explained by the Michigan Supreme Court, "the law has reposed special stewardship duties on lawyers on the basis of the venerable notion that lawyers are more than merely advocates who happen to carry out their duties in a courtroom environment, they are also *officers of the court*." "The public has a greater interest in being informed of and regulating the behavior of members of the legal profession than it does with other professions." *Long, supra*.

In a nearly identical case, the California Central District fully upheld anti-SLAPP against an attorney's claim brought against a former client. *Weiser Law Firm v. Hartlieb*, 8:23-cv-00171-CJC-JDE (C.D.Cal. 2023).

C. The Eleventh Circuit upholds public figure status

The Eleventh Circuit deemed the defamation plaintiff (an attorney) a limited-purpose 'public figure' and affirmed summary dismissal based on his failure to demonstrate evidence of malice. *Berisha v. Lawson*, 973 F.3d 1304 (11th Cir. 2020). It affirmed the district court's grant of summary judgment against Berisha. Setting aside questions of truth or falsity, the court simply asked whether Berisha is a "public figure." The District Court also found irrelevant petitioner's claim that he never sought the public attention visited upon him: "Where the issues of truth and voluntariness are so entangled, a plaintiff can be deemed a public figure without regard to whether ... [he] initially thrust [him] self into the case." This Court denied Berisha's petition for certiorari. *Berisha V. Lawson* 594 U.S.___(2021).

D. The Third and Ninth Circuits disagree

In two identical cases and facts between the same parties, one filed in California and the other in Pennsylvania, each Circuit came up with a different result. The California Central District fully upheld anti-SLAPP against an attorney's claims brought against a former client. *Weiser Law Firm v. Hartleib*, 8:23-cv-00171-CJC-JDE (C.D.Cal.2023). However, the Eastern District of Pennsylvania failed to strike the

attorney's defamation claims, which is now pending before the Third Circuit. *Weiser Law Firm v. Hartleib*, 665 F. Supp.3d 647 (E.D.Pa. 2023). This case readily demonstrates the deep divide and inconsistencies in the different circuits' application of this Court's holdings in *Gertz* and *Sullivan*.

E. California's decision contradicts this Court's free-speech precedents

California's analysis of actionable opinion speech (and indirectly the public figure malice standard) takes a bulldozer to this Court's free-speech precedents.

Silenced Speech. This Court consistently rejects state's restraint of First Amendment speech rights—and for good reason. When the courts restrict speech, they inflict a "demeaning" injury that violates a "cardinal constitutional command," *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council* 31,138 S.Ct. 2448, 201 L.Ed.2d 924 (2018), "the fundamental rule of protection under the First Amendment," *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.*, U.S. 573 (1995) and the principle that lies "[a]t the heart of the First Amendment," which grounds our very "political system and cultural life." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S.622, 641 (1994).

Speech—even if disparaging or offensive—remains protected under the First Amendment. This Court unanimously reaffirmed the "bedrock First Amendment principle" that "[s]peech may not be banned on the ground that it expresses ideas that offend." *Matal, supra*.

California did the opposite, silencing Alai's petitioning and expressive speech about Plummer's litigation conduct. This slights what this Court has repeatedly declared sacred: "individual freedom of mind." *W. Va. Bd. of Educ.* v. *Barnette*, 319 U.S. 624(1943). And it dims the most "fixed star in our constitutional constellation": government can neither silence nor compel citizens to speak against their conscience. *Id.* at 642.

California placed undue weight on the narrow statutory legal definition of 'vexatious', under section 391, not the nature of Alai's alleged speech. But *Matal* reinforces the principle that speech—even if disparaging or offensive—remains protected. Overly restrictive interpretations of speech, especially in public controversies, upends this Court's steadfast holdings. And this position conflicts with decisions of the Second, Sixth, Eighth, Ninth, and Eleventh Circuits, all of which have granted speech protection to similar disparaging speech about professional conduct. *Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235 (1991), *Seaton v. TripAdvisor LLC*, 728 F.3d 592 (6th Cir. 2013), *Trump, supra, Silvester v. American Broadcasting Companies, Inc.*, 839 F.2d 1491 (11th Cir. 1988).

An overly restrictive view of such speech, especially in the context of public controversies, contradicts this Court's jurisprudence.

This is no trivial matter. This result cannot satisfy the Free Speech Clause or *Gertz*. After all, "the concept that government may restrict the speech of some elements of our society in order to enhance the

relative voice of others is wholly foreign to the First Amendment." *Buckley* v. *Valeo*, 424 U.S. 1, 48-49 (1976).

California's conclusion that alleged speech about Plummer's vexatious litigation conduct amounts to actionable speech cannot be squared with this Court's free-speech precedents or common sense. Its decision also runs headlong into this Court's cases requiring appropriate analysis of public figure and actual malice standard where these are raised. And the decision leads to the upside-down rule that speech about an attorney being 'dishonest' and 'incompetent' are protected while speech about their 'vexatious litigation' conduct or failure to properly maintain a business premises (where depositions are taken and employees report to work, (App.107a-108a,146a) are inherently not in the public interest because those two latter issues would only impact the attorney himself—not the public. App.41a. However, these four notions are inherently fungible—these go to the heart of professional competence, integrity, and trustworthiness—all of which this Court has deemed as protected speech about professionals.

II. The California decision substantially narrows *Sullivan* and underscores *Gertz's* inadequacies

California's free speech analysis neuters *Sullivan* and highlights *Gertz's* inadequacies.

Contrary to *Sullivan*, which established a need for actual malice in defamation cases involving public officials and matters of public interest, and *Gertz*, which refined this standard to apply to public figures, California failed to assess whether Plummer's extensive

self-representation in numerous lawsuits qualified him as a limited-purpose public figure in relation to alleged comments about his "vexatious litigation". This oversight leaves unaddressed whether statements about his litigation tactics and professional conduct—which are matters of significant public interest—should be protected under the First Amendment.

Further, California's interpretation of the alleged website statements compounds this error. It determined that the website explicitly states that Plummer "*files vexatious and meritless lawsuits*." App.34a. Yet, it then transformed the express language to "*vexatious litigant" instead*, a legal classification with specific implications under California's 'vexatious litigant statute'. App.7a.,fn. This shift improperly escalated the website statement from a protected opinion about professional conduct into a potentially defamatory factual assertion. On that erroneous basis, California upheld Plummer's defamation claim.

California's recharacterization illustrates its lack of deference to *Sullivan*. By failing to consider that statements about a litigator's conduct fall within the realm of public interests, it has set a dangerous precedent for restricting speech that critiques legal practices or professional ethics.

Lastly, California's failure to address or apply the actual malice standard underscores the gaps left by *Gertz*. The circuit split between courts in the Ninth Circuit, which has established a relatively restrictive approach to public figure classification, and others—such as the D.C. Circuit's broader approach

in *Waldbaum*—highlights the need for this Court to provide clear standards. The Ninth Circuit has traditionally required that individuals seek out public controversy to be deemed limited-purpose public figures, while the D.C. Circuit focuses more on whether the individual became embroiled in a public controversy, even involuntarily.

By capriciously narrowing the scope of First Amendment protections, California's decision not only deviates from national norms but also places significant limitations on discourse involving professional conduct.

Clear rules for applying *Sullivan and Gertz* ultimately will benefit both the press and the public. California acknowledged that speech about a professional's 'dishonesty' and 'incompetence' is explicitly protected. Yet it upheld that speech about an attorney's tendency to 'file meritless and vexatious pleadings' is not protected speech and expressly actionable. California's fragmented decision exacerbates a circuit split over these questions.

A law that restricts speech concerning professional conduct, while allowing exemptions for other types of speech, may lack the neutrality required under the First Amendment. If California's interpretation is correct, it could diminish the protective scope established in *Sullivan*, suggesting a need to reconsider *Gertz*. This Court should therefore clarify the standards for applying the actual malice requirement to defamation claims involving professionals. If California's analysis is correct, then *Sullivan* means little, and this Court should overrule *Gertz*.

A. If California correctly applied the law, then this Court should overrule *Gertz*

Despite this Court's holdings in *Sullivan* and *Gertz*, California upheld a defamation claim on the idea of 'vexatious litigation' without performing the requisite heightened scrutiny and analysis as to limited-purpose public figure, actual malice, or even falsity. If this is allowed, it is time for this Court to overrule *Gertz*.

This cannot be the outcome that this Court envisioned. If California cannot correctly apply these sentinel cases on this record, then other defendants have little hope. California's failure underscores that Gertz has been unworkable in practice. *Berisha v. Lawson*, 594 U. S.____(2021) (Thomas, J. dissenting)

Gertz's flaws are well-documented. *Long, supra*. And this is a reasonable opportunity to answer these question.

III. This case raises exceptionally important issues

The Free Speech Clause now covers everything from digital newspapers, to social media influencers, Google reviews, bloggers, and YouTube journalists and channels. *Reno v. ACLU*, 521 U.S. 844 (1997); *Obsidian Finance Group, LLC v. Cox*, 740 F.3d 1284 (9th Cir. 2014).

Public matters, public figures, and the First Amendment can be harmonized. But California's decision places them in untenable tension. It enables courts to regulate speech selectively, potentially

enforcing content-based restrictions that silence dissenting opinions from the public square, contrary to the guaranteed fundamental First Amendment protections.

A. *Gertz* and its progeny have yielded highly conflicting results

"*Gertz* and its progeny establish the framework for lower courts charged with determining the public-figure status of defamation plaintiffs." "In the case of attorneys as defamation plaintiffs at least, the framework has not produced consistent results." *Long, supra.*

The issue is a pervasive one through many circuits and courts of last resort. The Idaho Supreme Court noted the lack of clarity in *Gertz* and *Sullivan*, but found Bandelin, an attorney, to be a public figure and dismissed his claims for lack of actual malice. *Bandelin, supra.* In Michigan, the appellate court held that "a trial attorney is a public figure for purposes of comment on his conduct at trial," thus necessarily implying that a trial—any trial—is a public controversy. *Bufalino v. Associated Press*, 692 F.2d 266, 273 (2d.Cir. 1982) (*Bufalino*). Notably, the Michigan Supreme Court reviewed a second defamation case brought by the attorney plaintiff and explicitly remanded that case for determination of his public figure status. *Bufalino v. Detroit Magazine, Inc.*, 433 Mich. 766, 449 N.W.2d 410 (1989)

Lower courts have not only reached conflicting results in comparable cases, they also disagree as to the relevance of a plaintiff 's certain actions in making

the determination. While *Gertz* emphasized that mere involvement in legal representation does not make a lawyer a public figure, lower courts remain unclear. This creates a circuit split.

The Third Circuit held that an attorney representing controversial clients and engaging in public issues could be classified as a limited-purpose public figure. *Marcone v. Penthouse Int'l Ltd.*, 754 F.2d 1072 (3dCir. 1985). The Ninth Circuit held that a lawyer's extensive media involvement during a high-profile criminal case pushed him into limited-purpose public figure status. *Partington v. Bugliosi*, 825 F. Supp. 906 (D. Haw. 1993), aff'd 56 F.3d 1147 (9thCir. 1995). The Kansas Supreme Court found that a lawyer who regularly engaged in high-profile legal work in the community, such as representing clients in prominent criminal cases, was a limited-purpose public figure. *Steere v. Cupp*, 602 P.2d 1267 (Kan. 1979).

B. Courts inconsistently apply *Gertz*

Gertz's specific holding that the attorney plaintiff (Elmer Gertz) was not a public figure was based in part on the determination that *Gertz* never discussed the underlying case with the press, nor was he quoted as having done so. That standard was set *fifty years ago*, and has left substantial gaps. These competing conceptions of *Gertz's* 'voluntariness' consideration play out inconsistently. For some courts, the lawyer must "mount the rostrum" and attempt to shape the views of the public at large, typically through the use of the media. But for other courts, the focus is on whether the lawyer voluntarily assumed a particularly visible

position in the forefront of a public issue. If so, the lawyer impliedly invited comment and attention. *Id.* "When a private person with sufficient experience, understanding and knowledge enters into a personal transaction or conducts his personal affairs in a manner that one in his position would reasonably expect implicates a legitimate public interest with an attendant risk of publicity, and the actual malice standard applies" *Sisler v. Gannett Co., Inc.*, 516 A.2d 1083 (N.J. 1986). In similar cases, the courts have dismissed the defamation suit based on the attorney plaintiff's limited-purpose public figure classification. *Trotter, supra; Berisha, supra.*

Plummer's voluntary insertion of himself as a frequent self-represented litigant makes commentary about his 'vexatious litigation'[5] conduct relevant to public interests *and* public figure analysis. Under *Trotter*, Plummer is a public figure for the limited-purpose of his litigation conduct because the alleged "statement is germane to the controversy". Under *Sisler*, Plummer is also a public figure because "when a private person with sufficient experience, understanding and knowledge enters into a personal transaction ... " California should have ordered dismissal, concluding that Plummer was a limited-purpose public figure in a matter of public interest.

The Court should *grant* the petition to resolve the substantive constitutional questions.

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5. Alai's vexatious litigant motion cited approximately fifteen qualifying unsuccessful Plummer self-represented lawsuits. App.53a-56a,176a-178a.

C. The lawyer as public figure for First Amendment purposes

The expanded gaps and inconsistent application of First Amendment protections have produced conflict, particularly in cases involving attorneys engaged in public controversies. *Long, supra*. For the last five decades, defendants have faced numerous defamation lawsuits filed by attorneys as plaintiffs. *Id.* A number of these suits have ended up before this court—*including Gertz*.

Gertz holds that "..an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues." 418 U.S. at 351, 94 S.Ct. Attorneys, by their nature, are sometimes litigious in their personal capacity and have assumed the role of plaintiffs in numerous defamation cases against media defendants as well as former clients, opposing counsel, and others. *Long*, *supra*. The shortcomings of current defamation jurisprudence is illustrated by the surplus of cases involving attorneys as plaintiffs.

Likewise, the Eleventh Circuit found especially significant that "Berisha [an attorney] forced himself into the *public debate* over his involvement. " It explained that "[b]ecause Berisha is a public figure, he cannot prevail in this suit unless he shows, by clear and convincing evidence, that the defendants acted with actual malice toward him." (citing *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 659 (1989)). The Eleventh Circuit underscored its analysis of Berisha's status as an 'involuntary limited public

figure' and the requirement he show respondents' actual malice was governed solely by federal law under the First Amendment.

Similarly, a Texas attorney sued a newspaper columnist for libel in the Fifth Circuit, which applied a five-factor test assessing whether the 'statement is germane to the controversy.' *Trotter, supra.* It ordered dismissal after finding Trotter a public figure.

Conversely, Ross, a California attorney engaged in decade-long defamation lawsuits against a newspaper was deemed a private figure. One case culminated in an unsuccessful petition by the newspaper to this Court citing Ross's public figure status, leaving in place a $2.25 million judgment for Ross. *Santa Barbara News-Press v. Ross*, 541 U.S. 1073 (2004).

While the Ninth Circuit requires more voluntary public engagement. Courts like the D.C. Circuit have taken a broader approach, treating individuals embroiled in public disputes as limited-purpose public figures. *Waldbaum, supra.* Establishing clear rules for applying *Sullivan* and *Gertz* would ultimately benefit both the press and the public by making defamation more predictable and consistent.

The Idaho Supreme Court found that the "controversy" in which the attorney became involved was a seemingly non-descript estate proceeding, but deemed him a public figure based on a detailed analysis of his activities on the issue in question. *Bandelin, supra.*

Bufalino, an attorney plaintiff, also engaged in a prolonged series of defamation suits. The Michigan Supreme Court found "*the Court of Appeals never properly examined the question of plaintiff's public-figure status, and that this case therefore should be remanded to that Court for plenary consideration.* " *Bufalino, supra.* In his second case before the Second Circuit, *Bufalino v. Associated Press*, 692 F.2d 266, 273 (2d Cir. 1982), the court found he was not a public official.

California narrowly construed that an attorney's filing of meritless lawsuits on his own behalf would in no way affect his practice of law or interests of his clients. App.15a. That is nonsense. An attorney's actions in a public trial, or as to his own litigation are of legitimate public concern. *Id.*

In this toxic legal climate, nearly anyone involved in critical or unflattering speech about professionals, *especially attorneys*, faces realistic threats of prosecution for speaking freely and consistently with their beliefs under laws that impose nearly catastrophic legal defense fees.

California's decision allows courts to restrict and to regulate speech based on content, and to enact laws that create a "substantial risk of excising certain ideas or view- points from the public dialogue" and have "[e] liminating such ideas [as their] very purpose." 303 *Creative LLC v. Elenis*, 143 S. Ct. 2298, 216 L. Ed. 2d 1131 (2023).

And these consumer harms and financial risks are not just hypothetical—attempts to eliminate certain ideas from the public square are *happening right now*, with alarming frequency.

For nearly the last decade, consumer Michael Hartleib has faced lawsuit after lawsuit filed by his former attorney Weiser, based on Hartlieb's speech about alleged unethical billing practices and an amicus brief filed about the Weiser Firm. *See e.g. Weiser Law Firm v. Hartleib*, 665 F. Supp. 3d 647 (E.D. Pa. 2023), *Weiser Law Firm v. Hartleib*, 8:23-cv-00171-CJC-JDE (C.D. Cal. 2023) These appeals are pending. The defamation suits have cost Hartlieb upwards of $750,000 to defend. These vexatious suits are becoming effective in "silencing John Doe" and others like him. *Lidsky, supra.*

The uncertainty surrounding the classification of attorneys as limited-purpose public figures is representative of the broader uncertainty surrounding the test for determining the public figure status more generally.

D. This Court should clarify the limited-purpose public figure doctrine

The fundamental issue in this case is whether Plummer, by virtue of his repeated self-representation in numerous contentious legal matters, should be classified as a limited-purpose public figure under *Gertz*. In *Gertz*, this Court held that individuals who voluntarily engage in public controversies or who seek to influence public opinion on significant matters are

subject to the actual malice standard in defamation cases.

Plummer's litigation history aligns with this Court's definition of a limited-purpose public figure. His decision to represent himself in contentious legal matters, many of which have garnered attention in the legal community, demonstrates his active participation in public controversies. App.158a,164a-165a. Multiple circuits have recognized that professionals who voluntarily inject themselves into public matters, particularly through litigation, should be held to the heightened actual malice standard. *Trump, supra; Waldbaum, supra.*

California's failure to apply this standard highlights the urgent need for this Court to provide clarity on the purpose public figure doctrine. Given the rise of digital platforms, attorney plaintiffs who engage in public litigation are more visible than ever, and their conduct is frequently subject to public scrutiny. Without clear guidance from this Court, lower courts will continue to apply inconsistent standards, undermining both free speech and the integrity of defamation law.

E. Issue of falsity

The *Gertz* court said: "[w]e begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor

the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues. *Gertz* at 339-340.

The alleged defamatory speech at the heart of this libel suit is simply that "*Plummer files vexatious and meritless lawsuits*." App.34a. Under nearly all circuits, California's analysis of Plummer's defamation claim about would fail flat as simply a 'pernicious' opinion.

California conceded that Plummer's libel *complaint failed as a matter of law* because it did not plead libel verbatim as required, yet astonishingly it did not fully strike his claims. App.43a. ("Importantly, "'the words constituting [the] alleged libel must be specifically identified, if not pleaded verbatim, in the complaint.'" (*Ibid*.) In this case, the *complaint fails to meet that requirement* ... It does not specifically identify or plead verbatim the words constituting the alleged libel. It fails to identify the allegedly defamatory website...." "*That pleading failure alone is enough for us to find Plaintiffs failed to establish a likelihood of success on their defamation claim*." *Id*.)

Even more inexplicable, is that despite California's own explicit finding that the website verbatim stated "*files vexatious and meritless lawsuits*" (App.34a) it then made the leap to find that the precise words above were instead 'generally plead' as '*vexatious litigant*' (App.7a) and on that erroneous basis concluded that 'vexatious' was defamatory because it necessarily referred to section 391 'vexatious litigant statute.'

California also conceded that there was no evidence that the alleged statement about Plummer filing 'vexatious and meritless litigation' was false. App.35a. ("They[*Plaintiffs] provided no evidence refuting or otherwise addressing the website's statements concerning their litigation history or professional competency.*" *Id.*)

At a minimum, had California applied the requisite federal constitutional heightened scrutiny and its own standard of *de novo* review of Alai's appeal, it would have found that Plummer was a public figure for the limited purpose of the 'vexatious' opinion analysis and that there was no actual malice. App.20a-24a,56a-58a.

IV. California overlooked due process

This Court has upheld due process through a fair balancing analysis. *Mathews v. Eldridge*, 424 U.S. 319 (1976). Due process demands an individualized assessment, balancing private interests, the risk of erroneous deprivation, and procedural economy.

Without cataloguing the evidence or Alai's explicitly raised public figure and malice defenses (App.113a,131a-132a,148a-150a) within this appeal as it was required to do, California summarily denied Alai's federal defenses based on the limited arguments made in another defendant's appeal. App.3a. California explicitly intertwined and referenced its *unpublished* 'Nabili' opinion within Alai's no less than fifteen times, and on that basis deemed her appeal as 'moot'. App.2a-12a,16a.

California declined to independently review the merits of Alai's constitutional arguments regarding free speech and the public figure standard of actual malice, litigation privilege, and Noerr-Pennington doctrine (App.81a,98a,153a), which had been expressly raised as part of her defense, and omitted from Nabili's. Its decision thus facially also violates the requisite heightened scrutiny for free speech.

A. California did not apply the correct level of scrutiny or standard of review

California expressly agreed that the standard of review for an anti-SLAPP analysis is *de novo*. App.13a,31a. So far, so good. However, it then took the unprecedented leap that Alai's appeal was moot because the appellate court had made the defamation determination as to a prior defendant's appeal. App.3a,16a. At oral argument, Justice Goethals expressly articulated that he didn't understand why this appeal is before him—citing he had already decided it *the year prior Alai filed her appeal.* App.77a,fn21. California failed to comply with its own precedents requiring *de novo* review. And thus it conceded that it failed to apply the heightened scrutiny required by *Sullivan* and *Gertz*.

However, Alai's anti-SLAPP motion drew on successful arguments from prior, well-supported anti-SLAPP cases, unlike the narrower scope of the Nabili brief. Notably, the Nabili pleadings did not address Plummer's public figure status or other critical federal defenses central to Alai's arguments. App.113a,131a,148-150a,153a. Accordingly, California also did not address these core federal issues whatsoever. App.2a-15a.

Much like the Michigan Supreme Court's finding in *Bufalino*, the California court never examined Plummer's public figure status. To be certain, Alai sufficiently raised the limited-purpose public figure and malice questions in the lower court and appellate briefing. App.113a,131a,148a-150a. California failed to acknowledge or address either issue despite both being asserted front and center. It failed, for example, to indicate whether Plummer should be considered a limited-purpose public figure or discuss in any meaningful way the merits of Alai's defenses in terms of the "applicable case law" found in *Sullivan, Gertz*, and their progeny. It also failed to engage in any substantive legal analysis in support of its conclusion as to 'vexatious', despite the key issue being Plummer's self-represented litigation conduct. App.53a-58a,164a-166a. Lastly, California's insufficient independent analysis of Alai's federal claims, coupled with its narrow statutory interpretation of the term 'vexatious" underscores a substantial due process deviation.

The Michigan Supreme Court remanded *Bufalino* to that appellate court for 'plenary consideration of the public figure' issue. At a minimum, remand on that issue here would be appropriate.

V. This case is an ideal vehicle to resolve the questions presented

This case offers an ideal vehicle to answer critical free-speech questions that "will keep coming until the Court ... suppl[ies] an answer." *Fulton* v. *City of Philadelphia*, 141 S.Ct. 1868 (2021).

The constitutional issues in this case have been developing for over fifty years since *Gertz*. The need for clarity is highlighted by recent cases like *Berisha v. Lawson*, 594 U.S.___(2021), *Coral Ridge Ministries Media, Inc. v. SPLC*, 597 U.S.___(2022), and *McKee v. Cosby*, 586 U.S.___(2019), where justices have openly questioned applicability of the *Gertz* standard. Yet this Court has not fully addressed the modern complexities of the public figure doctrine, making this case an ideal vehicle for such clarification.

To begin, Dr. Alai's alleged commentary on Plummer's unsuccessful court filings, were made in the context that any reasonable individual would view as opinion based on her direct experience with his litigation practices. The facts here leave no dispute that Alai's statements were rooted in substantial truth. She expressed concern over the volume and nature of Plummer's self-represented litigation and filed her statements in court, believing this to be part of her right to petition. California determined that Plummer provided *no evidence* contradicting alleged defamatory assertions about his litigation conduct. App.34a. Moreover, its conclusion that statements about an attorney's litigation history—an inherently public activity—could be subject to defamation claims, even when truthful, presents a dangerous precedent. Such a stance risks chilling legitimate speech on matters of public concern and professional conduct. California's decision diverges significantly from other jurisdictions, where public commentary on professional practices remains protected and subject to the actual malice under *Gertz*.

The Circuits are in disarray over when and how such speech triggers heightened scrutiny, and California's decision risks emboldening courts to erode First Amendment protections by subjecting critical commentary, even on public matters, to defamation. What's more, California's narrow interpretation of *Sullivan* and *Gertz* establishes a blueprint for future defamation litigants. Certiorari is warranted to resolve these critical issues.

The Ninth and Eleventh Circuits often find public figure status for attorney defamation plaintiffs, while the Second circuit found none. *Bufalino v. Associated Press*, 692 F.2d 266 (2d Cir. 1982). The decision below will only empower courts to afford fewer First Amendment protections to consumers, and embolden similar attorney driven defamation suits.

The constitutional issues here have sufficiently percolated. Courts, attorneys, law professors, scholars, and litigants have closely analyzed many cases like this one, yet significant ambiguity remains. *Long, supra.* And this Court has been positioned to clarify such issues in recent petitions, but has either denied those or resolved them on narrower grounds. As a result, these fundamental questions remain unanswered and continue to invite confusion across jurisdictions. Delay will produce victims of endless litigation, and might produce more opinions and articles, but not more insights.

The promises of free speech that the First Amendment enshrines ensure the survival of our advanced society. There is a clear path where we

can protect the rights of citizens in the Internet era, recognizing the sharp line between free speech on the one hand, and protecting reputational interests on the other. But until this Court does so, those with dissenting views will continue to face harm, the citizenry will continue to speak freely relying on their reliance on the Free Speech Clause, plaintiffs will file (and re-file) defamation cases intended to 'silence John Doe' (*Lidsky, supra*), and courts will continue to face harassing litigation that lasts years on end. Certiorari is warranted.

CONCLUSION

This petition should be *granted* for number of compelling reasons.

Some of America's most respected jurists have observed that the right of free expression includes public discourse and speech—not unlike the "vexatious litigation" and "unsafe office" comments that offended the California Court of Appeal here. App.7a. Additionally, our country has never penalized genuine petitioning activity like filing a motion to deem a plaintiff a vexatious litigant or an 'amicus brief', as was done by California. *Id.* If these lay opinions and speech are to be enjoined, it must be for a constitutional reason, which is yet to be identified.

Six decades ago, Justice John Marshall Harlan said of the right of free speech: "To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth

necessary side effects of the broader enduring values which the process of open debate ..."*Cohen v. California*, 403 U.S. 15 (1971) at pp.24-25.

Justice William Brennan famously wrote that "debate on public issues should be uninhibited, robust, and wide-open ... *"*. *Sullivan*, *supra*. Justice Hugo Black championed the "prized American privilege to speak one's mind, although not always with perfect good taste." *Bridges v. California*, 314 U.S.252 (1941). Justice Warren Burger cautioned that "the fact that society may find speech offensive is not a sufficient reason for suppressing it." *F.C.C. v. Pacifica Foundation* 438 U.S. 726, 745 (1978).

Justice Louis Brandeis underscored the importance of free speech. *Whitney v. California*, 274 U.S. 357 (1927). Justice Oliver Holmes warned "we should be eternally vigilant against attempts to check the expression of opinions that we loathe." *Abrams v. United States* 250 U.S. 616,630(1919)[dis. opn.].

Allowing California's decision to stand would cast a pall over ordinary citizens who will be deterred from speaking freely in support of social causes close to their heart—a long-standing practice—for fear of extraordinary civil prosecution and financial ruin.

The evolving nature of Internet speech and its intersection with defamation law, particularly regarding limited-purpose public figures, necessitates a reexamination of the actual malice standard in today's digital media and social influencers environment. Additionally, California's unprecedented due process

violations in the appellate proceedings warrant further review to ensure that the constitutional rights of individuals engaging in protected speech are upheld.

This Court, standing on the shoulders of the legal giants, should vindicate their principles here and address the fundamental constitutional issues at stake.. For the foregoing reasons, Petitioner requests that this Court *grant* certiorari to clarify the limited public figure doctrine, protect constitutionally guaranteed speech on matters of public concern, and reaffirm the protections of the Free Speech Clause and Due Process.

Respectfully submitted,

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November 12, 2024

APPENDIX

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APPENDIX A — OPINION OF THE SUPREME COURT OF CALIFORNIA, FILED AUGUST 14, 2024

IN THE SUPREME COURT OF CALIFORNIA

S285405

LAW OFFICES OF MARK B. PLUMMER, *et al.*,

Plaintiffs and Respondents,

v.

NILI N. ALAI,

Defendant and Appellant.

Filed August 14, 2024

Court of Appeal, Fourth Appellate District,
Division Three—No. G062355

EN BANC

The petition for review is denied.

/s/ GUERRERO
Chief Justice

APPENDIX B — OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE, FILED MAY 2, 2024

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

G062355
(Super. Ct. No. 30-2020-01141868)

LAW OFFICES OF MARK B. PLUMMER, *et al.*,

Plaintiffs and Respondents,

v.

NIILI N. ALAI,

Defendant and Appellant.

Filed May 2, 2024

OPINION

Appeal from orders of the Superior Court of Orange County, Melissa R. McCormick, Judge. Affirmed. Request for judicial notice denied.

Law Offices of Gloria Juarez, Gloria M. Juarez; Bohm Wildish & Matsen, James G. Bohm; and Ally Alain,[1] in pro. per., for Defendant and Appellant.

1. During oral argument the court learned Ally Alain, who is an attorney, and defendant and appellant Nili N. Alai are the same person.

Appendix B

Appeal from orders of the Superior Court of Orange County, Melissa R. McCormick, Judge. Affirmed. Request for judicial notice denied.

* * *

After a lawyer and two former clients had a dispute concerning the nonpayment of attorney fees, the clients allegedly created a website that contained negative comments about the lawyer and his law firm. The lawyer and his law firm sued the clients for defamation, interference with prospective business advantage, false personation, and declaratory relief, alleging the defendants' website included disparaging statements about the lawyer's competency and integrity, the safety of his office, and his status as a vexatious litigant.

The defendants each filed a special motion to strike under the anti-SLAPP (strategic lawsuit against public participation) statute (Code Civ. Proc.,[2] § 425.16), asserting the claims arise from protected activity and are unlikely to succeed on the merits. The trial court denied the first defendant's anti-SLAPP motion in May 2021.

In a previous opinion (*Law Offices of Mark B. Plummer v. Nabili* (Oct. 6, 2022, G060354) [nonpub. opn.]), we affirmed in part and reversed in part, finding that the claims arise from both protected activity (the website's alleged statements about the lawyer's competency and integrity) and from unprotected activity (the website's alleged statements

2. All further statutory references are to the Code of Civil Procedure unless otherwise stated.

about the safety of the office and the lawyer being a vexatious litigant). As for the portions of the claims arising from protected activity, we found the lawyer and his law firm failed to establish a probability of prevailing on those portions of the claims; we therefore held that the complaint's allegations that the website made false statements concerning the lawyer's competency and integrity, as well as the causes of action for interference with prospective business advantage and false personation, must be stricken.

On remand, in accordance with our direction, the plaintiffs dismissed those two causes of action and struck the allegations that the website attacked the lawyer's competency and integrity. The trial court then denied the second defendant's anti-SLAPP motion, finding it was mooted by the dismissal and otherwise failed on the merits for the reasons explained in our prior opinion.

Meanwhile, the second defendant filed an ex parte application to disqualify the lawyer from representing his firm. The trial court denied the application without a hearing.

This appeal followed. We affirm the trial court's order denying the anti-SLAPP motion. And we dismiss the appeal from the court's order denying the ex parte application, as it is not an appealable order.

FACTS

The following facts are taken from the first amended complaint (the complaint), declarations, and other evidence submitted on the special motion to strike. (See § 425.16,

subd. (b)(2) [in ruling on anti-SLAPP motion, "the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based"].)

1. Background of the Parties' Dispute

Mark B. Plummer is an attorney with a law firm, the Law Offices of Mark B. Plummer, PC (Plummer Law). In 2016, Siamak Nabili, M.D., and Nili N. Alai, M.D., asked Plummer to represent them in a medical malpractice case pending in Santa Clara County Superior Court. Plummer agreed to assist with expert discovery only; he disassociated from the case in March 2017 after the last expert was deposed.

In 2018, after Nabili and Alai allegedly refused to pay Plummer for his work, he sued them in Orange County Superior Court regarding the fee dispute. Nabili and Alai in turn filed a cross-complaint against Plummer and Plummer Law.

In late 2019, Plummer learned from another attorney about the existence of a website that made disparaging statements about Plummer and his law practice. With the help of a computer expert, Plummer learned the website was hosted by networksolutions.com.

2. The Complaint

In 2020, Plummer and Plummer Law (collectively, Plaintiffs) filed an unverified complaint against

networksolutions.com in Orange County Superior Court. After conducting some preliminary discovery, Plummer learned the anonymous creator of the website had the same contact information as his former clients, Nabili and Alai, so he added them as Doe defendants.

Plaintiffs' complaint asserted causes of action against the Doe defendants for (1) defamation, (2) interference with prospective business advantage, (3) false personation under Penal Code section 528.5, and (4) declaratory relief. The complaint did not identify the allegedly defamatory website by name, nor did it quote or describe the allegedly defamatory statements in any detail. It alleged in general terms that the Doe defendants "maliciously posted false and defamatory statements of fact on a website intended to defame Plaintiffs in a professional capacity, such as the claim that Plaintiffs are incompetent, dishonest, the office was unsafe and unpermitted, and the Plaintiffs are vexatious litigants, none of which are true. Said Defendants are doing this in part by illegally impersonating Plaintiffs and illegally impersonate [*sic*] a relationship with the State Bar."

3. The Anti-SLAPP Motions and Our Prior Opinion

In February 2021, Alai filed an anti-SLAPP motion, asserting Plaintiffs' claims arise from protected activity and are unlikely to succeed on the merits. While Alai's motion was pending, Nabili filed his own anti-SLAPP motion, which Plaintiffs opposed.

Although Alai filed her motion first, Nabili's motion was heard first. The trial court denied Nabili's motion in

May 2021; Nabili appealed. Pending his appeal, the court vacated the hearing on Alai's pending anti-SLAPP motion.

In Nabili's appeal, we found Plaintiffs' claims arose from both protected activity and unprotected activity, and Plaintiffs had not established a likelihood of prevailing on the portions of the claims arising from protected activity. In our prong one analysis (protected activity), we concluded the website's statements that Plaintiffs are "incompetent [and] dishonest" are protected because they concerned a matter of public interest (an attorney's competency and integrity) and were made in a public forum (a website accessible to the public), but that the website's statements that Plaintiffs' "office was unsafe and unpermitted" and that Plaintiffs are "vexatious litigants"[3] are not protected activity.

In our prong two analysis (probability of prevailing), we concluded Plaintiffs had not established a probability

3. "The vexatious litigant statutes (§§ 391-391.7) are designed to curb misuse of the court system by those persistent and obsessive litigants who, repeatedly litigating the same issues through groundless actions, waste the time and resources of the court system and other litigants." (*Shalant v. Girardi* (2011) 51 Cal.4th 1164, 1169.) A "'vexatious litigant'" is "a person who has, while acting in propria persona, initiated or prosecuted numerous meritless litigations, relitigated or attempted to relitigate matters previously determined against him or her, repeatedly pursued unmeritorious or frivolous tactics in litigation, or who has previously been declared a vexatious litigant in a related action." (*Id.* at pp. 1169-1170; see § 391, subd. (b).) Once a person has been declared a vexatious litigant, a court may enter a prefiling order prohibiting such person from filing any new litigation in California courts without first obtaining leave of court. (§ 391.7, subd. (a).)

of prevailing on the portions of the claims arising from protected activity. As for first cause of action (libel) and fourth cause of action (declaratory relief based on the allegedly defamatory website), we found Plaintiffs had failed to specifically plead the allegedly libelous words, either in their complaint or in their opposition to Nabili's motion, and therefore had not demonstrated a probability of prevailing to the extent those claims are based on the website's statements about Plaintiffs' incompetency and dishonesty. Accordingly, we held the words "incompetent, dishonest" must be stricken from paragraphs 3, 6, 11, and 27 of the complaint as to Nabili. We found the remaining parts of the first and fourth causes of action (i.e., libel and declaratory relief based on the website's alleged statements about Plaintiffs' office and Plummer's alleged status as a vexatious litigant) were not based on protected activity and thus should not be stricken.

As for the second cause of action (interference with prospective business advantage) and the third cause of action (false personation), we found Plaintiffs had not demonstrated a probability of prevailing on those claims. Plaintiffs' evidence did not identify any specific third party with whom they had an existing economic relationship, and Plaintiffs had failed to show that Nabili credibly impersonated Plummer through markplummerattorney.com for the purposes of harming him, or that another person would reasonably believe, or did believe, that Plummer created the website.

On remand, Plaintiffs dismissed the second and third causes of action, as well as the words "incompetent [and] dishonest" from paragraphs 3, 6, 11, and 27, in January

2023.[4] Alai's anti-SLAPP motion, which had been pending since February 2021, was then set for hearing in February 2023.

After hearing oral argument, the trial court denied Alai's motion. Citing Plaintiffs' request for dismissal, the court reasoned Alai's motion was "moot as to the words 'incompetent, dishonest' in paragraphs 3, 6, 11 and 27 of the first amended complaint and as to the second and third causes of action." As for what remained of the complaint, the court denied the motion "in all other respects in accordance with the court of appeal opinion and for the reasons set forth in that opinion."

4. Alai's Motion and Ex Parte Application to Disqualify Counsel

On February 9, 2023 (the same day the trial court denied her anti-SLAPP motion), Alai filed an ex parte application for an order disqualifying Plummer from serving as Plaintiffs' counsel under rule 3.7 of the State Bar Rules of Professional Conduct. In the alternative, Alai sought an order shortening time on her pending motion to disqualify Plummer, which she had filed in late 2022 and which was set for hearing in April 2023. Although Alai's ex parte application included a declaration by her attorney summarizing the procedural history of the case, that declaration did not address the issues of irreparable harm, immediate danger, or any other statutory basis for granting ex parte relief, as required by rule 3.1202(c) of the California Rules of Court.

4. The dismissal was as to all parties, not just Nabili.

The trial court denied Alai's ex parte application. It reasoned that courts "will not grant ex parte relief in any but the plainest and most certain of cases," and counsel's supporting declaration had not "address[ed] any claimed irreparable harm, immediate danger, or other statutory basis for granting relief ex parte, much less makes an affirmative factual showing of such." As for the alternative request to advance the hearing date, the court indicated it had no earlier hearing dates available.

Two weeks later, Alai filed a notice of appeal from the trial court's February 9, 2023 order denying her anti-SLAPP motion and the court's February 14, 2023 order denying her ex parte application to disqualify Plaintiffs' counsel.[5]

DISCUSSION

1. Appealability

We first consider whether the challenged orders are appealable. No judgment or order is appealable unless expressly permitted by a statute. (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 696.)

The order denying Alai's anti-SLAPP motion is appealable. (§§ 425.16, subd. (i), 904.1, subd. (a)(13).) The

5. Although Alai's notice of appeal purports to appeal from the trial court's "Feb. 14, 2023" "order denying [her] Motion to Disqualify Counsel," the court had not yet considered her disqualification motion when Alai filed her notice of appeal; thus, we presume Alai instead appeals from the court's February 14, 2023 order denying her ex parte application.

same cannot be said about the order denying her ex parte application to disqualify. Although an order denying a *motion* to disqualify opposing counsel is an appealable order (*Derivi Construction & Architecture, Inc. v. Wong* (2004) 118 Cal.App.4th 1268, 1272), we are aware of no authority that an order denying an ex parte application to disqualify counsel is an appealable order, and Alai cites none. Since the record does not include any opposition by Plaintiffs to Alai's motion to disqualify, nor a ruling by the trial court on the motion, we decline to construe this matter as an appeal from any order denying Alai's motion to disqualify (to the extent such an order even exists). As best we can tell, the trial court has not yet reached the merits of Alai's disqualification arguments, and we decline to do so in the first instance.

As we lack jurisdiction to entertain an appeal from the order denying Alai's ex parte application to disqualify, we limit our review to the ruling on Alai's anti-SLAPP motion.

2. The Anti-SLAPP Statute

The Legislature enacted the anti-SLAPP statute to address "what are commonly known as SLAPP suits (strategic lawsuits against public participation)—litigation of a harassing nature, brought to challenge the exercise of protected free speech rights." (*Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655, 665, fn. 3.) The statute authorizes a special motion to strike meritless claims early in the litigation if the claims "aris[e] 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. . . ." (§ 425.16, subd. (b)(1).) The statute is "'intended to resolve quickly and relatively inexpensively meritless lawsuits that threaten free speech on matters of public interest.'" (*Rand Resources, LLC v. City of Carson* (2019) 6 Cal.5th 610, 619.)

When evaluating a special motion to strike, the trial court must engage in a two-step process. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. . . . [Citation.] If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) "Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.)

"At the first step, the moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them. When relief is sought based on allegations of both protected and unprotected activity, the unprotected activity is disregarded at this stage." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 396 (*Baral*).)

"If the court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached. There, the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated. The court, without resolving evidentiary conflicts, must determine whether the plaintiff 's showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment. If not, the claim is stricken. Allegations of protected activity supporting the stricken claim are eliminated from the complaint, unless they also support a distinct claim on which the plaintiff has shown a probability of prevailing." (*Baral, supra*, 1 Cal.5th at p. 396.)

We review a trial court's order denying an anti-SLAPP motion de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.)

3. Step One: Protected Activity

Under step one of the anti-SLAPP analysis, we must decide whether Alai made a threshold showing that Plaintiffs' claims arise from an act in furtherance of Alai's right of petition or free speech in connection with a public issue. (§ 425.16, subd. (b)(1).) As amended following the January 2023 dismissal, Plaintiffs' complaint now alleges that Alai "maliciously posted false and defamatory statements of fact on a website intended to defame Plaintiffs in their professional capacity, such as the office was unsafe and unpermitted, and the Plaintiffs are vexatious litigants," and it asserts only two causes

of action based on those alleged misstatements: the first cause of action for libel, and the fourth cause of action for declaratory relief. We must determine whether those remaining claims arise from protected activity—i.e., from a "written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest." (See § 425.16, subd. (e)(3).)

As we observed in our previous opinion, it is well settled that websites accessible to the public are public forums for purposes of the anti-SLAPP statute. (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 41, fn. 4; see *Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1366 (*Wong*) [collecting cases].) And "although 'not every Web site post involves a public issue' [citation], consumer information that . . . implicates matters of public concern that can affect many people is generally deemed to involve an issue of public interest for purposes of the anti-SLAPP statute." (*Ibid.*)

Having determined Plaintiffs' complaint arises from written statements in a public forum (the website), the next question is whether those statements were made "in connection with an issue of public interest." (§ 425.16, subd. (e)(3).) We find they were not.

If the complaint still alleged the website made statements concerning Plummer's professional qualifications as an attorney, such allegations would involve a public issue for purposes of the anti-SLAPP statute. (See, e.g., *Yang v. Tenet Healthcare Inc.* (2020) 48 Cal.App.5th 939, 947 ["the qualifications, competence, and professional ethics of a licensed physician" is a public

issue]; *Abir Cohen Treyzon Salo, LLP v. Lahiji* (2019) 40 Cal.App.5th 882, 888 [online review of a law firm was protected activity]; *Wong, supra*, 189 Cal.App.4th at pp. 1366-1367 [negative Yelp review of dentist was protected activity]; *Carver v. Bonds* (2005) 135 Cal.App.4th 328, 343-344 [newspaper article about doctor was issue of public interest where information would assist others in choosing doctors]; *Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 898-899 [statements about insurance broker involved issue of public interest because they constituted a consumer warning to others with similar problems].)

But Plaintiffs currently make no such allegation. The only remaining allegedly false statements described in the complaint are that Plaintiffs' "office was unsafe and unpermitted" and that Plaintiffs are "vexatious litigants." Those statements do not concern a public issue.

As we explained in our previous opinion, "[t]he structural safety of a small firm's law office impacts the individuals who work there and visitors, not the public at large. And Plaintiffs' alleged status as vexatious litigants would impact Plaintiffs' ability to file lawsuits on Plaintiffs' own behalf, not their ability to provide legal advice to others. Accordingly, statements regarding either Plaintiffs' office space or their alleged status as vexatious litigants do not implicate a matter of public concern affecting many consumers; those statements are therefore not protected activity. . . ." (*Law Offices of Mark B. Plummer v. Nabili, supra*, G060354.)

Having concluded the complaint, in its current form, does not arise from protected activity, we need not consider step two of the anti-SLAPP analysis (Plaintiffs' probability of previous). The trial court correctly determined that Alai's anti-SLAPP motion was mooted by the dismissal and otherwise failed on the merits for the reasons stated in our previous opinion.

DISPOSITION

The trial court's order denying Alai's special motion to strike under section 425.16 is affirmed. Alai's appeal from the order denying her ex parte application to disqualify Plummer is dismissed. Plaintiffs shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

/s/_____
GOETHALS, J.

WE CONCUR:

/s/_____
BEDSWORTH, ACTING P. J.

/s/_____
SANCHEZ, J.

APPENDIX C — MINUTE ORDER OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE, CENTRAL JUSTICE CENTER, FILED FEBRUARY 9, 2023

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

CASE NO: 30-2020-01141868-CU-DF-CJC

LAW OFFICES OF MARK B. PLUMMER, PC

vs.

NETWORKSOLUTIONS.COM

DATE: 02/09/2023

MINUTE ORDER

Tentative Ruling posted on the Internet.

Hearing held, all participants appearing remotely.

The Court hears oral argument and confirms the tentative ruling as follows:

Defendant Nili Alai's Special Motion to Strike

Defendant Nili Alai moves pursuant to pursuant to Civil Procedure Code section 425.16 to strike the first amended complaint filed by plaintiffs Law Offices of Mark

B. Plummer and Mark B. Plummer. For the following reasons, Alai's motion is denied.

Defendant Siamak Nabili filed a similar special motion to strike in April 2021, which the trial court denied on May 13, 2021 (ROA 161). Nabili appealed the trial court's ruling. On October 6, 2022 the court of appeal issued its opinion affirming in part and reversing in part the trial court's order. *See Law Offices of Mark B. Plummer, et al. v. Nabili*, Court of Appeal Case No. G060354 (filed 10/6/22). The court of appeal remanded the case to the trial court with instructions to enter a new order granting Nabili's special motion to strike in part by striking the words "incompetent, dishonest" from paragraphs 3, 6, 11 and 27 of the first amended complaint as to Nabili, and by striking the second and third causes of action in the first amended complaint as to Nabili. The court of appeal instructed the trial court to deny Nabili's special motion to strike in all other respects. The trial court issued the new order on February 1, 2023 (ROA 289).

After the court of appeal issued its opinion, and while Alai's instant motion was pending, plaintiffs filed a request for dismissal striking the words "incompetent, dishonest" from paragraphs 3, 6, 11 and 27, and dismissing the second and third causes of action (ROA 272). The clerk entered the dismissal on January 23, 2023.

Accordingly, Alai's special motion to strike is denied as moot as to the words "incompetent, dishonest" in paragraphs 3, 6, 11 and 27 of the first amended complaint and as to the second and third causes of action. Alai's

special motion to strike is denied in all other respects in accordance with the court of appeal opinion and for the reasons set forth in that opinion.

Alai sought an award of attorneys' fees and costs in her motion. Notice of Motion at iii:9-10; Brief at 15:27-28. When a plaintiff or cross-complainant voluntarily dismisses its complaint or cross-complaint (or challenged causes of action) while a special motion to strike is pending, the trial court retains jurisdiction to award attorneys' fees under section 425.16(c). *Coltrain v. Shewalter* (1998) 66 Cal.App.4th 94, 107; *Liu v. Moore* (1999) 69 Cal.App.4th 745, 752; *Law Offices of Andrew L. Ellis v. Yang* (2009) 178 Cal.App.4th 869, 878-79. A determination of whether a "defendant would have prevailed on its motion to strike is an essential prerequisite to an award of attorneys fees and costs." *Tourgeman v. Nelson & Kennard* (2014) 222 Cal.App.4th 1447, 1457; *see also Liu*, 60 Cal.App.4th at 752. Thus, to find Alai is entitled to an award of attorneys' fees and costs pursuant to section 425.16, the court must determine whether Alai would have prevailed on her anti-SLAPP motion.

As discussed above, the court of appeal ruled that Nabili's virtually identical special motion to strike should be granted in part and denied in part. Based on that ruling, the court concludes Alai would have prevailed in part on her special motion to strike. Alai may therefore be entitled to an award of attorneys' fees and costs. *See*, *e.g.*, *City of Industry v. City of Fillmore* (2011) 198 Cal.App.4th 191, 218 ("A defendant need not succeed in striking every challenged claim to be considered a prevailing defendant

entitled to recover attorney fees and costs under the statute. Instead, a defendant is entitled to recover fees and costs in connection with a partially successful motion, unless the results obtained are insignificant and of no practical benefit to the defendant. [Citation.] A court awarding fees to the prevailing defendant on a partially successful special motion to strike must exercise its discretion in determining the amount of fees and costs to award in light of the defendant's relative success in achieving its litigation objectives."). Fees and costs, if any, to be awarded to Alai shall be determined pursuant to a separate motion for attorneys' fees and costs, should Alai choose to file one.

Alai's evidentiary objections were not material to the disposition of the motion.

Clerk to give notice.

Defendant Nili Alai's Motion to Deem Plaintiffs Vexatious Litigants

Defendant Nili Alai moves pursuant to Civil Procedure Code section 391 *et seq.* for an order deeming plaintiffs Mark B. Plummer and Law Offices of Mark B. Plummer vexatious litigants. For the following reasons, defendant's motion is denied.

"Any determination that a litigant is vexatious must comport with the intent and spirit of the vexatious litigant statute." *Morton v. Wagner* (2007) 156 Cal.App.4th 963, 970. "The purpose of which is to address the problem

created by the persistent and obsessive litigant who constantly has pending a number of groundless actions and whose conduct causes serious financial results to the unfortunate objects of his or her attacks and places an unreasonable burden on the courts." *Id.* at 970-71. "Therefore, to find that a litigant is vexatious, the trial court must conclude that the litigant's actions are unreasonably impacting the objects of the [litigant's] actions and the courts as contemplated by the statute." *Id.* at 971.

Defendant asserts plaintiffs should be deemed vexatious litigants pursuant to sections 391(b)(1), 391(b)(2), and 391(b)(3). Section 391(b)(1) defines a vexatious litigant as a person who "[i]n the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing." Civ. Proc. Code § 391(b)(1). Section 391(b)(2) defines a vexatious litigant as a person who "[a]fter a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate, in propria persona, either (i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (ii) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined." Section 391(b)(3) defines a vexatious litigant as a person who "[i]n

any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engaged in other tactics that are frivolous or solely intended to cause unnecessary delay."

"A court may declare a person to be a vexatious litigant who, in 'the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been . . . finally determined adversely to the person. '(§ 391, subd. (b)(1).) The term '"[l]itigation"' is defined broadly as 'any civil action or proceeding, commenced, maintained or pending in any state or federal court.' (§ 391, subd. (a).) A litigation includes an appeal or civil writ proceeding filed in an appellate court. [Citations.] A litigation is finally determined adversely to a plaintiff if he does not win the action or proceeding he began, including cases that are voluntarily dismissed by a plaintiff." *Garcia v. Lacey* (2014) 231 Cal.App.4th 402, 406.

An action is counted as being within the immediately preceding seven-year period so long as it was filed or maintained during that period. *Garcia*, 231 Cal.App.4th at 406 n.4. The seven-year period is measured as of the time the motion is filed. *Id.* Defendant filed this motion on January 25, 2021. Accordingly, any adverse prior determinations must have been filed or maintained during the seven years before January 25, 2021, i.e., between January 25, 2014 and January 24, 2021.

Defendant contends plaintiff Law Offices of Mark B. Plummer has had eight prior adverse determinations

against it "as defined by [section] 391(b)(1)" in the following cases: Court of Appeal Case No. G053836; Court of Appeal Case No. G057721; Orange County Superior Court Case No. 2019-01069271; Orange County Superior Court Case No. 2019-01113991; Orange County Superior Court Case No. 2018-01014163; Orange County Superior Court Case No. 2015-00785129; Orange County Superior Court Case No. 2014-00759128; and Orange County Superior Court Case No. 2011-00524331. Notice of Motion at ii:17-21. Defendant contends plaintiff Mark B. Plummer has had five prior adverse determinations against him in the following cases: Court of Appeal Case No. B246940; Orange County Superior Court Case No. 2016-00831688; Orange County Superior Court Case No. 2011-00525808; ADR Case No. 11-2638-AA; and Los Angeles Superior Court Case No. BC479944. Notice of Motion at ii:22-25.

The court addresses each of these cases in turn below:

Orange County Superior Court Case No. 2011-00524331: Plaintiff filed the complaint on November 21, 2011. Plaintiff filed a request for dismissal with prejudice of the entire action on April 1, 2014. Plaintiff Mark B. Plummer states in his declaration that the dismissal was filed following a settlement in which the Law Offices of Mark B. Plummer received more than $102,000. Plummer Decl. ¶ 4. This case does not constitute an adverse determination pursuant to section 391(b)(1).

Orange County Superior Court Case No. 2011-00525808: Plaintiff filed a request for dismissal on May 15, 2013. Because plaintiff dismissed this case before January

25, 2014, the case does not fall within the seven-year period immediately preceding the filing of this motion. In addition, plaintiff Mark B. Plummer states in his declaration that "Bank of America paid me $30,000.00." Plummer Decl. ¶ 12. This case does not constitute an adverse determination pursuant to section 391(b)(1).

Orange County Superior Court Case No. 2014-00759128: Defendant did not provide the court with sufficient evidence for the court to determine whether this case constitutes an adverse determination pursuant to section 391(b)(1).

Orange County Superior Court Case No. 2015-00785129: The court ordered this case dismissed without prejudice on August 12, 2016. Plaintiff Mark B. Plummer states in his declaration that this case "was won when Mr. Riley assigned Law Offices of Mark B. Plummer, PC the $30,000 judgment." Plummer Decl. ¶ 8. Defendant has not presented any evidence the outcome of the case was adverse to plaintiffs. This case does not constitute an adverse determination pursuant to section 391(b)(1).

Orange County Superior Court Case No. 2016-00831688: Plaintiff Mark B. Plummer dismissed this case with prejudice on October 11, 2016. Plaintiff Mark B. Plummer states in his declaration that this case "was settlement by Wells Fargo paying $23,500." Plummer Decl. ¶ 9. Defendant has not presented any evidence the outcome of the case was adverse to plaintiffs. This case does not constitute an adverse determination pursuant to section 391(b)(1).

Appendix C

Orange County Superior Court Case No. 2018-01014163: The court entered two judgments against plaintiffs in this case (a judgment of dismissal and an amended judgment). The judgment of dismissal was not appealed; the Court of Appeal affirmed the amended judgment. The amended judgment included a damages award against plaintiffs. This case constitutes an adverse determination pursuant to section 391(b)(1).

Orange County Superior Court Case No. 2019-01069271: Plaintiff filed a request for dismissal on June 6, 2019. Plaintiff Mark B. Plummer states in his declaration that this case "was won when Mr. Sugamele paid the balance of the fees and costs that he owed." Plummer Decl. ¶ 6. Defendant has not presented any evidence the outcome of the case was adverse to plaintiffs. This case does not constitute an adverse determination pursuant to section 391(b)(1).

Orange County Superior Court Case No. 2019-01113991: Plaintiff filed a request for dismissal on December 20, 2019. Plaintiff Mark B. Plummer states in his declaration that this case "was won when KTM Enterprises, Inc. paid the balance of the fees and costs that it owed." Plummer Decl. ¶ 7. Defendant has not presented any evidence the outcome of the case was adverse to plaintiffs. This case does not constitute an adverse determination pursuant to section 391(b)(1).

Court of Appeal Case No. G057721: Defendant has not provided evidence that the appellate decision in Case No. G057721 represents a final determination of the case,

nor can the court determine from defendant's submission whether this case is an appeal in one of the other cases on which defendant relies. *See*, *e.g.*, *Holcomb v. U.S. Bank National Association* (2005) 129 Cal.App.4th 1494, 1502. This case does not constitute an adverse determination pursuant to section 391(b)(1).

Court of Appeal Case No. G053836: Defendant has not provided evidence that the appellate decision in Case No. G053836 represents a final determination of the case, nor can the court determine from defendant's submission whether this case is an appeal in one of the other cases on which defendant relies. *See*, *e.g.*, *Holcomb*, 129 Cal. App.4th at 1502. This case does not constitute an adverse determination pursuant to section 391(b)(1).

Court of Appeal Case No. B246940: Defendant has not provided evidence that the appellate decision in Case No. B246940 represents a final determination of the case, nor can the court determine from defendant's submission whether this case is an appeal in one of the other cases on which defendant relies. *See*, *e.g.*, *Holcomb*, 129 Cal. App.4th at 1502. This case does not constitute an adverse determination pursuant to section 391(b)(1).

Los Angeles Superior Court Case No. BC479944: Plaintiff Mark B. Plummer states in his declaration that he "received a 5-digit settlement" in this case, and that "the entire action was dismissed on 05/15/13." Plummer Decl. ¶ 10. Defendant has not presented any evidence the outcome of the case was adverse to plaintiffs. This case does not constitute an adverse determination pursuant to section 391(b)(1).

ADR Case No. 11-2638-AA: Defendant has not presented any evidence plaintiffs commenced or maintained ADR Case No. 11-2638-AA in a state or federal court. Civ. Proc. Code § 391(a). This case thus does not constitute an adverse determination pursuant to section 391(b)(1).

Based on the above, the court finds defendant has established one adverse determination against plaintiffs within the meaning of section 391(b)(1).

Defendant primarily relies for its argument that plaintiffs should be deemed vexatious litigants pursuant to section 391(b)(2) on the Bayuk Declaration. The Bayuk Declaration generally summarizes several lawsuits. It does not provide evidence plaintiffs repeatedly relitigated or attempted to relitigate either (i) the validity of a determination against the same defendant or defendants as to whom a litigation was finally determined, or (ii) a cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by a final determination against the same defendant or defendants as to whom a litigation was finally determined.

Defendant also asserts plaintiffs repeatedly relitigated determinations against the defendants in Orange County Superior Court Case No. 2018-01014163, including by filing Orange County Superior Court Case No. 2019-01117435. Defendant does not identify the determinations defendant contends plaintiffs repeatedly relitigated or otherwise provide sufficient information or evidence from which the court could conclude plaintiffs' alleged conduct with

respect to Orange County Superior Court Case No. 2018-01014163 and/or Orange County Superior Court Case No. 2019-01117435 constitutes vexatious conduct pursuant to section 391(b)(2).

Defendant also argues plaintiffs should be deemed vexatious litigants pursuant to section 391(b)(3). Defendant has presented evidence other attorneys have found plaintiffs' conduct uncivil and unprofessional. *See*, *e.g.*, Aljian Declaration; Bohm Declaration; Satalino Declaration. Neither the attorney declarations nor defendant's other evidence demonstrates, however, that plaintiffs, while acting in propria persona, have repeatedly filed unmeritorious motions, pleadings, or other papers, conducted unnecessary discovery, or engaged in other tactics that are frivolous or solely intended to cause unnecessary delay.

Plaintiffs' evidentiary objections were not material to the disposition of the motion.

Defendant's request for judicial notice and supplemental request for judicial notice are granted in part. A court may take judicial notice of the existence of a document in a court file, including the truth of results reached, but a court may not take judicial notice of the truth of hearsay statements in decisions and court files. *Richtek USA, Inc. v. UPI Semiconductor Corp.* (2015) 242 Cal. App.4th 651, 658. Defendant's request for judicial notice and supplemental request for judicial notice, which include extensive attorney argument, are otherwise denied.

Appendix C

Plaintiffs' motion for sanctions pursuant to Civil Procedure Code section 128.5, which is set forth in plaintiffs' opposition, is denied without prejudice. Should plaintiffs desire to file such motion, plaintiffs should file and serve the motion on regular notice and schedule it for hearing on the court's law and motion calendar. While section 128.5(c) appears to permit notice of a request for expenses pursuant to section 128.5 to be made in a party's responding papers, section 128.5(f)(1)(A) states that a motion for sanctions under section 128.5 shall be made separately from other motions or requests.

Clerk to give notice.

APPENDIX D — OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE, FILED OCTOBER 6, 2022

IN THE COURT OF APPEAL OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

G060354
(Super. Ct. No. 30-2020-01141868)

LAW OFFICES OF MARK B. PLUMMER, PC, *et al.*,

Plaintiffs and Respondents,

v.

SIAMAK NABILI,

Defendant and Appellant.

OPINION

October 6, 2022, Opinion Filed

Appeal from an order of the Superior Court of Orange County, Ronald L. Bauer, Judge. (Retired Judge of the Orange Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed in part, reversed in part, and remanded with directions.

Appendix D

The Safarian Firm, Harry A. Safarian, Christina S. Karayan, and Hillary D. Patton for Defendant and Appellant.

Law Offices of Mark B. Plummer and Mark B. Plummer for Plaintiffs and Respondents.

* * *

After a lawyer and two former clients had a dispute concerning the nonpayment of attorney fees, the clients allegedly created a website that included disparaging statements about the lawyer. The lawyer and his law firm sued both clients for defamation, interference with prospective business advantage, false personation, and declaratory relief.

One of the clients filed a special motion to strike under the anti-SLAPP (strategic lawsuit against public participation) statute (Code Civ. Proc., § 425.16 (§ 425.16)), asserting the claims arise from protected activity and are unlikely to succeed on the merits. The trial court denied the anti-SLAPP motion, finding that although the claims arose from protected conduct, the lawyer and his law firm had demonstrated a probability of prevailing.

After reviewing the matter de novo, we find that the claims arise from both protected activity and unprotected activity, and the lawyer and his law firm have established a probability of prevailing on some, but not all, of the claims arising from protected activity. We therefore affirm the trial court's order in part and reverse it in part, and we

remand with instructions to strike certain allegations as detailed below.

FACTS

The following facts are taken from the first amended complaint (the complaint), declarations, and other evidence submitted on the special motion to strike. (See § 425.16, subd. (b)(2) [in ruling on anti-SLAPP motion, "the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based"].) We disregard the unsupported statements contained in the briefs below and on appeal; the anti-SLAPP statute does not permit us to consider such statements (see *ibid.*), and in any event those statements are not evidence (*Alki Partners, LP v. DB Fund Services, LLC* (2016) 4 Cal.App.5th 574, 590, 209 Cal. Rptr. 3d 151).

Mark B. Plummer is an attorney with a law firm, the Law Offices of Mark B. Plummer, PC (Plummer Law). In 2016, Siamak Nabili, M.D. and Nili N. Alai, M.D. asked Plummer to represent them in a medical malpractice case then pending in Santa Clara County Superior Court. Plummer agreed to help with expert discovery only; he disassociated from the case in March 2017 after the last expert was deposed.

Dr. Nabili and Dr. Alai allegedly refused to pay Plummer for his work, so in 2018, Plummer sued them in Orange County Superior Court. The outcome of that lawsuit is unclear from the record.

Appendix D

In late 2019, Plummer learned from another attorney about the existence of a website that made various disparaging statements about Plummer and his law practice. With the help of a computer expert, Plummer learned the website was hosted by networksolutions.com.

Plummer and Plummer Law (collectively, Plaintiffs) filed a complaint against networksolutions.com in Orange County Superior Court. After conducting some preliminary discovery, Plummer learned the anonymous creator of the website had the same contact information as his former clients, Dr. Nabili and Dr. Alai, so he added them as Doe defendants.

Plaintiffs' complaint asserts causes of action against the Doe defendants for (1) defamation, (2) interference with prospective business advantage, (3) false personation under Penal Code section 528.5, and (4) declaratory relief. The complaint does not identify the allegedly defamatory website by name, nor does it quote or describe the allegedly defamatory statements in any detail. It alleges in general terms that the Doe defendants "maliciously posted false and defamatory statements of fact on a website intended to defame Plaintiffs in a professional capacity, such as the claim that Plaintiffs are incompetent, dishonest, the office was unsafe and unpermitted, and the Plaintiffs are vexatious litigants, none of which are true. Said Defendants are doing this in part by illegally impersonating Plaintiffs and illegally impersonate [*sic*] a relationship with the State Bar." The complaint further alleges that "multiple third parties" have seen the unidentified website, which has interfered with Plaintiffs' actual and prospective client relationships.

Appendix D

Dr. Nabili filed an anti-SLAPP motion, and in his supporting declaration he swears he was unaware of this website and did not create any website concerning Plummer. Plaintiffs opposed the motion and submitted a declaration by Plummer providing the name of the website (markplummerattorney.com) along with four screenshots of the website, among other evidence.[1]

According to Plummer's declaration, markplummerattorney.com makes the following "objectively false statements of fact" about Plaintiffs: Plaintiffs are vexatious litigants; Plummer has filed in propria persona, and lost, more than five lawsuits in the last seven years; Plummer has violated multiple court orders and protective orders; Plaintiffs have lost multiple cases; Plummer uses several aliases; and Plaintiffs work out of a residential garage that is unpermitted and unsafe.

Plummer's declaration explains "[t]here are a huge number of pages and links" at the website, and he attaches four pages of "excerpts" from the website as exhibit 2 to his declaration. As best we can tell, those screenshots are the only portions of the website included in the record.

Looking at the four screenshots, the website makes statements like "Plummer Regularly Sues His Own Clients," "Habitually Sues Own Associate Attorneys," "Files Vexatious and Meritless Lawsuits in *pro per*, which

1. Dr. Nabili filed extensive evidentiary objections to Plaintiffs' opposition evidence. The trial court overruled the objections, and Dr. Nabili does not challenge the court's evidentiary ruling on appeal.

cases he also loses," "*los[t] in the Court of Appeals*," and was "*sanctioned in Superior Court for more than $10,000*." One of the screenshots includes a photograph of Plummer and a photograph of what appears to be a residential garage with a caption that reads, "*Plummer Law Office* [¶] This law office is a garage." The website seems to include numerous hyperlinks which include short bursts of text in blue boxes (e.g., "Plummer lost Appeals Case G057721," "WELLS FARGO CASE," and "Vexatious Pleadings"). We cannot determine from the record what content, if any, is available at each of those hyperlinks.

On the issue of falsity, Plaintiffs submitted evidence that their office is neither a garage nor unsafe. They provided no evidence refuting or otherwise addressing the website's statements concerning their litigation history or professional competency.

At the hearing on Dr. Nabili's anti-SLAPP motion, the trial court commented that Dr. Nabili "probably prevails" on the first prong of the anti-SLAPP statute (protected activity), but that Plaintiffs had established a substantial probability of prevailing on their claims. After oral argument, the court denied the motion without further explanation. Dr. Nabili appeals.

DISCUSSION

1. *The Anti-SLAPP Statute*

The Legislature enacted the anti-SLAPP statute to address "what are commonly known as SLAPP suits

(strategic lawsuits against public participation)—litigation of a harassing nature, brought to challenge the exercise of protected free speech rights." (*Fahlen v. Sutter Central Valley Hospitals* (2014) 58 Cal.4th 655, 665, fn. 3, 168 Cal. Rptr. 3d 165, 318 P.3d 833.) The statute authorizes a special motion to strike meritless claims early in the litigation if the claims "aris[e] 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. . . ." (§ 425.16, subd. (b)(1).) The statute is "'intended to resolve quickly and relatively inexpensively meritless lawsuits that threaten free speech on matters of public interest.'" (*Rand Resources, LLC v. City of Carson* (2019) 6 Cal.5th 610, 619, 243 Cal. Rptr. 3d 1, 433 P.3d 899.)

When evaluating a special motion to strike, the trial court must engage in a two-step process. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. . . . [Citation.] If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67, 124 Cal. Rptr. 2d 507, 52 P.3d 685.) "Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89, 124 Cal. Rptr. 2d 530, 52 P.3d 703 (*Navellier*).)

"At the first step, the moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them. When relief is sought based on allegations of both protected and unprotected activity, the unprotected activity is disregarded at this stage." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 396 (*Baral*).)

"If the court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached. There, the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated. The court, without resolving evidentiary conflicts, must determine whether the plaintiff's showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment. If not, the claim is stricken. Allegations of protected activity supporting the stricken claim are eliminated from the complaint, unless they also support a distinct claim on which the plaintiff has shown a probability of prevailing." (*Baral, supra*, 1 Cal.5th at p. 396.)

We review a trial court's order denying an anti-SLAPP motion de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325, 46 Cal. Rptr. 3d 606, 139 P.3d 2 (*Flatley*).)

2. *Step One: Protected Activity*

Under step one of the anti-SLAPP analysis, we must decide whether Dr. Nabili made a threshold showing that Plaintiffs' claims arise from an act in furtherance of

Dr. Nabili's right of petition or free speech in connection with a public issue. (§ 425.16, subd. (b)(1).) That is, did Dr. Nabili establish the complaint arises from protected activity? As is relevant here, the anti-SLAPP statute defines protected activity to include "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest." (*Id.*, subd. (e)(3).)

Plaintiffs' complaint alleges that Dr. Nabili "maliciously posted false and defamatory statements of fact on a website intended to defame Plaintiffs in their professional capacity, such as the claim that Plaintiffs are incompetent [and] dishonest, the office was unsafe and unpermitted, and the Plaintiffs are vexatious litigants, none of which are true." In his anti-SLAPP motion, Dr. Nabili argued those statements are "directly connected to the public's interest in an attorney's competency, honesty and business practices as the alleged statements serve as a warning to both potential and current clients looking to hire or retain a lawyer."[2] Yes and no.

It is well settled that websites accessible to the public are public forums for purposes of the anti-SLAPP statute. (*Barrett v. Rosenthal* (2006) 40 Cal.4th 33, 41, fn. 4, 51 Cal. Rptr. 3d 55, 146 P.3d 510; see *Wong v. Jing* (2010) 189 Cal. App.4th 1354, 1366, 117 Cal. Rptr. 3d 747 (*Wong*) [collecting

2. Dr. Nabili's ability to identify the protected activity was complicated by the fact that the complaint neither identifies the allegedly defamatory website nor quotes or describes in any detail its allegedly defamatory statements. Dr. Nabili instead relied on the allegations in the complaint, as we do here.

cases].) And "although 'not every website post involves a public issue' [citation], consumer information that . . . implicates matters of public concern that can affect many people is generally deemed to involve an issue of public interest for purposes of the anti-SLAPP statute." (*Ibid.*)

Numerous courts have found that statements concerning the qualifications of a variety of professionals, including attorneys, can involve a public issue for purposes of the anti-SLAPP statute. (See, e.g., *Yang v. Tenet Healthcare Inc.* (2020) 48 Cal.App.5th 939, 947, 262 Cal. Rptr. 3d 429 ["the qualifications, competence, and professional ethics of a licensed physician" is a public issue]; *Abir Cohen Treyzon Salo, LLP v. Lahiji* (2019) 40 Cal.App.5th 882, 888, 254 Cal. Rptr. 3d 1 [online review of a law firm was protected activity]; *Wong, supra*, 189 Cal. App.4th at pp. 1366-1367 [negative Yelp review of dentist was protected activity]; *Carver v. Bonds* (2005) 135 Cal. App.4th 328, 343-344, 37 Cal. Rptr. 3d 480 [newspaper article about doctor was issue of public interest where information would assist others in choosing doctors]; *Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 898-899, 17 Cal. Rptr. 3d 497 [statements about insurance broker involved issue of public interest because they constituted a consumer warning to others with similar problems].)

Applying these authorities here, we conclude the website's statements that Plaintiffs are "incompetent [and] dishonest" are protected. The website qualifies as a public forum because it is accessible to the public.[3] And

3. It is of no consequence that the website is privately controlled and does not allow for the posting of differing opinions.

whether or not Plaintiffs are incompetent and dishonest is a matter of public interest. Such information about the professional competency, trustworthiness, qualifications, and integrity of an attorney who describes himself in his complaint as having "hundreds of clients" is relevant consumer information that could help members of the public make informed choices when deciding who to hire as a lawyer. Construing "public interest" broadly, as we must (see *Chaker v. Mateo* (2012) 209 Cal.App.4th 1138, 1145, 147 Cal. Rptr. 3d 496), we conclude Dr. Nabili met his burden on prong one to show that the website's statements that Plaintiffs are "incompetent" and "dishonest" qualify as protected activity.[4]

The same cannot be said, however, for the website's statements that Plaintiffs' "office was unsafe and unpermitted" or that Plaintiffs are "vexatious litigants." The structural safety of a small firm's law office impacts the individuals who work there and visitors, not the public at

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What matters is that the website is accessible by the public; such is the case here, as confirmed by Plaintiffs' allegations that multiple third parties have seen it.

4. Plaintiffs argue in passing that section 425.16 does not apply to activity that is illegal as a matter of law (see *Flatley, supra*, 39 Cal.4th at p. 317), and the creation of a website in Plummer's name is illegal because it violates Penal Code section 528.5. We are not persuaded. The narrow exception excluding illegal conduct from the definition of protected activity only applies if "the defendant concedes the illegality of its conduct or the illegality is conclusively shown by the evidence." (*Flatley*, at p. 316.) Dr. Nabili has not conceded the illegality of his conduct, and as we discuss below, Plaintiffs have not demonstrated Dr. Nabili violated Penal Code section 528.5.

large. And Plaintiffs' alleged status as vexatious litigants would impact Plaintiffs' ability to file lawsuits on Plaintiffs' own behalf,[5] not their ability to provide legal advice to others. Accordingly, statements regarding Plaintiffs' office space or their alleged status as vexatious litigants do not implicate a matter of public concern affecting many consumers; those statements are therefore not protected activity, and we disregard them for the remainder of our anti-SLAPP analysis. (*Baral, supra*, 1 Cal.5th at p. 396.)

3. *Step Two: Probability of Prevailing*

Having concluded some of Plaintiffs' claims arise from protected activity, we turn to step two of the anti-SLAPP analysis, in which the burden shifts to Plaintiffs to demonstrate a probability of prevailing on each challenged claim based on protected activity. (*Baral, supra*, 1 Cal.5th

5. "The vexatious litigant statutes ([Code Civ. Proc.,] §§ 391-391.7) are designed to curb misuse of the court system by those persistent and obsessive litigants who, repeatedly litigating the same issues through groundless actions, waste the time and resources of the court system and other litigants." (*Shalant v. Girardi* (2011) 51 Cal.4th 1164, 1169, 126 Cal. Rptr. 3d 98, 253 P.3d 266.) A "'vexatious litigant'" is "a person who has, while acting in propria persona, initiated or prosecuted numerous meritless litigations, relitigated or attempted to relitigate matters previously determined against him or her, repeatedly pursued unmeritorious or frivolous tactics in litigation, or who has previously been declared a vexatious litigant in a related action." (*Id.* at pp. 1169-1170; see Code Civ. Proc., § 391, subd. (b).) Once a person has been declared a vexatious litigant, a court may enter a prefiling order prohibiting such person from filing any new litigation in California courts without first obtaining leave of court. (*Id.*, § 391.7, subd. (a).)

at p. 396.) To carry that burden, Plaintiffs must offer competent and admissible evidence to make a prima facie showing of facts that, if proved at trial, would support a judgment. (*San Diegans for Open Government v. San Diego State University Research Foundation* (2017) 13 Cal.App.5th 76, 94-95, 218 Cal. Rptr. 3d 160.)

In evaluating whether such a showing was made here, ""[w]e do not weigh credibility, nor do we evaluate the weight of the evidence."" (*Edward v. Ellis* (2021) 72 Cal. App.5th 780, 789, 287 Cal. Rptr. 3d 467.) We determine only whether Plaintiffs ""stated and substantiated a legally sufficient claim.'" [Citation.] 'Put another way, the plaintiff[s] "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[s] is credited."" (*Navellier, supra*, 29 Cal.4th at pp. 88-89.)

a. *Defamation*

Plaintiffs' first cause of action against Dr. Nabili is for defamation. This is a mixed claim, meaning it arises from both protected conduct (the website's statements about Plaintiffs' incompetency and dishonesty) and unprotected conduct (the website's statements that Plaintiffs' office is unpermitted and unsafe, and that Plaintiffs are vexatious litigants). Since we disregard the unprotected activity in performing step two of the anti-SLAPP analysis, Plaintiffs must demonstrate a probability of success on the merits on their defamation cause of action related to the website's statements about their alleged "incompetency"

and "dishonesty." (See *Baral, supra*, 1 Cal.5th at p. 396; *Neurelis, Inc. v. Aquestive Therapeutics, Inc.* (2021) 71 Cal.App.5th 769, 793, 286 Cal. Rptr. 3d 631.)

Defamation can involve either libel or slander. (Civ. Code, § 44, subds. (a) & (b).) Libel is defamation that is based on a publication in writing or other fixed representation that can be seen. (*Id.*, § 45.) "To establish defamation, a plaintiff must show a publication that was false, defamatory, unprivileged, and that has a natural tendency to injure or cause special damages." (*Medical Marijuana, Inc. v.* ProjectCBD.com (2020) 46 Cal.App.5th 869, 884, 260 Cal. Rptr. 3d 237 (*Medical Marijuana*).)

"Because 'the issues in an anti-SLAPP motion are framed by the pleadings' [citation], we look to the [operative] complaint to determine what activity on the part of the [] defendants the plaintiffs have alleged as forming the basis of their claim for libel." (*Medical Marijuana, supra*, 46 Cal.App.5th at p. 884.) Importantly, "'the words constituting [the] alleged libel must be specifically identified, if not pleaded verbatim, in the complaint.'" (*Ibid.*)

In this case, the complaint fails to meet that requirement. It does not specifically identify or plead verbatim the words constituting the alleged libel. It fails to identify the allegedly defamatory website. The complaint alleges, in general terms, that Doe defendants "maliciously posted false and defamatory statements of fact on a website intended to defame Plaintiffs in their professional capacity, such as the claim that Plaintiffs are incompetent [and] dishonest, . . . none of which [is] true."

That pleading failure alone is enough for us to find Plaintiffs failed to establish a likelihood of success on their defamation claim. (*Medical Marijuana, supra*, 46 Cal.App.5th at pp. 888, 895 [the plaintiffs did not demonstrate a probability of prevailing on libel claim because their complaint failed to quote or specify the allegedly defamatory matter]; *Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 31-32, 53 Cal. Rptr. 3d 752 [anti-SLAPP motion granted where the plaintiff failed to plead a legally sufficient defamation claim, noting the complaint "is a paradigm of vagueness, and does not even come close to the specificity required to state an actionable libel claim"]; *Vogel v. Felice* (2005) 127 Cal.App.4th 1006, 1019, 26 Cal. Rptr. 3d 350 (*Vogel*) [where defamation complaint was legally deficient on its face, the plaintiffs could not "establish the requisite likelihood that they could prevail on the merits if allowed to proceed with the lawsuit"].) Plaintiffs had unrestricted access to the website when they filed their lawsuit; therefore, "there is simply no justification for them to set forth in their complaint only the 'substance' of the statements that they claim are defamatory, instead of the *actual statements* that they assert are false and defamatory." (*Medical Marijuana*, at p. 894.)

Perhaps in an attempt to remedy that shortcoming, Plaintiffs provided additional detail about the allegedly defamatory website in their opposition to the anti-SLAPP motion in the form of Plummer's declaration and the attached exhibits. This was too little, too late.

"[T]he pleading itself provides the outer boundaries of the issues that are to be addressed in an anti-SLAPP motion. [Citation.] Because '[t]he general rule is that the words constituting an alleged libel *must be specifically identified, if not pleaded verbatim*, in the complaint' [citation], a court need not consider assertions of defamatory statements that are not alleged in the complaint [citation]." (*Medical Marijuana, supra*, 46 Cal. App.5th at p. 893; see *Vogel, supra*, 127 Cal.App.4th at p. 1017, fn. 3 [because plaintiff must specifically identify the libelous words in his complaint, a court considering the plaintiff's likelihood of success may "disregard[] any evidence or argument concerning statements not explicitly set forth in the complaint"].) Simply put, "the plaintiffs, themselves, controlled the framing of their cause of action for libel," and they cannot demonstrate "a probability of prevailing based on purportedly false statements that are not mentioned or even alluded to in the [operative] complaint." (*Medical Marijuana*, at p. 895.)

In any event, if we were to look beyond the pleading failure and consider the additional information contained in Plaintiffs' opposition evidence, our conclusion would be the same because Plaintiffs' evidentiary showing is deficient. As noted, in support of their opposition to the anti-SLAPP motion, Plaintiffs submitted a declaration by Plummer providing the name of the website and attaching four "excerpts" or screenshots of the website. However, the complaint, Plummer's declaration, and the website screenshots provide conflicting and inconsistent information as to what defamatory statements were allegedly made, and Plaintiffs fail to prove those statements are false.

The complaint alleges that the website says Plaintiffs are "incompetent [and] dishonest," but those words appear nowhere in Plummer's declaration or in the website screenshots. The website screenshots do include what appear to be cursory references to lawsuits that Plummer allegedly filed or was involved in (e.g., "Plummer vs. Sawyer," "7toSeven vs Mark B Plummer," "Mark Plummer sues local attorney Bruce Danneymeyer," and "Plummer vs. Bayuk"), but we cannot tell from the record (a) whether those phrases are hyperlinks, (b) if so, what content appears when a user clicks on them, or (c) whether any such hyperlinked content is false. This is fatal to the defamation claim. (See *Medical Marijuana, supra*, 46 Cal.App.5th at p. 884 [falsity is the sine qua non of a defamation claim].)

Plaintiffs argue that defendants also made defamatory statements in a 2019 amicus brief that was "linked" to the website. The 14-page amicus brief, which is attached as exhibit 13 to Plummer's declaration, is purportedly authored by Dr. Alai and describes "troubling acts of dishonesty" by Plummer. According to Plummer's declaration, Dr. Nabili and Dr. Alai threatened to file the amicus brief in a different case, but they never did so; instead, the brief later "showed up on '*markplummerattorney.com*.'"

The amicus brief fails to remedy the situation for Plaintiffs. First, the connection between the amicus brief and markplummerattorney.com is not clear from the record. If Plaintiffs mean to suggest the amicus brief is part of the website or is hyperlinked on the website, they

have provided no proof of that. Second, Plaintiffs again made no effort to establish that any statements in the brief concerning their alleged dishonesty are false.

Accordingly, the allegations in the first cause of action based on the website's statements about Plaintiffs' incompetency and dishonesty are stricken as to Dr. Nabili. The remainder of the cause of action (i.e., defamation based on the website's statements about Plaintiffs' office and Plaintiffs' alleged status as vexatious litigants) remains intact because it is not based on protected activity.

(b) *Interference with Prospective Business Advantage*

Plaintiffs' second cause of action against Dr. Nabili is for interference with prospective business advantage. According to the complaint, Plaintiffs have hundreds of clients, and defendants' conduct (i.e., the creation of the website) wrongfully interfered with Plaintiffs' reasonable expectation of future economic benefits from their clients, especially new clients.

The complaint does not specify whether this cause of action is for intentional or negligent interference with prospective economic advantage. The elements for those two claims are similar, but not identical. In either instance, the plaintiff must allege the existence of an economic relationship with a specific third party that contains the probability of future economic benefit to the plaintiff. (See *Golden Eagle Land Investment, L.P. v. Rancho Santa Fe Assn.* (2018) 19 Cal.App.5th 399, 429-430, 227 Cal. Rptr. 3d 903 [intentional interference elements]; *Venhaus v.*

Shultz (2007) 155 Cal.App.4th 1072, 1078, 66 Cal. Rptr. 3d 432 [negligent interference elements].)

To satisfy that element, an actual economic relationship with a third party must be shown; liability cannot be premised on the speculative expectation that a potentially beneficial relationship will arise in the future. (*Muddy Waters, LLC v. Superior Court* (2021) 62 Cal.App.5th 905, 926, 277 Cal. Rptr. 3d 204 (*Muddy Waters*).) An allegation that the plaintiff had "'"at most a hope for an economic relationship and a desire for future benefit'"" is not enough. (*Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc.* (2017) 2 Cal.5th 505, 510, 213 Cal. Rptr. 3d 568, 388 P.3d 800.)

Plaintiffs assert in their appellate briefing that the website interfered with their client referral relationships with several law firms, and that Plaintiffs have lost hundreds of thousands of dollars as a result. Nothing in the record supports those statements.

The only evidence Plaintiffs provided regarding lost clients is a single paragraph in Plummer's declaration stating that Plummer Law "has been damaged by being required to spend the time to explain to other attorneys, both adverse and non-adverse, that markplummerattorney.com is not their website. [Plummer Law] otherwise, has lost potential clients who googled MARK PLUMMER or where [*sic*] looking for an attorney and were directed to *markplummerattorney.com*. . . . [Plummer Law] also lost referrals from other counsel."

That is insufficient. Once the burden shifted to Plaintiffs on prong two, "it was incumbent on plaintiff[s] to produce *evidence* to show a *specific* economic relationship with the prospect of future economic advantage." (*Muddy Waters, supra*, 62 Cal.App.5th at p. 927, italics added.) They failed to do so. "The failure to produce any evidence in support of this threshold element of a claim for intentional interference with prospective economic advantage compels the conclusion that plaintiff[s] ha[ve] not shown a probability of prevailing on the merits." (*Ibid.* [directing trial court to enter order granting anti-SLAPP motion].)

Because Plaintiffs' evidence does not identify any specific third party with whom they had an existing economic relationship, the cause of action for interference with prospective business advantage must be stricken as to Dr. Nabili.

(c) *False Personation*

Plaintiffs' third cause of action is for false personation in violation of Penal Code section 528.5. That provision authorizes a civil action against "any person who knowingly and without consent credibly impersonates another actual person through or on an Internet Web site or by other electronic means for purposes of harming, intimidating, threatening, or defrauding another person. . . ." (*Id.*, subds. (a), (e).) It adds that "an impersonation is credible if another person would reasonably believe, or did reasonably believe, that the defendant was or is the person who was impersonated." (*Id.*, subd. (b).) Thus, to prevail on their

third cause of action, Plaintiffs had to make a prima facie showing that Dr. Nabili credibly impersonated Plummer through markplummerattorney.com for the purposes of harming him, and that another person would reasonably believe, or did believe, that Plummer created the website.

Plaintiffs have made no such showing. To the contrary, the content of the website excerpts supports the conclusion that Plaintiffs would not have created or endorsed the site. The excerpts claim "Plummer Regularly Sues His Own Clients" and "loses" cases. The information on the site seems to be almost entirely negative regarding Plaintiffs. Moreover, the website never references Plummer or his affiliates in the first person.

Plummer nevertheless claims other attorneys believed he created the website, averring in his declaration that he has had "to explain to other attorneys, both adverse and non-adverse, that *markplummerattorney.com* is not [his] website." He provides no details regarding those communications, however, and the select e-mails attached as exhibits to Plummer's declaration bely that claim. For example, the e-mail attached as exhibit 1 to his declaration is an e-mail from Plummer's opposing counsel to his cocounsel that states: "Speaking of [Plummer], we came across this website today by chance: https://www.markplummerattorney.com/. *We have no idea who created the site*, but it does give a revealing glimpse of who you've paired up with in this dispute." (Italics added.)

Plummer's declaration claims that his opposing counsel in another case thought the statements on the

website were true and believed markplummerattorney.com was Plummer's website; Plummer supported that claim by attaching the e-mail from counsel as exhibit 16. In reviewing exhibit 16, however, counsel's e-mail does not reference markplummerattorney.com, much less suggest he believed Plummer created that website.

We conclude no reasonable person would believe Plummer created a website describing himself as vexatious, incompetent, or dishonest. Plaintiffs failed to establish that any other person actually believed Plummer created that website. Accordingly, the cause of action for false personation must be stricken as to Dr. Nabili.[6]

(d) *Declaratory Relief*

That leaves Plaintiffs' claim for declaratory relief, which is derivative of and premised on the same facts as their defamation claim. In this cause of action, Plaintiffs request a declaration and order that the website is false, malicious, and defamatory; that defendants have no right to post it; that the website must be removed; that its content must never be posted elsewhere; and that

6. Plaintiffs assert their false impersonation claim is also supported by Business & Professions Code section 17525, subdivision (a), which makes it "unlawful for a person, with a bad faith intent, to register, traffic in, or use a domain or subdomain name that is identical or confusingly similar to, because of, among other things, misspelling of the domain or subdomain name, . . . [¶] (1) The personal name of another living person or deceased personality, without regard to the goods or services of the parties." However, Plaintiffs did not assert a cause of action under that code section in their complaint, so we need not consider it further.

defendants must post an undertaking to protect Plaintiffs against future harm. Because we conclude the defamation cause of action may proceed after the words "incompetent" and "dishonest" are stricken as to Dr. Nabili, we make the same finding as to the declaratory relief cause of action.

DISPOSITION

The trial court's order denying Dr. Nabili's special motion to strike under section 425.16 is affirmed in part and reversed in part. On remand, the trial court is directed to enter a new order granting the motion in part by striking the words "incompetent, dishonest" from paragraphs 3, 6, 11, and 27 of the first amended complaint as to Dr. Nabili, and by striking the second and third causes of action as to Dr. Nabili. In all other respects, the anti-SLAPP motion shall be denied.

In the interests of justice, each side is to bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

GOETHALS, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

SANCHEZ, J.

APPENDIX E — MINUTE ORDER OF THE SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE, CENTRAL JUSTICE CENTER, FILED FEBRUARY 5, 2019

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER

CASE NO: 30-2018-01002061-CU-FR-CJC

LAW OFFICES OF MARK B. PLUMMER, PC

vs.

ALAI

DATE: 02/05/2019

MINUTE ORDER

There are no appearances by any party.

The Court, having taken the above-entitled matter under submission on 1/22/19 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

Defendant's (Nili Alai) Motion to Deem High Frequency Plaintiff Mark B. Plummer a Vexatious Litigant Pursuant to Code of Civil Procedure § 391 (filed on 11-15-18) is DENIED.

Appendix E

Code of Civil Procedure section 391, subdivision (b), states, [¶] "'Vexatious litigant' means a person who does any of the following: [¶] (1) In the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing. [¶] (2) After a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate, in propria persona, either (i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (ii) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined. [¶] (3) In any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay. [¶] (4) Has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based upon the same or substantially similar facts, transaction, or occurrence." Code of Civil Procedure section 391, subdivision (a) defines "Litigation" as " . . . any civil action or proceeding commenced, maintained or pending in any state or federal court." Code of Civil Procedure section 391.2, provides, in part, "At the hearing upon the motion the court shall consider any evidence, written or oral, by witnesses or affidavit, as may be material to the ground for the motion."

Appendix E

Garcia v. Lacey (Garcia) (2014) 231 Cal.App.4th 402, 406, 407, states, "A court may declare a person to be a vexatious litigant who, in 'the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been . . . finally determined adversely to the person. . . .' [Citation.] The term "'[l]itigation'" is defined broadly as 'any civil action or proceeding, commenced, maintained or pending in any state or federal court.' [Citation.] A litigation includes an appeal or civil writ proceeding filed in an appellate court. [Citations.] A litigation is finally determined adversely to a plaintiff if he does not win the action or proceeding he began, including cases that are voluntarily dismissed by a plaintiff. [Citations.] (Footnotes 4 and 5 omitted.) "An action is counted as being within the "'immediately preceding seven-year period'" so long as it was filed or maintained during that period. [Citation.] The seven-year period is measured as of the time the motion is filed. [Citation.] (Id., at p. 406, footnote 4.)

Page 2 of Defendant's Notice of Motion and Motion to Deem High Frequency Plaintiff Mark B. Plummer a Vexatious Litigant Pursuant to Code of Civil Procedure § 391 (filed on 11-15-18) lists 9 cases that Defendant claims were determined adversely against Plaintiff. Initially, the court notes that the named plaintiff in this action is "Law Offices of Mark B. Plummer, PC." As to the designated cases in the Defendant's Notice, the court makes the following findings:

(1) The named appellant in appellate court case number G053836 was "Law Offices of Mark B. Plummer PC." As to Appellate Court case number G053836, this case number qualifies as an adverse determination against "Law Offices of Mark B. Plummer PC" because the appellate court affirmed the judgment against "Law Offices of Mark B. Plummer PC" in Orange County Superior Court (OCSC) case number 30-2014-00759128. The court takes judicial notice of the court records filed in OCSC case number 30-2014-00759128 (Evid. Code, § 452, subd. (d)). OCSC case number 30-2014-00759128 shows the filing of the opinion under Appellate Court case number G053836. Under Garcia, the definition of litigation in Code of Civil Procedure section 391, subdivision (a), includes an appeal.;

(2) As to OCSC case number 30-2016-00831688, the named plaintiff was "Mark B. Plummer." Under Garcia, OCSC case number 30-2016-00831688 qualifies as an adverse determination against "Mark B. Plummer" because it resulted in a dismissal (Defendant's Notice of Lodgment of Exhibits (NOL), filed on 11-19-18; Exhibit D).;

(3) As to OCSC case number 30-2014-00759128, the named plaintiff is "Law Offices of Mark B. Plummer, PC." The court takes judicial notice of the court records filed in OCSC case number 30-2014-00759128 (Evid. Code, § 452, subd. (d)). OCSC case number 30-2014-00759128 qualifies as an adverse determination against "Law Offices of Mark B. Plummer, PC" because it resulted in a judgment against "Law Offices of Mark B. Plummer, PC.;

(4) Defendant's Notice identifies "Law Offices of Mark B Plummer, Pc Vs Chris W. Bayuk without providing a case number. The court does not make any finding as to this entry."

(5) As to appellate court case number B246940, the named appellant is "Mark B. Plummer." Appellate Court case number B246940 qualifies as an adverse determination against "Mark B. Plummer" because it affirmed the judgment against "Mark B. Plummer." (NOL, Exhibit HH.);

(6) As to OCSC case number 07CC05089, the named plaintiff is "Mark B. Plummer." OCSC case number 07CC05089 does not qualify as an adverse determination against "Mark B. Plummer" because the judgment was in favor of "Mark B. Plummer." The court takes judicial notice of the court records filed in OCSC case number 07CC050089 (Evid. Code, § 452, subd. (d)).

(7) As to Los Angeles County Superior Court (LACSC) case number BC479944, the named Plaintiff is "Mark B. Plummer." LACSC case number BC479944 qualifies as an adverse determination against "Mark B. Plummer" because the judgment was against "Mark B. Plummer" as shown by appellate court case number B246940. (NOL, Exhibit HH.);

(8) As to OCSC case number 30-2011-00525808, the named plaintiff is "Mark B. Plummer." OCSC case number 30-2011-00525808 qualifies as an adverse determination

against "Mark B. Plummer" because it resulted in a dismissal filed on 5-15-13 (NOL, Exhibit P).; and

(9) As to OCSC case number 30-2011-00524331, the named plaintiff is "Law Offices of Mark B. Plummer, PC." The court takes judicial notice of the court records filed in OCSC case number 30-2011-00524331 (Evid. Code, § 452, subd. (d)). OCSC case number 30-2011-00524331 qualifies as an adverse determination against "Law Offices of Mark B. Plummer, PC" because it resulted in a dismissal filed on 4-1-14.

In summary, the plaintiff in the current case, Law Offices of Mark B. Plummer, PC has had three prior adverse determinations against it based on appellate court case number G053836, OCSC case number 30-2014-00759128, and OCSC case number 30-2011-00524331. Defendant asserts that "Mark B. Plummer" is plaintiff's alter ego. (Motion 10:4-15.) The court recognizes that Code of Civil Procedure section 391, subdivision (b), can apply to a corporation that acts as the alter ego of an individual. (See Say & Say, Inc. v. Ebershoff (1993) 20 Cal. App.4th 1759, 1766-1770 and Hupp v. Solera Oak Valley Greens Association (2017) 12 Cal.App.5th 1300, 1313.) The evidence from Defendant, however, is insufficient to establish that "Mark B. Plummer" as an individual is the alter ego of "Law Offices of Mark B. Plummer, PC." Defendant provided a Notice of Lodgment of Exhibits, the 1-9-19 declaration of James G. Bohm, the 1-14-19 declaration of Mark Eisenberg, and the 1-15-19 declaration of Christopher Bayuk. Jay v. Mahaffey (Jay) (2013) 218 Cal. App.4th 1522, 1537, states, "The general rule of motion

practice, which applies here, is that new evidence is not permitted with reply papers." The court notes Defendant provided each of these declarations after Plaintiff filed its opposition on 1-7-19. Under Jay, the court declines to consider the declarations of James G. Bohm, Mark Eisenberg, and Christopher Bayuk. Even if the court considered these declarations, they are insufficient for the court to make a finding of alter ego within the meaning of Say & Say, Inc. v. Ebershoff (1993) 20 Cal.App.4th 1759, 1766-1770, Zoran Corp. v. Chen (2010) 185 Cal.App.4th 799, 811-812, and Code of Civil Procedure section 391.2. The court notes that Mr. Plummer represented "Law Offices of Mark B. Plummer, PC" OCSC case number 30-2014-00759128 and OCSC case number 30-2011-00524331.

Based on the above, Defendant has failed to establish that Plaintiff, "Law Offices of Mark B. Plummer, PC," has commenced, prosecuted, or maintained three prior litigations that resulted in an adverse determination against it. Defendant also has not sufficiently demonstrated that "Mark B. Plummer" is the alter ego of "Law Offices of Mark B. Plummer, PC." Thus, the court finds that Plaintiff does not qualify as a vexatious litigant under Code of Civil Procedure section 391, subdivision (b)(1). Further, Defendant has not sufficiently established that Plaintiff has repeatedly relitigated the determinations against the defendants in the actions listed on Defendant's Notice. (Code Civ. Proc., § 391, subd. (b)(2).) Finally, Defendant has not sufficiently established that Plaintiff has engaged in the conduct listed in Code of Civil Procedure section 391, subdivision (b)(3).

Based on the above, the court DENIES Defendant's (Nili Alai) Motion to Deem High Frequency Plaintiff Mark B. Plummer a Vexatious Litigant Pursuant to Code of Civil Procedure § 391 (filed on 11-15-18.)

Court clerk is to give notice.

APPENDIX F — RELEVANT STATUTORY PROVISIONS

State of California

CODE OF CIVIL PROCEDURE

Section 425.16

425.16. (a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

(b) (1) 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.

(2) 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.

(3) If the court determines that the plaintiff has established a probability that the plaintiff will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.

(c) (1) Except as provided in paragraph (2), in any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover that defendant's 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.

(2) A defendant who prevails on a special motion to strike in an action subject to paragraph (1) shall not be entitled to attorney's fees and costs if that cause of action is brought pursuant to Section 11130, 11130.3, 54960, or 54960.1 of the Government Code, or pursuant to Chapter 2 (commencing with Section 7923.100) of Part 4 of Division 10 of Title 1 of the Government Code. Nothing in this paragraph shall be construed to prevent a prevailing defendant from recovering attorney's fees and costs pursuant to Section 7923.115, 11130.5, or 54960.5 of the Government Code.

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of

California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

(e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) 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, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause

shown, may order that specified discovery be conducted notwithstanding this subdivision.

(h) For purposes of this section, "complaint" includes "cross-complaint" and "petition," "plaintiff" includes "cross-complainant" and "petitioner," and "defendant" includes "cross-defendant" and "respondent."

(i) An order granting or denying a special motion to strike shall be appealable under Section 904.1.

(j) (1) Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall, promptly upon so filing, transmit to the Judicial Council, by email or facsimile, a copy of the endorsed, filed caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order granting or denying a special motion to strike, discovery, or fees.

(2) The Judicial Council shall maintain a public record of information transmitted pursuant to this subdivision for at least three years, and may store the information on microfilm or other appropriate electronic media.

(Amended by Stats. 2021, Ch. 615, Sec. 56. (AB 474) Effective January 1, 2022. Operative January 1, 2023, pursuant to Sec. 463 of Stats. 2021, Ch. 615.)

Appendix F

State of California

CODE OF CIVIL PROCEDURE

Section 391

391. As used in this title, the following terms have the following meanings:

(a) "Litigation" means any civil action or proceeding, commenced, maintained or pending in any state or federal court.

(b) "Vexatious litigant" means a person who does any of the following:

(1) In the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been (i) finally determined adversely to the person or (ii) unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing.

(2) After a litigation has been finally determined against the person, repeatedly relitigates or attempts to relitigate, in propria persona, either (i) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or (ii) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined.

(3) In any litigation while acting in propria persona, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay.

(4) Has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding based upon the same or substantially similar facts, transaction, or occurrence.

(5) After being restrained pursuant to a restraining order issued after a hearing pursuant to Chapter 1 (commencing with Section 6300) of Part 4 of Division 10 of the Family Code, and while the restraining order is still in place, they commenced, prosecuted, or maintained one or more litigations against a person protected by the restraining order in this or any other court or jurisdiction that are determined to be meritless and caused the person protected by the order to be harassed or intimidated.

(c) "Security" means an undertaking to assure payment, to the party for whose benefit the undertaking is required to be furnished, of the party's reasonable expenses, including attorney's fees and not limited to taxable costs, incurred in or in connection with a litigation instituted, caused to be instituted, or maintained or caused to be maintained by a vexatious litigant.

(d) "Plaintiff" means the person who commences, institutes or maintains a litigation or causes it to be commenced, instituted or maintained, including an attorney at law acting in propria persona.

(e) "Defendant" means a person (including corporation, association, partnership and firm or governmental entity) against whom a litigation is brought or maintained or sought to be brought or maintained.

(Amended by Stats. 2022, Ch. 84, Sec. 1. (AB 2391) Effective January 1, 2023.)

APPENDIX G — PETITION FOR REVIEW IN THE SUPREME COURT OF THE STATE OF CALIFORNIA, FILED JUNE 9, 2024

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

S285405

NILI ALAI,

Appellant and Defendant

v.

MARK B. PLUMMER &
LAW OFFICES OF MARK PLUMMER, PC

Plaintiffs and Respondents.

Review of an Unpublished Opinion by the Court of Appeal, Fourth Appellate District, Division Three, Case No. G062355, Orange County Superior Court Case No. 30-2020-01141868

PETITION FOR REVIEW

LAW OFFICES OF GLORIA JUAREZ
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Attorneys For Appellant And Defendant
Dr. Nili Alai, M.D., J.D.

* * *

[12]4. Whether the period when the trial court does not observe a full litigation stay can retroactively be counted as a stay?

5. Whether referring to someone's pleadings as 'vexatious' on a public website necessarily constitutes 'libel' in the statutory context as a legal term of art, or whether it is considered public discourse and protected First Amendment expression of opinion, given the general audience?

WHY REVIEW SHOULD BE *GRANTED*

This free speech case raises defamation, Strategic Lawsuits Against Public Participation (SLAPP) issues, and the 'vexatious litigant' statute – in modern communications – the Internet. The case raises key jurisdiction questions and the interplay between the statutory stay provisions under Code of Civil Procedure[4] section 391.6 (vexatious litigant [13]statute) and *Hanna*[5], and section 425.16 (anti-SLAPP) under *Varian*[6].

This Petition respectfully seeks the Court's guidance to address five critical questions.

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4. All section references are to the California Code of Civil Procedure.

5. *Hanna v. Little League Baseball, Inc.*, 53 Cal.App.5th 871, 267 (2020) (*Hanna*)

6. *Varian Med. Systems, Inc. v. Delfino* 35 Cal.4th 180 (2005) (*Varian*)

Although this Court granted review in *Varian* to resolve the jurisdictional question of section 425.16 (anti-SLAPP), there has been little to no clarification of the statutory stay under section 391.6 (vexatious litigant statute), or its interplay with section 425.16. Given the commonality that both statutes are intended by the legislature to expeditiously terminate certain meritless litigation and protect defendants from a class of obsessive 'vexatious" plaintiffs who regularly clog the courts with unnecessary litigation, it is important that their relationship here be clarified.

Review is therefore necessary to ensure that continuing jurisdictional errors do not result in void [14] orders and dependent appellate opinions issued during statutory stays. Conflicting interpretations of these two core and commonly referenced statutes among the lower courts have created uncertainty and prejudicial errors. This Court's intervention is thus essential to provide uniformity in the application of these two independent but potentially conflicting statutes – which were enacted within *thirty years* of each other.

This Petition is mainly concerned with the free speech question, and the interpretation and application of section 391.6's 'automatic' litigation stay provision (*Hanna*), section 425.16's partial stay provision (*Varian*), the conflicting combined interpretation under *Singh*[7], and their application to Defendant Dr. Nili Alai M.D., J.D.'s ("Appellant") anti-SLAPP claims which were decided during pendency of her vexatious litigant motion. Additionally, the Petition examines Plaintiffs' (an attorney

7. *Singh v. Lipworth*, 227 Cal.App.4th 813, 174 (2014).

and his single member law firm) 'libel' claim [15]based on the alleged public website use of the term 'vexatious litigant' or 'vexatious pleading' by Appellant, contending that this term (even if either term was used), would be constitutionally protected expression of opinion (because these are logically related to the attorney's professional competence and ethics as underpinned below.)

INTRODUCTION

This case is part of *two* incipient trends in litigation: SLAPP suits filed by vexatious litigants. Increasingly, corporations and their owners, and professionals like dentists, doctors, and lawyers – are filing defamation lawsuits in droves in retaliation for statements made about them by individuals on websites and Internet message boards. Lidsky, Silencing John Doe: Defamation & Discourse in Cyberspace (2000) 49 Duke L.J. 855, 858 & fn. 6 (Lidsky). These lawsuits "are not even arguably about recovering money damages" from the relatively impecunious defendants, but "are largely symbolic, the primary goal being to silence John Doe and others like him." *Id.*/pp. 858-859. This trend threatens to "chill the use of the Internet as a medium for free-[16]ranging debate and experimentation with unpopular or novel ideas" (*id.*/p.890) and "blunt the effectiveness of the Internet as a medium for empowering ordinary citizens to play a meaningful role in public discourse". *id.*/p.945. Hence, these defamation lawsuits are leading to a substantial uptick in anti-SLAPP litigation. Additionally, SLAPP defamation suits are more likely to be brought by certain obsessive litigants, hence there has been a significant

uptick in section 391 motions to deem these plaintiffs 'vexatious litigants.'

This action arises from a professional conflict between two former clients of Law Offices of Mark Plummer and its principal Mark Plummer ("Plaintiffs" or "Plummer")-on one side, on the other side two physician clients Dr. Alai[8] and Dr. Nabili. Plaintiffs sued the physicians twice in parallel actions, once in 2018 for an alleged fee dispute on a *contingency matter with zero recovery*, and the second

* * *

[22]3. Holding that speech about a lawyer and his corporation on a public website does not implicate an issue of public concern;

4. Impliedly ruling, in direct conflict with a contrary holding in *Hanna*, that a trial court is not divested of jurisdiction to proceed with other hearings during the pendency of a vexatious litigant motion under section 391.6;

5. Failing to vacate, in contradiction to *Hanna*, the order and dependent opinion entered when the trial court lacked jurisdiction during pendency of the section 391.6 motion; and

8. Appellant appeals here from the May 2, 2024 Opinion G062355 (Court of Appeal Opinion ("Opinion-2024")), which is hinged on and cited the 2022 Nabili Opinion G060354 ("Opinion").

6. Failing to strike the declaratory relief claim seeking to take down the public website and restraint against future speech.

This case affords a unique opportunity for the State's highest Court to vindicate of the right of free expression, expressly protect amicus briefs as petitioning activity, as well as clarify the current ambiguity in the "automatic" statutory *stay* provision* * * *.

* * *

[25]*SLAPP actions*. Hence, these two statutes' respective preemption or stay hierarchy requires clear interpretation.

PREEMPTION OF SECTION 391.6'S STAY VERSUS SECTION 425.16

A split of authority

A split of authority and mounting confusion exists among California courts regarding the scope of the statutory litigation stay under section 391.6, and the partial stay under section 425.16. There is also a split between the Third and Fourth Districts as to the statutory stay under section 391.6, and if the court retains jurisdiction to rule on any other motions during the pendency of a vexatious litigant motion.

In *Hanna*, the Fourth District (Second Division) Court of Appeals that held when a motion to deem plaintiff a vexatious litigant is filed, there is an automatic stay of

further trial court proceedings pending the vexatious status determination. *Hanna* interpreted section 391.6 and vacated all trial court orders entered during pendency of the vexatious litigant motion. It ruled that the filing of the motion [26]stayed the entire proceedings and the court without jurisdiction to enter any other orders on the same day that it entered the vexatious order.

In this case, the Fourth District (Third Division) neither acknowledged the section 391.6 stay, lack of jurisdiction, nor vacated the orders entered during pendency of the vexatious litigant motion.

In *Varian*, this high Court held that an appeal taken from the grant or denial of anti-SLAPP motion automatically stays all further trial court proceedings encompassed by the appeal. This Court reviewed section 425.16 and whether an anti-SLAPP appeal automatically stays the trial court proceedings. It found that the lack of jurisdiction in the trial court rendered the trial and judgment completely void. This Court held that the proceedings should have been stayed during an appeal of the anti-SLAPP motion.

In *Singh*, the Third District interpreted *both* sections 391 and 425.16 *concurrently*, ruling in connection with a granted anti-SLAPP motion which was filed on the same day as a vexatious litigant [27]motion. *Singh* did not address the 391.6 stay issue, and upheld both orders granting the anti-SLAPP as well as the vexatious order. Pursuant to the Fourth District under *Hanna*, however,

the anti-SLAPP order would be void for lack of jurisdiction. These rulings thus create substantial ambiguity.

Here, as underscored by Appellant' *unsuccessful* Petition for Rehearing[13], the statutory jurisdictional issue under *section* 391.6 and *Hanna*[14] divested the trial court of power to enter the anti-SLAPP order underlying the prior *nonpublished* Opinion in G060354. That Opinion was cited within this appeal as a substantive basis and 'law of the case', ultimately resulting in affirming the trial court's order here. The jurisdictional question was not addressed in either appellate Opinion.

Accordingly, both the appellate and trial court's jurisdiction are a material question here because the Opinion was based on the trial court's* * * *.

* * *

[31]two matters in 2016, one an employment defense and one as a plaintiff in a personal injury matter.

The carrier in the defense matter unilaterally terminated Plaintiffs for conduct, and Plaintiffs retaliated by surreptitiously 'disassociating' as counsel of record in the personal injury case on the eve of trial matter –

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13. Appellant raised the jurisdictional defect. Cal. Rules of Court, rule 8.268.

14.

without leave of court or notifying Appellant. Plaintiffs continued to bill for purported services for a full five days after they 'disassociated', which resulted in a genuine fee dispute. Additionally, Plaintiffs' pretextual abandonment resulted in dismissal of Appellant's personal injury matter without trial on the merits – or any recovery.

Despite Plaintiffs' admitted abandonment on the eve of trial in the injury matter, they audaciously sued Appellant for 'unpaid fees' of '$331,000' for '58.7 hours' of purported services – in a contingency based representation. Plaintiffs sent Appellant a pre-litigation demand threatening to damage her underlying matter, reputation, and professional relationships. Appellant did not submit to Plaintiffs' demands, and thus Plaintiffs filed two lawsuits against her, the first in June 2018 for purported fees,* * * *.

* * *

[41]This construction comports with the ordinary meaning of the term "litigation." "Litigation" refers to "[t]he process of carrying on a lawsuit." Black's Law Diet. (9th ed. 2009) p. 1017. When a defendant files a vexatious litigant motion, the litigation must be stayed, and no other motions including an anti-SLAPP motion may be heard until the vexatious motion and plaintiff's vexatious status is determined. Thus, section 391.6 should be construed to require the trial court to stay the entire action whenever a vexatious litigant motion is filed – at any stage of a pending lawsuit. Finally, when the legislature revised section 391 in 1990 and again in 2003, it impliedly reiterated section 391.6's stay provision.

The Opinion here overlooked the vexatious litigant statute and thus erred in its analysis of the anti-SLAPP statute.

B. The Opinion creates a split of authority whether an anti-SLAPP motion requires *de novo* review, or may be deemed 'mooted' based on another defendant's appeal.

The well-settled rule of appellate procedure is that a *de novo* standard of review applies to denied or [42]granted anti-SLAPP motions. *Flatley v. Mauro (2006) 39 Cal.4th 299, 325 (Flatley).* And that standard cannot be hinged or dependent on a prior appellant's pleadings, appeal, or ruling. However, that is precisely what happened here, which is prejudicial error. Opinion-2024/2.

The appellate court expressly stated that there was no point[21] to this Appellant's anti-SLAPP appeal because the issues were decided two years prior in another appellant's appeal. Consequently, it concluded this appeal was *moot*. Hence, nobody could have won this appeal – no matter as to Appellant's pleadings or oral argument.

A corollary appellate procedure rule defines a mooting event as one that makes it impossible for the appellate court to grant the appellant "any effectual relief." *Giles v. Horn* (2002) 100 Cal.App.4th 206, 227. This definition

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21. At oral argument (video@4:38 minutes) and on page 2 of its Opinion, the court stated so, and then fully recapped the 2022 decision.

places mooting events squarely within the scope of the statutory stay under section 391.6, [43]which divested the appellate court from jurisdiction to enter its prior Opinion. However, it does not moot a new defendant's anti-SLAPP.

The standards for determining mootness and the scope of appellate review are identical. Both assess the impact on the effectiveness of an appeal. If trial during the pendency of an appeal could moot the appeal by precluding any effectual relief – which could happen as a result of trial during the pendency of an anti-SLAPP appeal – then such trial would have an impact on the effectiveness of the appeal and is within the scope of the appellate stay prescribed by section 9I6.

C. The appellate court cannot circumvent the *de novo* standard of review of an anti-SLAPP appeal, by misapplying re judicata from another defendant's prior opinion.

The Opinion still should be reversed because of prejudicial anti-SLAPP statutory analysis error. Here, even without the section 391.6 jurisdictional issue, the evidence before the court did not support the notion of identicality of Appellant's anti-SLAPP* * * *.

APPENDIX H — PETITION FOR REHEARING OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE, DATED MAY 9, 2024

G062355

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT,
DIVISION THREE

MARK B. PLUMMER & LAW OFFICES
OF MARK PLUMMER PC

Plaintiffs and Respondents,

v.

NILI ALAI,

Defendant and Appellant.

Appeal from Orange County Superior Court
Central Justice Center
Hon. Melissa McCormick
Trial Court Case No. 30-2020-01141868

APPELLANT'S PETITION FOR REHEARING

[TABLES INTENTIONALLY OMITTED]

Appendix H

INTRODUCTION

Pursuant to California Rules of Court, rules 8.268 (a) (1) and (b)(1)(A), Defendant Ms. Nili Alai ("Appellant") respectfully requests that the honorable Justices *grant* this Petition for Rehearing ("Petition") of the anti-SLAPP[1] appeal G062355[2] (May 2, 2024 Opinion) based on a critical jurisdictional defect.

Appellant avers that a statutory jurisdictional issue under *Code of Civil Procedure*[3] §391.6 and *Hanna v. Little League*[4], divested the lower court of power to enter the anti-SLAPP order underlying the prior *nonpublished* Opinion in G060354[5]. That Opinion was cited within this appeal as a substantive basis and 'law of the case', ultimately resulting in affirming the lower court's order here. Although a jurisdictional issue may be raised at any time, including for the first time on appeal or after

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1. SLAPP is the acronym for 'strategic lawsuit against public participation. '

2. *Law Offices of Mark Plummer v. Networksolutions et al., 2020-01141868 (2023) ("Alai")*

3. All further section references are to the Code of Civil Procedure unless stated.

4. *Hanna v. Little League Baseball, Inc.,* 53 Cal.App.5th 871, 267 (2020) ("*Hanna*") [holding that under section 391.6, the trial court is divested of jurisdiction to rule on other motions after defendant filed a vexatious litigant motion, and on that basis vacating all trial court orders as *void*- which were made in that period.]

5. *Law Offices of Mark Plummer v. Nabili, 2020-01141868*

final judgment[6]- this critical defect *was* raised a number of times in the lower court, and also within this appellate briefing[7]. The jurisdictional question was neither directly addressed during oral arguments nor in the appellate Opinion in this case. Accordingly, the lower court's jurisdiction is a material question here because the G060354 Opinion was based on the lower court's order entered *during* a statutory stay as triggered by a motion to deem Plaintiffs vexatious litigants- a lengthy period when pursuant to section 391.6 and affirmed by *Hanna,* the lower court lacked power to enter such other orders.

The grounds for this Petition are (1) the lower court lacked *jurisdiction* to enter the order underlying G060354 during pendency of a vexatious litigant motion, (2) there is an insufficient basis to apply res judicata or collateral estoppel to this appeal, and (3) even if it is determined that the court had jurisdiction, Appellant's alleged speech about an attorney's vexatious litigant status and safety of his public facing law office are matters of public interest which go to professional competence and ethics, and thus protected First Amendment speech under the United States Constitution and the Noerr Pennington Doctrine.

Appellant respectfully contends that the jurisdiction question before this Court is foundational and relevant because the Opinion in this case relies on and cites

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6. *Rochin v. Pat Johnson Manufacturing Co.*, 67 Cal.App.4th 1228, (1998).

7. *See e.g.* Ex. 1 (lower court pleadings), and Appellant's Reply Brief ("ARB")/16,fn.

G060354 as 'law of the case' doctrine. Therefore, if the underlying lower court order in the G060534 appeal is void for lack of jurisdiction, that determination not only materially impacts Appellant's instant case, but justifies the *grant* of this Petition for Rehearing.

Accordingly, if this Court adopts *Hanna's section 391.6* holding (as intimated in its very recent Order in G063811[8] (between the same parties)), the lower court's May 2021 Nabili anti-SLAPP order and the G060354 Opinion are also void as there was no jurisdiction for the lower court to enter any orders during the pendency of the vexatious litigant motion. Since the vexatious motion was filed in January 2021 (Register of Action ("ROA") 58), and was not heard until February 2023 (ROA 317), the May 2021 order (ROA 161) is *void*.

Hence, at a minimum, there is a substantive statutory question before this honorable Court in connection with section 391.6 and *Hanna*- which only this Court has the power and jurisdiction to determine. This scenario presents a very interesting '*domino*' effect issue. Does the Court of Appeal deem a lower court order entered during a statutory stay imposed by section 391.6 valid or void, and does it then approve or void the order and appellate opinion as basis for its determination of a subsequent appeal?

8. This Court's recent April 24, 2024 Order, and the February 29, 2024 Order (attached hereto as Exhibit ("Ex.")/2) in G063811 (*Plummer v. Alai 2018-01002061)* reference section 391.6's stay.

If this Court determines that the lower court's order underlying G060354 is void pursuant to the plain language of section 391.6 and *Hanna*, then it logically follows that the May 2, 2024 Opinion issued in this appeal (which explicitly cites the earlier Opinion) would be vacated pursuant to rule 8.268(d). If the Court alternatively determines that the order is not void for lack of jurisdiction, then the question remains as to the first prong of the anti-SLAPP statute for constitutionally protected speech. In either event, rehearing would seem reasonable and appropriate.

For the reasons stated above, and pursuant to the authority set forth in Code of Civil Procedure §391.6 and the precedent established by *Hanna* regarding void judgments or orders, this Court is respectfully requested to *grant* Appellant Ms. Alai's Petition for Rehearing. It is further requested that the *nonpublished* Opinion in G062355 filed on May 2, 2024, be vacated in accordance with Rules of Court, rule 8.268(d).

ARGUMENT

I. REHEARING IS APPROPRIATE TO CORRECT A SUBSTANTIVE ERROR IN THE APPELLATE PROCEEDING.

Rehearing is appropriate "for the purpose of correcting any error which the court may have made in its opinion." *San Francisco v. Pacific Bank* (1891) 89 Cal. 23, 25; *In re Jessup* (1889) 81 Cal. 408, 471-472 [rehearing will be granted "[i]f we are satisfied, from the petition, that, owing to any mistake of law

or misunderstanding of facts, our decision has done an injustice in the particular case . . .”].

Appellant respectfully avers that the Court’s Opinion in the present case turns on a void order or judgment which was made by the lower court when it statutorily lacked jurisdiction to enter any orders. Therefore, there is an injustice to the parties by seriously misconstruing and misapplying a void order.

Further, although the opinion was not published and therefore cannot be cited, it is available online and could mislead attorneys seeking guidance regarding the competing anti-SLAPP statute under section 425.16 and vexatious litigant statute under section 391.6, *especially since the stays under these statutes do not appear to have been previously construed together in any case.* Moreover, this case is likely to broadly mislead in regard to libel claims upheld despite the clear connection of protected speech about an attorney’s vexatious litigation conduct and his professional competence and ethics.

A. A jurisdictional error may be raised at any time, including for the first time on appeal, or after final judgment.

Jurisdictional errors can render judgments void, and as such, they may be raised at any time, even on appeal or after final judgment. *Rochin v. Pat Johnson Manufacturing Co.*, 67 Cal.App.4th 1228 (1998) (“*Rochin*”) [“..a void judgment or order may properly be attacked at any time, directly or collaterally.”] This principle is encapsulated in state and federal jurisdictions.

Section 473(d) explicitly provides for the setting aside of any void judgment or order. The California Supreme Court has affirmed that the lack of jurisdiction over a case renders any resultant judgment void, thus subject to challenge at any stage. *Rochin,* [Reversing a void judgment entered in excess of jurisdiction.] Similarly, Federal Rule of Civil Procedure, rule 60(b)(4) allows for relief from a void final judgment, underscoring that jurisdictional defects can invalidate a judgment entirely. The U.S. Supreme Court reinforced this, stating that a judgment is void if the court that rendered it lacked jurisdiction over the subject matter or the relevant parties. *United Student Aid Funds, 545 F.3d 1113,553 F.3d 1193 (9th Cir. 2008)*

In light of these authorities, the Court's reliance on a fundamentally flawed order affects the integrity of its opinion and also represents a continuation of jurisdictional error.

As briefed more fully below, although the jurisdiction issue was not addressed in oral argument or the Opinion, it was in the lower court and in Appellant's briefing. ARB/16. Appellant had no expectation at all, and was thus blindsided by the Court and Justice Goethals' first few comments at oral argument which disclosed that the Court's tentative ruling was to affirm this appeal, based on the Court's determination that the justices had already made their ruling in the earlier G060354 appeal, and thus found it unpersuasive to make any redetermination of the first prong analysis in this appeal.

B. A key question is does section 391.6's statutory stay preempt section 425.16 when a vexatious litigant motion is filed in advance of the anti-SLAPP.

Confusion would likely arise from this Opinion regarding if section 391.6's stay preempts section 425.16's stay under *Varian.* Even if the Court adjudicates the partial stay imposed by the filing of the latter filed anti-SLAPP under section 425.16, the full litigation stay imposed by section 391.6 the month prior trumps. Therefore, *Hanna* and section 391.6 should preempt *Varian* and section 425.16 in regard to divesting the lower court of jurisdiction, and imposing a case stay.

Appropriately construing *Hanna,* the lower court was without authority to rule on the Nabili anti-SLAPP (filed on April 6, 2021 under ROA 124). Likewise, then this Court's Opinion under G060354 (October 5, 2022) may be collaterally challenged as void for lack of jurisdiction.

C. The lower court was without authority to rule on an anti-SLAPP motion before ruling on the vexatious litigant motion.

Consistent with the holding in *Hanna* and section 391.6, the appellate Court finds that the 'trial court was without authority to rule on a motion after the defendant had filed a vexatious litigant motion." Appellant indeed filed extensive briefing precisely on this issue in the lower court. Attached here as Exhibit 1 is the "Joint Statement regarding OSC re Stay Pending Appeal," filed on October 28,2021, ROA 241.

The question of a lower court's lack of jurisdiction to enter anti-SLAPP orders during pendency of the vexatious litigant motion was not only raised in the lower court in 2021, but the statutory section 391.6 stay was also explicitly raised by this Court just last month when it *granted* Appellant's Writ of Supersedeas in G063811- as also attached here as Exhibit 2.

Accordingly, the lower court's section 391.6 briefing is highly relevant to this Court's determination of this Petition. Appellant of course has no authority to speak on behalf of Nabili's legal team or strategy, however, the Opinion in this instant case leaves no choice but to directly address the jurisdictional issue underlying the October 2022 *nonpublished* Opinion in G060354.

D. A void order and opinion are without force and effect.

The California Supreme Court concluded "..that the doctrine of res judicata does not apply to void judgments or orders." *Rochin, supra.* Accordingly, this Court would reasonably determine similarly- that it would not apply the G060354 Opinion neither as res judicata nor collateral estoppel. It would be fundamentally erroneous to apply a void order and the resultant opinion, to this appeal. Like the void orders vacated by *Hanna*, upholding section 391.6, the lower court's May 2021 anti-SLAPP order and G060354. are thus without force and effect. They cannot support or set precedent in this appeal. Therefore, a rehearing should be *granted.*

II. THIS COURT AND THE JUSTICES' INTERPRETATION OF SECTION 391'S STATUTORY STAY ARE WELL KNOWN FOR THEIR METHODICAL CONSISTENCY.

The plain language of section 391.6's mandatory stay and voiding of any orders entered during the stay was perhaps most cleanly underscored in *Hanna*, but has been reiterated in a number of similar cases. *Golin v. Allenby,* 190 Cal.App.4th 616, (2010) [" filing of the vexatious litigant motion otherwise stayed the action under section 391.6.."]; *Bravo v. Ismaj* (2002) 99 Cal.App.4th,211; *Holcomb v. U.S. Bank Nat'l Assn.* (2005) 129 Cal.App.4th 1494; *Stolz v. Bank of America* (1993) 15 Cal.App.4th 217; *In re Shieh* (1993) 17 Cal.App.4th 1154.

As material precedent, this Court and the honorable Justices are dedicated to consistent interpretation of statutes and fair rulings, as noted in the G063811 (*Plummer v. Alai et. al 30-2018-01002061)* order *granting* Appellant's Writ of Supersedeas. Ex./2. The Court's referenced orders are applicable to this case for two equally compelling reasons, one in the context of the 'vexatious litigant' status disputes[9] between the same

9. Notably and of particular interest to this Court, Plaintiffs moved to deem Appellant a 'vexatious litigant' under section 391.6 in 2023, Appellant moved twice to deem Plaintiffs a vexatious litigant in 2018 and 2021.

Of distinct comport, (1) Plaintiffs initiated a new lawsuit in 2020 alleging that Appellant 'defamed' them by purportedly referring to them as a 'vexatious litigant', which Appellant admits she did exclusively within referenced court pleadings, and (2) the lower court

parties as this instant appeal (and Plaintiffs' explicit claim of 'defamation' as to the term 'vexatious'), as well as this Court's adherence to the statutory 'stay' mandate under section 391.6. This Cout's most recent April 24, 2024 Order, and the February 29, 2024 Order in G063811 (attached hereto) are relevant here because the orders *explicitly* reference the statutory stay under section 391.6.

A. Justice Sanchez's order references section 391.6's stay.

In brief, G063811 challenges that lower court's section 391.6 vexatious litigant order entered on February 13, 2024, and its unsealing orders entered on the same day. This Court *granted* an emergency stay of the unsealing orders days after the appeal was filed. On April 24, 2024, the Court on *its own motion* issued a Writ of Supersedeas fully staying the lower court proceedings during pendency of the appeal, apparently in part relying on section 391.6.

Similar to *Hanna*, in G063811 this Court appears to have upheld the comprehensive application of section 391.6's stay provision. The Court's most recent stay order further demonstrates this Court's consistent approach in enforcing section 391.6 and adhering to legislative intent. Further, this Court has demonstrated that any procedural missteps at the lower court that contravene section 391.6 and *Hanna*, will be rigorously scrutinized, and corrected.

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in *Plummer v. Alai* 2018-01002061's February 13, 2024 order which was appealed in G063811-intimates that Plaintiffs' litigation conduct is vexatious and unmeritorious, but that the matter was not before the court. (The referenced order is attached to the Notice of Appeal.)

Therefore, the same section 391.6 stay and *Hanna* application to void orders would obviously be extended to the May 2021 anti-SLAPP order and G060354 opinion.

In light of the foregoing, Appellant's Petition for Rehearing should be *granted* because the Court would likely not proceed in its same course of citing the G060354 Opinion as partial decisional basis *in this appeal.*

III. THE FILING OF A VEXATIOUS LITIGANT MOTION UNDER SECTION 391.6 AUTOMATICALLY STAYS ALL FURTHER PROCEEDINGS IN AN ACTION, AND RENDERS ANY INTERIM ORDERS VOID.

A. Appellant's vexatious litigant motion divested the lower court of jurisdiction until it ruled on the motion in February 2023.

Pursuant to *Hanna* "… section 391.6, all further proceedings in the action should have been stayed once the vexatious litigant motion under section 391.1 was filed." Lower court orders entered during pendency of a vexatious litigant motion are deemed void and vacated by the appellate court. Under section 391.6, the stay remains until that motion has been determined. The statutory language ("shall") suggests that this stay is not discretionary.

In general, orders issued in violation of a mandatory stay have no legal effect. *B.E. Witkin,* 9 California Procedure § 267 (5th ed. 2008) ("A void order is, in legal

effect, nothing; an absolute nullity; the proceedings are coram non judice [before a person not a judge]; disregard of it by the public is proper.")

Appellant's vexatious litigant motion was filed in January 2021 (ROA 58) and was not heard until February 9, 2023 (ROA 317). Pursuant to section 391.6 and *Hanna*, the statutory stay imposed in January 2021 divested the lower court of jurisdiction to enter any other rulings until it ruled on the vexatious motion.

Appellant's anti-SLAPP motion was not filed until the next month- in February 2021. The second Defendant's (Nabili) filed his anti-SLAPP in April 2021. The disputed lower court order on the second anti-SLAPP was entered in May 2021, ROA 161. This Court entered its Opinion on the second anti-SLAPP in October 2022. Because the lower court was statutorily divested of jurisdiction, the May 2021 order is *void*. Even if the lower court entered the disputed order, the appellate Court would vacate such an order- either on a collateral or direct attack. *Hanna.*

A. The lower court neither adopted Hanna, nor calendared the vexatious motion in advance of the anti-SLAPP.

In defense of the lower court, Appellant filed the vexatious litigant motion in January 2021 which was a few short months or so after *Hanna was published* in late August 2020. Therefore, *Hanna* was relatively new, and the court likely did not have an adequate opportunity to become familiar with section 391.6's stay.

But the perfect storm and fundamental errors that flowed from the court's calendaring irregularity and declination to stay the case with the vexatious motion- is far reaching and has adversely affected Appellant's due process, and prejudiced her anti-SLAPP motion determination as explained above.

For the foregoing reasons, this honorable Court has the discretion to independently determine the issues on Appellant's anti-SLAPP, without consideration of the G060354 opinion. Treating G060354 as "law of the case[10]", would be erroneous as it was based on an order entered when the court lacked jurisdiction. Applying those set of facts and pleadings to Appellant's anti-SLAPP is also unduly prejudicial.

B. The balance of harms favors granting this Petition.

The jurisdiction question is foundational because if the underlying lower court order in the G060534 appeal is void for lack of jurisdiction, that determination materially impacts Appellant's instant case. If this Court makes such

10. This Opinion may benefit from a minor correction because it inaccurately adopted Plaintiffs' misstatement that they voluntarily dismissed their claims to conform to the "law of the case". That is not correct. Plaintiffs did dismiss two of their claims against Appellant on January 23, 2023. CT/923-924. However, Plaintiffs' retreat was in direct response to Appellant's section 128.7 motion for sanctions served on January 6, 2023. CT/1186-1200. Notably, the G060354 opinion was posted on October 22, 2022 which was nearly a full 3 months before Plaintiffs partially dismissed their claims.

a determination, then there can be neither res judicata nor collateral estoppel as to Appellant's matter here because the lower court's precedent order and the cited *nonpublished* Opinion in G060354 would be declared void.

Notwithstanding the cited statutory authority under section 391.6 and *Hanna*, a balance of harms analysis also favors the Court *granting* rehearing in this appeal. The further analysis is grounded in the legal authority that the prior appeal also does not meet the requisite elements of res judicata, and thus is inapplicable as such in this appeal. Without the overreach of the prior appeal which appears insufficiently briefed in critical areas, the Court would have reached a different anti-SLAPP analysis here- as set forth below.

Based on the foregoing, and pursuant to rules 8.268 (a)(1) and (b)(1)(A), Appellant respectfully requests that the Court *grant* this Petition for Rehearing.

IV. THE 2021 ANTI-SLAPP ORDER IS VOID FOR LACK OF JURISDICTION.

The Hanna Court vacated all orders entered in the period after the vexatious litigant motion was filed and before its ruling.

In *Hanna*, the appellate court found that the trial court was without authority to rule on several discovery motions after the defendant had filed a vexatious litigant motion. *Hanna* then vacated the lower court rulings made during the pendency of defendant's section 391 motion.

Here, the Court in a collateral attack may deem the May 2021 anti-SLAPP order void.

1. Appellant filed the motion to deem plaintiffs vexatious litigant first.

In January 2021 Appellant filed her first motion in this case- the Motion to Deem Plaintiffs Vexatious Litigants pursuant to section 391.1, ROA 58. In February 2021, Appellant filed her anti-SLAPP motion, ROA 69. Three months later in April 2021, Defendant Nabili filed his anti-SLAPP, ROA 124. Due to calendaring irregularities, both Appellant's motions went off calendar. In May 2021 Nabili's anti-SLAPP was denied, and appealed, ROA 161.

In direct contravention of section 391.6, the lower court erroneously ruled on the May 2021 anti-SLAPP motion during the pendency of the vexatious litigant motion. The court's oversight resulted in fundamentally flawed orders due to lack of jurisdiction, warranting *grant* of this Petition to rectify the jurisdiction error.

B. Appellant raised the jurisdiction issue in the lower court proceedings.

The parties unsuccessfully raised the section 391.6 statutory jurisdictional defect at the lower court a number of times. *See e.g.* Ex./1. The lower court was unpersuaded by the *Hanna* briefing, and eventually stayed the case pursuant to *Varian.* ROA 244.

Joint Statement. The parties filed a Joint Statement in advance of a November 2021 OSC issued by the lower court to stay the case. Defendants judicially noticed the August 2020 *published Hanna Opinion*, and cited section 391.6. The parties expressly requested that the lower court vacate the May 2021 anti-SLAPP order pursuant to *Hanna*. Ex./1.

The Joint Statement stated:

> *"Therefore, notwithstanding Code of Civil Procedure § 425.16 (f) this Court lacked jurisdiction to rule on the anti-SLAPP motions filed by each Defendant, until the Court first determined Alai's January 25, 2021 §391.1 Motion. Accordingly,* ***Defendants further request that the Court as authorized by Hanna therefore vacate its May 13, 2021 Order on Nabili's Special Motion to Strike (which would render Nabili's pending appeal moot),*** *and thus the trial court stay of proceedings which would otherwise apply during the appeal of Nabili's anti-SLAPP pursuant to Varian Med. Systems, Inc. v. Delfino (Varian) (2005) 35 Cal.4th 180, 186, is also moot." [Emphasis added.]*

As outlined by *Hanna* , as an operation of law, the vexatious litigant motion "shall"[11] stay the entire

11. Code of Civil Procedure §391.6 states: "Except as provided in subdivision (b) of Section 391.3, when a motion pursuant to Section

proceedings. Section 391.6 does not carve out any exception for proceedings that may continue during that period except for the dismissal of the action under section 391.3, subdivision (b). That exception did not apply here. However, despite the Joint Statement, and the parties appearing for oral argument and asserting the same, the lower court neither vacated the May 2021 order nor calendared the vexatious litigant motion.

At the time of the Joint Statement, the parties explained at the OSC that they did not dispute that pursuant to section 425.16 and *Varian,* the discovery and case are stayed pending an anti-SLAPP appeal. However, in this context, the case was statutorily stayed prior to that because of Appellant's vexatious motion.

However, the trial court did not adopt that *Hanna* is dispositive and holds first, not *Varian. Hanna* holds because the vexatious litigant motion was filed the month prior to Appellant's anti-SLAPP motion. Thus, the case must have been stayed in January 2021, and any orders entered in the interim period would be void pursuant to *Hanna- because of lack of jurisdiction.*

391.1 is filed prior to trial the litigation is stayed, and the moving defendant need not plead, **until 10 days after the motion shall have been denied**, or if granted, until 10 days after the required security has been furnished and the moving defendant given written notice thereof. When a motion pursuant to Section 391.1 is made at any time thereafter, **the litigation shall be stayed** for such period after the denial of the motion or the furnishing of the required security as the court shall determine." [Emphasis added.]

The parties expressly requested at the lower court that

> "*Given that this matter may be inappropriately stayed until 2022 or 2023 while Nabili's appeal would otherwise be pending, Defendants respectfully request that the Court re-set Alai's vexatious litigant motion such that it may be heard within the next thirty (30) to sixty (60) days, and vacate the Order on Nabili's Anti-SLAPP motion.*"

The court stayed the action citing *Varian*, declined to hear the vexatious motion, and further ordered Nabili's appeal to proceed- which it did. That resulted in the G060354 Opinion.

C. Appellant attempted to raise the jurisdiction issue in appellate briefing.

Although Appellant attempted to raise the jurisdiction question before this Court (ARB 16,fn5), apologetically- this effort in hindsight appears insufficient. At oral argument, Appellant failed to assert that the lower court's order in the prior appeal was void for a number of reasons. First, none of Appellant's counsel frankly had any advance expectation that the Court would directly apply the G060354 Opinion to this case. Had a possibility of res judicata or collateral estoppel been known or reasonably anticipated, the jurisdictional issue could have been discussed in Appellant's Opening Brief. Secondly, once the Court made it apparent at oral argument that

essentially its G060354 Opinion is 'law of the case', Appellant lacked opportunity to fully process that unexpected determination and was further blindsided by Plaintiffs' pretextual assertion at oral argument- and the time and efforts ultimately allocated to his substantively and procedurally immaterial statement. Opinion, p.1fn.

V. THE ALLEGED LIBELOUS SPEECH CONSTITUTES CONSTITUTIONALLY PROTECTED STATEMENTS OF PUBLIC INTEREST ABOUT AN ATTORNEY'S PROFESSIONAL COMPETENCE AND ETHICS, AND PETITIONING ACTIVITY PROTECTED BY THE NOERR PENNINGTON DOCTRINE.

Appellant's alleged speech about an attorney's vexatious litigant status and safety of his public facing law office are matters of public interest, directly relate to professional competence and ethics, and are thus protected under the First Amendment of the United States Constitution. Further, the Noerr Pennington Doctrine protects both Appellant's alleged defamatory Amicus Brief[12] and government petitioning activity in connection with (1) Plaintiffs' vexatious litigation conduct, and (2) Plaintiffs' noncompliance with building regulations and city licensing permits. Therefore, at a minimum, the alleged speech satisfies the first prong of the anti-SLAPP statute under the second, third, and fourth constructs: sections 425.16 (e)(2), (e)(3), and (e)(4).

12. As a reliable indica of Plaintiffs' scienter, they admit they their libel case against Appellant is about her "filing the Amicus Briefs *in cases that do not involve Ms. Alai*.." RB/29.

There are four legally sufficient reasons why the Court should *grant* rehearing, and find that the alleged speech is constitutionally protected and satisfies the first prong of the anti-SLAPP statute: (1) the G060354 Opinion is based on a void order, and thus would not be citable. If that Opinion and order are void, a fully de novo review of the entire record on this appeal would be required; (2) if a de novo review is undertaken of Appellant's anti-SLAPP, Plaintiffs' operative Complaint will be found to lack specificity for libel or recitation of the actual libelous words, and the alleged speech will be found to be constitutionally protected; (3) the alleged speech will also be found to be protected by Appellant's explicit government and court petitioning activity under the Noerr Pennington Doctrine[13]; and (4) Plaintiffs at this appellate oral argument conceded that their alleged claims against this Defendant arise not from the website, but from her April 27, 2019 Amicus Brief, which directly implicates Civil Code section 47(b) (absolute litigation privilege).

Even if the Court finds the jurisdiction issue unpersuasive, and determines that neither of the First Amendment protections apply, it will find that the one-year statute of limitations has run and extinguishes Plaintiffs' libel claims as the subject Amicus Brief and website

13. The Noerr-Pennington Doctrine extends First Amendment protection to government petitioning activity, including litigation-related conduct. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 [1972]. Here, both of Plaintiffs' claims regarding his 'vexatious litigant status' and 'failure to obtain business permits' fall under government petitioning activity, and are thus protected. CT/223,¶5;240.

were all known to Plaintiffs no later than April 27, 2019 (MJN/91), which was at least a full month before they filed this action in May 2020. In any of these events, Plaintiffs' remaining libel cause of action would be stricken.

A. Plaintiffs' Complaint fails to plead libel with requisite specificity.

To plead libel, Plaintiffs are required to recite with specificity the libelous statements. *Kahn v. Bower* (1991) 232 Cal.App.3d 1599 (*Kahn*.)[14] Plaintiff's First Amended Complaint fails such specificity because it alleges "… defame Plaintiff in their professional capacity, ***such as*** the office was unsafe and unpermitted and the Plaintiffs are vexatious litigants." (Opinion/p.10) [Emphasis added]. Here, '*such as*' hardly suffices as specific, and an overbroad construct cannot form the basis for a libel claim. Plaintiffs' pleading must fail for lack of specificity under *Kahn*. Plaintiffs' Complaint does not state that the website or Defendants stated "the office is unsafe" for instance, and hence it does not list the exact defamatory words which must be clearly alleged. Plaintiffs' pleading artifice

14. "The general rule is that the words constituting an alleged libel must be specifically identified, if not pleaded verbatim, in the complaint. (5 Witkin, Cal. Procedure (3d ed. 1985) Pleading, § 688, p. 140; *des Granges v. Crall* (1915) 27 Cal. App. 313, 315 [149 P. 777]; *Lipman v. Brisbane Elementary Sch*. Dist. (1961) 55 Cal. 2d 224 [specific words or substance, in slander action]; *Okun v. Superior Court,* 29 Cal. 3d 442, 458 [slander action, noting libel rule].) The instant complaint alleges only that defendant's letter is false insofar as it "stated [plaintiff] was incompetent to do her job as a Child Welfare Worker I.""

is obviously because neither the website nor Defendants make these statements at all.

B. The Court examines the Complaint and website.

In the first prong of the anti-SLAPP, the Court examines if the complaint arises from protected speech. A defamation claim looks at the statements alleged, but also looks at the content of the website[15] as evidence provided by the parties. CT/226-229,111. The actual website will be used by the Court to determine the context of the speech, as well as the presentation of evidence by the parties.

Here, Plaintiffs' *unverified* Complaint references the website markpummerattoreny.com, and their core defamation allegations of '*vexatious litigant'* and '*unsafe and unpermitted* [office premises]' are unsupported by the website, Exhibits, and Judicially Noticed Records. To be clear the terms '*vexatious litigant'* appears nowhere on referenced website. Without the defamatory terms, Plaintiffs' *unverified* libel complaint folds like a house of cards.

"[C]onsideration is limited to the factual allegations in plaintiff['s] amended complaint, which are accepted as true, to documents attached to the complaint as an

15. The Court is limited to the documents attached to the complaint as exhibits or incorporated by reference, and matters of which judicial notice may be taken. *Staehr v. Hartford Fin. Servs.*, 547,F.3d,406,425 (2d,Cir. 2008), *Faconti v. Potter* 242 Fed. Appx.775,777 (2d,Cir. 2007).

exhibit or incorporated in it by reference, to matters of which judicial notice may be taken, or to documents either in plaintiff['s] possession or of which plaintiff['s] had knowledge and relied on in bringing suit." *Brass v. American Film Technologies, Inc.*, 987 F.2d 142, 150 (2d Cir. 1993). Based on the website, Plaintiffs can prove no set of facts in support of their libel claim which would entitle them to relief. *Sheppard v. Beerman*, 18 F.3d 147, 150 (2d Cir. 1994).

Notably, these alleged defamatory statements ['vexatious litigant' and 'unsafe office'] are, however, statements or inferences taken directly from Appellant's pleadings and Amicus Brief filed 13 months prior to this instant action, which thus are stale because the one-year statute of limitations has run. MJN/10-89;91-105. ARB/26. Lastly, even if the Court determines that the one-year defamation SOL had not run, the Supreme Court is clear that posting of court pleadings on digital platforms is protected speech. *Cox Broadcasting Corp. v. Cohn* (1975) 420 U.S. 469. Appellant's pleadings and Amicus Brief (MJN/91) as posted on websites are also protected by the Communications Decency Act. Hence, by the very nature of the subject website being a fully public forum for information, its content is not actionable.

C. The Court may reconsider its assessment of the first prong of the anti-SLAPP statute on its own motion.

Courts have inherent power to amend their prior orders, either on their own motion or on motion of a party.

*Francois v. Goe*l, 35 Cal.4th 1094, 112 P.3d 636 (2005) [Cal. Supreme Court holding a court's inherent authority, on its own motion, to review prior rulings in "derived from the California Constitution".] Whether the court acts *sua sponte* or in response to a litigant's motion is "to be a distinction without a difference." *Remsen v. Lavacot* (2001) 87 Cal.App.4th 421.

Here, it appears that Plaintiffs led the Court astray to finding the first prong unmet as to 'garage office' and the 'vexatious litigation' issue. The markplummerattonrey.com website actually states that Plaintiffs file 'vexatious and meritless litigation', an opinion which is clearly protected speech under Article I of the United States Constitution. The website also apparently includes a Google maps photo of Plaintiffs' office garage at 18552 Oriente in Yorba Linda, which is neither defamatory nor false because it is a publicly posted internet photo and Plaintiff admits his office is a converted garage- hence substantially true. Therefore, once the Court is satisfied that the first prong is met, the second prong would also be satisfied.

D. Both alleged statements are constitutionally protected and satisfy the anti-SLAPP's first and second prong analysis.

The Court and all parties agree that internet postings on public websites that 'are open and free to anyone who wants to read the messages' and 'accessible free of charge to any member of the public' satisfies the public forum requirement of section 425.16.

The issue was that the Court was thereafter led astray through Plaintiffs' unchallenged and unsupported statements in the prior appeal. Plaintiffs' First Amended Complaint alleges "…defame Plaintiff in their professional capacity, ***such as*** the office was unsafe and unpermitted and the Plaintiffs are vexatious litigants." (Opinion/p.10) [Emphasis added].

Even if the Court determines that the alleged libelous words (which are not specifically pleaded), or the alleged inferences (which do not even appear on the website), can form the basis for defamation- they are still protected under the anti-SLAPP statute because they go to the heart of an attorney's incompetence and lack of professional ethics.

The public has a legitimate interest in knowing about an attorney's adherence to ethical standards and ability to comply with the law. Statements about an attorney's vexatious litigant status and the safety of his office are matters of public interest because: (1) They directly relate to the attorney's professional competence and ethics, which the public has a right to evaluate; (2) An attorney's storefront office is publicly accessible, making the safety and professionalism of that environment a matter of public concern; and (3) the public has an interest in knowing whether an attorney can responsibly handle their own legal affairs, especially given the potential impact on their ability to provide effective representation.

Therefore, the first prong is met under the third category of protected activities in § 425.16 subdivision

(e)(3): "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest."

1. An attorney's vexatious conduct or litigant status goes to professional competence and is of public interest- thus protected speech.

A nuanced finding that an attorney's vexatious litigant status or unsuccessful litigations conducted on his own behalf are not of public interest and do not even minimally reflect on incompetence or dishonesty would be considered as overly narrowly construed and a misinterpretation. *In re Shieh* (1993) 17 Cal.App.4th 1154, *Standing Committee v. Yagman*, 55 F.3d 1430 (9th Cir. 1995) [holding that a declarant's statement was non-actionable opinion where he explicitly disclosed its factual basis], [quoting "A statement of opinion of this sort doesn't "imply a false assertion of fact," Milkovich, 497 U.S. at 19, 110 S.Ct. at 2706, and is thus entitled to full constitutional protection.]

Of all considered professions, an attorney's 'vexatious' conduct is of paramount public interest because an attorney's reputation among other attorneys and judges directly impacts their perceived credibility. Furthermore, an attorney who conducts vexatious litigation on his own behalf- where he unsuccessfully sues for himself (in *pro persona*) in the matters most important to him, where he naturally has the highest incentive and interest to prevail- is reasonably of public importance.

In other words, of all possible professions, an *attorney's* 'vexatious' conduct is of substantial public interest because the attorney's reputation and success in representing his own interests are material to the public when deciding to hire an attorney who could 'win' for them. Further, it would affect an attorney's ability to provide competent legal advice to clients, hence o public concern and aligned with assessment of attorney competence.

The term 'vexatious litigant' under section 391 indeed goes to the heart of a litigant who while representing themselves in litigation without retained counsel is *unsuccessful* in at least 5 litigations in 7 years. Hence, 'vexatious litigation' goes to the heart of an attorney's competence and honesty, both of which this Court determined are 'protected speech.' A competent pro per plaintiff would not be repeatedly unsuccessful in their litigations, hence a vexatious attorney would constitute an explicit remark on the attorney's professional competence, or lack thereof. For a number of reasons, a determination that applying the *term 'vexatious' to an attorney* is not Constitutionally protected speech or protected under the first prong of the anti-SLAPP statute (as to professional competence) would be fundamentally erroneous and set a dangerous precedent.

Lastly, an attorney who does obsessively or regularly sue for himself is a public risk of suing his clients as well- which is an important fact for the public to know in selecting an attorney for their own legal services. These are a consumer warning to others with potentially similar issues. *Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883,898-

899. A vexatious litigant attorney would be predisposed to sue his clients for any number of reasons- which would not compel a non-vexatious attorney to do so. In other words, if a dispute arose between a client and a non-vexatious litigant attorney, the public would be interested to know that information because the vexatious attorney would be predisposed- 'trigger happy'- and more likely to sue. Therefore, "vexatious litigant" even if it appeared on the website, would fail under the third category of protected speech under section 425.16.

2. An attorney's failure to comply with regulation or law is also of public interest, thus protected speech.

An attorney who himself fails to comply with regulations and laws in conducting his own affairs and businesses, cannot be expected to competently advise and direct the public on similar legal matters. Such a determination would go to the heart of both competence and honesty. It would be a logical basis that the public would find that information material and relevant to making decision to retain such an attorney. In other words, an attorney who cannot be trusted to comply with building code and permit regulations, could reasonably not be trusted with client's matters. Either the attorney is unknowledgeable about the laws and regulations governing his building permit conduct, or is knowledgeable but is unwilling to comply. Either way, the information and statements about such conduct are nuanced when they involve an attorney, and thus serve the public interest and are protected speech. For the same basis that this

Court affirmatively found that statements of professional *incompetence or dishonesty* are fully protected speech, so should be statements about an attorney who fails to comply with building permits and premises regulations for their place of business. These too go to the heart of professional competence and ethics, hence protected speech.

Lastly, an attorney's public facing law office is of public interest because if an attorney does not comply with building permit requirements, that is also a remark about the attorney's competence and ethics. Here, Plaintiffs fully admitted that they conducted party depositions in the unpermitted garage office space from at least 2010-through March 2011. ARB/32-33. Thus, the matter of the garage office is unequivocally of public interest and protected speech. ARB/36.

3. The Court incorrectly adopted Plaintiffs' claims as to his garage office.

This Court made express findings in G060354 that "*Plaintiffs submitted evidence that their office is neither a garage nor unsafe*." However, Plaintiffs' declaration within this appeal fully controverts the Court's prior findings. ARB/32-36. First, G060354 is void pursuant to *Hanna*, and is inapplicable as law of the case. Even if it was applicable, that would assist Appellant because Plaintiff fully admitted in this instant appeal that his office *is converted and used as an unpermitted garage.* Laying out Plaintiffs' declaration, it is evident that Plaintiffs are unable to meet either prong of the anti-SLAPP statute, or even prove falsity- which is the death knell to a defamation

claim. ARB/31-32. Here, Plaintiffs' purported garage defamation claims similarly fold like a house of cards. For these reasons, *grant* of rehearing is appropriate.

E. The elements of res judicata are unmet.

Even if the Court determines that the findings in G060354 were not void under section 391.6, those findings should not be applied to this Appellant because they fail the test for res judicata.

Applying the test of *Pike v. Freeman,* 266 F.3d 78, 91 (2d Cir. 2001) for applying the doctrine of res judicata—that (1) the previous actions involved final adjudication on the merits; (2) the previous actions involved the *same parties*; and (3) the claims asserted in the instant action *could have been raised in the prior action*- this Appellant's anti-SLAPP appeal is not barred by res judicata. For a number of reason, Appellant should not be subjected to res judicata for G060354, especially if this Court ultimately disapproves the underlying lower court's order for lack of jurisdiction.

CONCLUSION

For the above stated reasons, and as set forth by Code of Civil Procedure §391.6 and *Hanna* (voiding orders entered without jurisdiction during the pendency of a vexatious litigant motion), the Court is respectfully requested to *grant* Appellant Ms. Alai's Petition for Rehearing, and vacate the nonpublished Opinion in G062355 pursuant to Rules of Court, rule 8.268(d).

Appendix H

LAW OFFICES OF GLORIA JUAREZ

May 9, 2024

Respectfully submitted,

By: S/GJuarez

Gloria M. Juarez
Attorneys for Defendant and
Appellant
NILI ALAI

APPENDIX I — APPELLANT'S REPLY BRIEF IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE, FILED NOVEMBER 6, 2023

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE

G062355

MARK B. PLUMMER &
LAW OFFICES OF MARK PLUMMER PC,

Plaintiffs and Respondents,

v.

NILI ALAI,

Defendant and Appellant.

Appeal From Orange County Superior Court
Central Justice Center
Hon. Melissa McCormick
Trial Court Case No. 30-2020-01141868

[TABLES INTENTIONALLY OMITTED]

[9] **INTRODUCTION**

This complex appeal requires a *de novo* review of a denied Special Motion to Strike ("anti-SLAPP") by

Defendant/Appellant Nili Alai ("Ms. Alai"). In part, the complexity arises from the fact this this appeal comes a full year after appellate determination of another, fundamentally different anti-SLAPP appeal by a second defendant[1], emphasizing the distinct facts, defenses, and legal questions of the two appeals. We set forth a compelling case for reversal, as this appeal underscores significant reversible errors committed by the trial court. The Appellant's Opening Brief ("AOB") presents a comprehensive analysis of the legal quandaries stemming from Plummer's "defamation" lawsuit, demonstrating the need for remedial action reversing the lower court's two flawed rulings.

The AOB elaborates more fully on the trial court's prejudicial errors, including (1) the unwarranted summary dismissal of Ms. Alai's anti-SLAPP as "moot" solely on the misguided notion that it was "identical" to the prior defendant's anti-SLAPP and thus that defendant's appellate ruling somehow bars Ms. Alai's application for relief; and (2) the denial of Ms. Alai's attorney disqualification motion despite district standards barring Plaintiff/Respondent Plummer from taking an impermissible dual advocate-witness role in this proceeding.

[10] Ms. Alai's appeal raises seven core issues, notably the trial court's reluctance to align with the legislative intent of Code of Civil Procedure §425.16, and the court's declination to review the merits of her defamation

1. Defendant Nabili appealed his anti-SLAPP in 2021 in case G060354.

defenses. These defenses turn on *(1) First Amendment speech, (2) substantial truth, (3) litigation privilege; Civil Code §47(b), (4) limited public figure and lack of malice, (5) the Communications Decency Act under 47 U.S.C. §230, (6) the statute of limitations, and (7) the Noerr-Pennington Doctrine*—each solidifying the legislative position that the speech in question is protected and thus squarely fitting for dismissal under the anti-SLAPP statute.

Plummer's "defamation" lawsuit against Ms. Alai admittedly arises directly from her pleadings and statements in his 2018 fee dispute lawsuit against her. Having had no success in his first lawsuit, Plummer spuriously filed this second parallel suit in reprisal for her litigation speech. In this derivative suit, Plummer pretextually alleges Alai made defamatory digital platform statements—a claim that is patently legally meritless and lacks factual support. The crux of Plummer's grievances arise from Alai's prior motion to deem him a "vexatious litigant" and an Amicus Brief filed in earlier litigation—hence protected litigation speech under Civil Code 47(b).

This Appellant's Reply Brief is tendered to correct the misstatements and presumptions inherent in Plummer's [11] Respondent's' Brief ("RB"). It emphasizes the reasons why this Court should set aside or reject Plummer's inaccurately captioned "Respondents' *Opening* Brief", and reverse the lower court two rulings.

In sum, the balance of harms strongly favors reversing the trial court on both of these issues, and remanding with directions to *grant* the anti-SLAPP and attorney disqualification motions.

CASE OVERVIEW

This appeal stems from the trial court's denial of Ms. Alai's anti-SLAPP and attorney disqualification motions in parallel litigation initiated by Plaintiffs/Respondents Mark Plummer and the Law Offices of Mark Plummer (collectively "Plummer").

Here, Plummer alleged defamation, declaratory relief, false personation, and tortious interference. Plummer dismissed two of these claims in 2023 following Alai's Section 128.7 motion for sanctions. CT/923-924; 1186-1200. Plummer's only remaining claim (defamation and declaratory relief), akin to his prior voluntary dismissals of his "false impersonation" and "interference" claims, is both factually and legally untenable, making it apt for dismissal under Code of Civil Procedure[2] §425.16—the anti-SLAPP statute.

Plummer's operative allegations, which falsely attribute statements to the website labeling him as a 'vexatious litigant' and his office 'unsafe'—statements that are in fact nowhere to be found [12] on the site—are exclusively derived from Alai's protected speech in the

2. All further references are to the Code of Civil Procedure unless noted otherwise.

form of statements and pleadings from the predecessor litigation. Alai's pleadings sought to deem Plummer a "vexatious litigant" and to dismiss his claims based on unlawfully operating without the requisite licenses.

In its prior ruling as to another defendant's anti-SLAPP (G060354), this Court ruled that Plummer's claims stemmed from protected speech. Nevertheless, relying on Plummer's *unopposed* misstatements, it held there was evidence refuting claims of his office being a garage conversion or unsafe. Plummer has since in this appeal admitted under oath to using a converted residential garage for business without necessary permits, undermining the Court's prior findings on safety and falsity (CT/125-126; ¶¶15,33,34).

Plummer's own sworn testimony regarding the use of a converted residential garage for business without the necessary permits critically undermine both the allegations of premise safety and the Court's previous findings predicated on these claims. *Id*. ¶15. Under the plain language and ordinary meaning of "unsafe", an *unpermitted* usage of a structure for public and quasi-judicial proceedings would not be safe—hence by Plummer's admission—a substantially true statement. Hence there is material evidence as to both premise "safety" and public interest.

Likewise, in the same ruling, based on Plummer's unsupported claim that the website expressly states he is a [13] "*vexatious litigant*"—the Court determined that a key alleged website statement that "Plaintiffs

are vexatious litigants" would not be protected speech. However, Plummer misrepresented the challenged website. In reality, the website actually states Plummer "*files vexatious and meritless lawsuits*"—a protected opinion.

In assessing Plummer's claim, it is pivotal to discern with granularity the true character of his allegations. The core of Plummer's misrepresentation hinges on the depiction of his litigation conduct on the website. Contrary to Plummer's assertion, the website does not label him explicitly as a 'vexatious litigant'; rather, it delineates his actions as 'vexatious and meritless lawsuits'—a distinction of considerable legal import. This erroneous representation of content from the website has clouded the factual matrix and, in turn, potentially influenced the Court's interpretation of the underlying motives and credibility of the statements in question.

To provide context, both Ms. Alai and the other defendant have sought to classify Plummer as a 'vexatious litigant' based on his litigation history, an assertion that aligns with the narrowly[3] missed statutory designation in the 2018 trial court and lends credence to the challenge of Plummer's defamation claim. Both [14] defendants have a genuine and good faith belief that Plummer statutorily qualifies as a vexatious litigant. Otherwise, their counsel would not have pursued the costly and labor-intensive

3. The 2018 trial court was one (1) case short of deeming Plummer a vexatious litigant under Section 391—hence even such an extrajudicial statement had it been made would have been substantially true and not defamatory.

vexatious status review before this Court (G062753[4].) This context further mitigates against defamation because there is no element of malice.

This broad picture demonstrates that, in reprisal, Plummer is pretextually advancing knowingly false statements in order to press a legally defective defamation claim against Alai for her protected pleading speech. Given that the alleged "vexatious litigant" website statements which Plummer attributes appear nowhere on the site, there can be no colorable defamation claim for phantom statements.

[15] Plummer fails to establish a *prima facie* case for defamation. Plummer also has not shown that the alleged statements in question were not covered by absolute litigation privilege under Civil Code §47(b), qualified privilege—among other protections. *Flatley v. Mauro*, 39 Cal. 4th 299, 326 (2006). Lastly, in light of Plummer's retreat from his earlier sworn testimony denying his garage status, this Court's prior determination on another defendant's appeal should neither apply to Alai's appeal nor to its *de novo* determination.

Plummer also fails to meet the burden of showing a likelihood of success on the merits, stumbling at both the first and second prongs of the anti-SLAPP analysis. Further sealing the fate of his claims, Plummer finds himself ensnared by the defenses ranging from the statute

4. This was an unsuccessful 2023 writ taken from a denial of a motion to deem Plummer a vexatious litigant.

of limitations to the Noerr-Pennington doctrine. His futile quest for declaratory relief for a "gag order" is also doomed to fail because he seeks to gag a public website in violation of Section 230 of the Communications Decency Act (CDA), 47 U.S.C. § 230, which serves as a bulwark against claims arising from third-party content published on an interactive computer service. The site apparently has hyperlinks to various unfavorable Plummer lawsuits and judgments. In sum, this appeal underscores the applicability of the anti-SLAPP statute to Plummer's baseless defamation claims. It also highlights the judicially protected nature of the disputed litigation pleadings.

In closing, Alai's statutory right to attorney's fees and costs—both at the trial court level and on appeal—serves as a fitting reprimand for Plummer's vexatious and groundless litigation practices. Respectfully, this Court is urged to reverse the trial court's decisions, granting Ms. Alai's anti-SLAPP and attorney disqualification motions.

SUMMARY OF ISSUES AND ARGUMENTS

Plummer unsuccessfully represents Ms. Alai on a contingency-based personal injury matter in 2017, and [16] audaciously sues her in 2018 for alleged "unpaid fees" under an alternate quantum meruit theory despite a valid written contract. Alai cross-sues Plummer for negligence, breach of fiduciary duty, accounting, *defamation*, and fraud. Plummer loses his anti-SLAPP motion and appeal, and still owes Alai on a cost judgment.

During pendency of his first lawsuit, in reprisal, Plummer files a second lawsuit in 2020, now derivatively

claiming "defamation" which he never raised in his first lawsuit. Alai files an anti-SLAPP motion in January 2021, which the parties fully brief. She also files a motion to deem Plummer a vexatious litigant.[5] The other defendant later files an anti-SLAPP motion in April 2021. Alai's anti-SLAPP was to be heard concurrently with the other defendant. The other defendant's anti-SLAPP is heard, denied, and partially overturned on appeal. Alai's anti-SLAPP and vexatious motions fall off calendar and are reset for hearing in February 2023. Plummer withdraws two of his claims during the pendency of Alai's motions, leaving only his defamation claim operative. Plummer is disqualified in October 2022 under Professional Rules of Conduct, Rule 3.7 [witness-advocate rule prohibition] in his first lawsuit. Alai moves to disqualify him in this second lawsuit for the same facts and law.

[17] The trial court summarily denies Alai's anti-SLAPP as "moot" incorrectly deeming it as "nearly identical" to another defendant's prior motion. It also denies her vexatious litigant motion, and her application to disqualify Plummer as counsel. This appeal follows.

This is an appeal of the denial of the anti-SLAPP and attorney disqualification motions. Appellant Alai seeks dismissal of Plummer's defamation claim because the alleged website speech claims arise from either phantom statements, or acts in furtherance of the right

5. Under Code of Civil Procedure §391.6 Alai's vexatious litigant statutorily stayed the entire litigation. *Hanna v. Little League Baseball, Inc.*, 53 Cal.App.5th 871, 267 Cal. Rptr. 3d 845 (Cal. Ct. App. 2020) However, the court would not stay the action.

of petition. Given their importance in fostering public discourse, digital media and websites are afforded broad anti-SLAPP protection.

Plummer admits his defamation grievance against Alai specifically is about her two court pleadings (a motion to deem him a vexatious litigant and an Amicus Brief outlining his failures to comply with professional business and permit licenses), hence also protected litigation speech. Alai's truthful speech also cannot form the basis of a colorable defamation claim. To the extent Alai's alleged statements were defamatory, they are protected as they were made in good faith and with due diligence. Plummer has not conclusively demonstrated that Alai's pleadings and statements amounted to defamation as a matter of law. Further, public interest matters including a lawyer's ethics, honesty, and competence—or lack thereof—are protected speech. There is further a public interest in professional conduct and licensing. Plummer did not make a *prima facie* showing that he can prevail on the [18] merits of his claims against Alai. Since, a plaintiff has the burden of demonstrating that he has a probability of prevailing on his claims, Plummer inevitably fails the first and second prongs of the anti-SLAPP analysis. Since his defamation claim fails, Plummer cannot prevail on his declaratory relief claim.

Alai seeks dismissal of Plummer's claim pursuant to the anti-SLAPP statute. The Rule 3.7 disqualification motion should also be granted in line with district standards because Plummer's unethical dual role as witness-advocate violates the rules, confuses the jury, and compromises the fairness of the proceedings.

Plummer. In his Respondent's Brief (RB), Plummer appears more focused on gaslighting rather than addressing the core issues at hand. Plummer injects salacious and irrelevant statements which are not part of the appellate record, rehashing previously refuted arguments from his 2018 lawsuit against Alai, and generally seeks to divert the court's attention from the central questions on this appeal. It is unclear if Plummer's brief is arguing for this appeal, or his second bite at the apple on his prior appeal in the other defendant's motion. Plummer's lack of relevant focus and reliance on tired and internally contradictory claims should signal to the Court that it is not worthy of serious consideration.

In sum, this complex appeal demonstrates that the balance of harms strongly favors *reversing* the trial court, and remanding with directions granting the Alai anti-SLAPP motion with costs [19] and fees in the lower court and on appeal, and reversing the denial of the attorney disqualification motion.

QUESTION PRESENTED ON APPEAL

Ms. Alai raises three questions on appeal:

(1) Whether the trial court prejudicially erred in denying her anti-SLAPP motion based on an overbroad application of the appellate opinion concerning another defendant, thereby negating her distinct defenses;

(2) Whether the trial court committed reversible error by not addressing the merits of her unique defamation defenses and circumstances; and

(3) Whether the trial court erred in denying her attorney disqualification motion without adhering to the circuit standards and procedural rules requiring a statement of the decision for denial of such motions.

RESPONDENT'S ARGUMENTS

In his abbreviated Respondent's Brief, Plummer actually *copied and pasted* verbatim 15 pages of this Court's opinion from another defendant's appeal as pages 29 to 43 of his brief. In the remaining few pages, Plummer appears to advance five main arguments:

(1) Plummer (mis)states that Alai's anti-SLAPP motion is "identical" to the prior defendant's anti-SLAPP;

* * *

[23] reaffirmed by *Rivero v. American Federation of State, County and Municipal Employees* (2003) 105 Cal. App.4th 913, 919.

Plummer's attempts to hold Alai's anti-SLAPP and subsequent appeal as "identical" to the previous defendant's circumstances are unfounded and constitute a disservice to the judicious review process. Plummer pretextually claims Alai's anti-SLAPP is "identical"—but as outlined below, it is nothing remotely like the prior matter before this Court. Plummer disconcertingly directs this Court to eschew judicial rigor in favor of an expedient endorsement of a prior decision, disregarding the nuanced and vast differences in evidence and factual

matters pertinent to Alai's defense.

In this flawed strategy, Plummer therefore demands of this Court as he did the trial court to dispense with the required formalities—he suggests to simply rubber-stamp the prior opinion to this new appeal without any review of Alai's evidence. In fact, Plummer *verbatim* copied and pasted the entire prior defendant's opinion directly as a *full fifteen-pages* of his respondent's brief. However for a number of legally sufficient reasons, this Court should not accede to Plummer's proposal, as the defamation complaint is rife with deficiencies, including a lack of concrete defamatory statements and insufficient evidence of any connection to the disputed website content to Alai. Based on the foregoing combined with phantom libelous statements which appear nowhere on the disputed website, the Court is not required to look [24] beyond Plummer's complaint and pleading failures in reversing the trial court's anti-SLAPP order.

However, Plummer's Respondent's Brief turns largely on this Court's prior appellate opinion. In an abundance of caution, we'll thoroughly discuss the two potentially non-protected speech as cited by this Court—(1) Plummer's 'garage' and (2) his 'vexatious litigant' claim.

A. The Court Reviews This Anti-SLAPP On A De Novo Basis.

Notwithstanding Plummer's lack of colorable defamation claims as discussed below, the Court evaluates the parties' evidence, and applies the *de novo* standard to determine whether Alai has demonstrated her speech was

protected, and whether Plummer shows a probability of prevailing on the merits. *Rivero v. American Federation of State, County and Municipal Employees* (2003) 105 Cal.App.4th 913, 919. AOB/35.

It is crucial to this Court's determination to (1) objectively examine the sparsely paginated disputed website (CT/226-229, 111) and observe that it does not state any of the things which Plummer claims it does, (2) perform a thorough factual analysis of Alai's anti-SLAPP motion (CT/59-77), request for judicial notice (CT/79-111), and Declaration and exhibit thereto and observe the substantial truth of the alleged statements as well as analyze the litigation privilege context, and (3) substantially scrutinize the internally contradictory Plummer pleadings and evidence. The issues in this appeal are quite granular, heavily fact dependent, [25] and the nuances require an in-depth analysis. Otherwise, there exists a high likelihood that reliance on Plummer's contradictory and unsupported statements, and his demonstrable gaslighting would blur the issues sufficiently to yield an unjust result.

1. The Sparsely Paginated Website Refutes Plummer's Allegations Regarding Content.

Regardless of any prior review by this Court, it is crucial to this Court's *de novo* determination of this appeal to first objectively examine the sparely paginated disputed website www.markplummerattorney.com because it says nothing which Plummer claims it does. CT/226-229,111. It is not densely paginated, and its actual content is key

to this Court's adjudication. Without that, Plummers' house of cards folds, and his complaint fails as a matter of law. This is because based on both a wholly insufficient defamation complaint combined with phantom libelous statements which appear nowhere on the disputed website, and insufficient evidence establishing a nexus or authorship of the website to Alai, the Court is not required to look beyond Plummer's Complaint and pleading failure in reversing the trial court's anti-SLAPP order.

Plummer already fully conceded that he fabricated his claims of "*dishonest and incompetent*" in both iterations of his complaint, and thus voluntarily dismissed those claims in January 2023 following Alai's service of her Section 128.7 motion for sanctions. CT/923-924,1186-1200. Further, Plummer's partial dismissal occurred within days of the February 2023 hearing [26] and during pendency of Alai's anti-SLAPP. Likewise, Plummer's alleged statements "*vexatious litigant*" and "*unsafe and unpermitted*" office do not appear on the digital platform at all. CT/226-229. Neither does anything about Plummer being "dishonest" or "incompetent". *Id*. These are, however, statements or inferences taken directly from Alai's pleadings and Amicus Brief. MJN/10-89;91-105. Put simply, the responsibility to frame the libel cause of action lies squarely on Plummer. He cannot claim a likelihood of success based on supposed false and defamatory statements that are neither mentioned nor alluded to in the complaint (or on the disputed website.) *Medical Marijuana, Inc. v. ProjectCBD.com* (2020) 46 Cal.App.5th 869, p.895.

The website's straight hyperlinks to various Plummer court pleadings and orders are not actionable. The Supreme Court is clear that posting of court pleadings on digital platforms is protected speech. *Cox Broadcasting Corp. v. Cohn* (1975) 420 U.S. 469 (Cox). These are also protected by the Communications Decency Act. Hence, by the very nature of the website being a public forum for information, its content is not actionable. Thus, Plummer's complaint fails as a matter of law and is squarely subject to dismissal under the first prong of the anti-SLAPP statute.

2. Alai's Anti-SLAPP Demonstrates Her Unique Defenses.

Likewise, regardless of any prior review by this Court, it is unequivocally vital to this Court's determination of *this* appeal to [27] objectively examine the Alai anti-SLAPP, Request for Judicial Noice, Exhibits, and particular evidence because these also state nothing which Plummer claims they do. Plummer repeatedly gaslights with the notion of "identicality" citing phantom claims and wants this Court to shortcut its factual determination by upending its duty to perform a *de novo* determination of Alai's motion. For a number of reasons, that is not an option here because Alai's slog is much different and nuanced than the prior defendant. It would be manifestly unjust to essentially prejudge and penalize one defendant based on the legal skill or representation of an unrelated defendant's counsel and legal theories on appeal. For instance, notwithstanding the obvious "at-a-glance" differences of Alai's anti-SLAPP pleadings being some 700 pages and the prior defendant's being under 35 pages,

there are many factual and legal nuances. AOB/28. Alai's anti-SLAPP uniquely posited "substantial truth" and "litigation privilege" under Civil Code §47(b), statute of limitations, and the Noerr-Pennington doctrine, terms never mentioned at all in the other defendant's motion. Alai went through proving substantial truth of the alleged statements, in fact judicially noticing her actual litigation pleadings.

In stark contrast, the other defendant only attached a declaration attesting that he neither knew of nor was associated with the alleged website. The other defendant, for unknown reasons, did not factually explain the nuances of the parallel litigation between the parties, or reference the litigation pleadings which expressly stated Plummer was vexatious, dishonest, and [28] incompetent. After all, the defendants filed a cross-complaint against Plummer in the 2018 action which was adjudicated before this Court on an unsuccessful anti-SLAPP by Plummer. *Alai v. Law Offices of Mark B. Plummer*, No. G057721 (Cal. Ct. App. Sep. 10, 2020) Further, the defendants also filed a motion to deem Plummer a vexatious litigant. Therefore, litigation privilege was front and center in the defense to Plummer's libel claim. Hence, it would seem imperative at a minimum to invite the Court to the underlying litigation and raise the key issue of Civil Code 47(b). But for unknown reasons, none of those pivotal issues were briefed in the prior defendant's anti-SLAPP or appeal.

For these reasons, the trial court fully overlooked significant disparities in the two defendants' motions, resulting in the incorrect summary denial of Alai's anti-SLAPP as "identical" and thus "moot." However, even

if the Court adopts Plummer's misleading argument of "identicality", the two pivotal alleged statements[8] identified by this Court in its ruling as potentially defamatory—are demonstrably substantially true and thus cannot [29] form the basis of a legally tenable defamation claim. Even if the statements were not substantially true, they were unequivocally made in the course of litigation—thus they neither legally nor factually may form the basis for Plummer's claim.

Had the trial court had these facts properly before it, there is no basis to have denied Alai's anti-SLAPP.

II. THIS COURT CITED PLUMMER'S ALLEGED TWO DEFAMATORY STATEMENTS, NEITHER OF WHICH APPEAR ON THE WEBSITE.

In its previous ruling (G060354) as to the other defendant's anti-SLAPP, this Court was forced to rely on Plummer's *unchallenged* and factually unsupported assertions in making two key determinations. First, the Court determined that "on *the issue of falsity, Plaintiffs submitted evidence that their office is neither a garage nor unsafe*." However, Plummer shifted his narrative and now admits to both a 'garage' and unsafe/unpermitted

8. In its previous ruling (G060354), this Court relied on Plummer's assertions to determine that "on the issue of falsity, Plaintiffs submitted evidence that their office is neither a garage nor unsafe." Subsequent to that appeal, however, Plummer's later admissions under oath starkly contrasted his earlier narratives. Further, Plummer inaccurately represented that the contested website labeled him as a "vexatious litigant." The actual phrasing on the site is Plummer "files vexatious and meritless lawsuits."

premises. Second, the Court, based on Plummer's skewed portrayal deduced that Plummer's alleged "website" statement "*Plaintiffs are vexatious litigants*" might not fall under protected speech. However, the website never states that. The actual website states "*Plummer files vexatious and meritless lawsuits*"—an opinion. This case turns on a meticulous exam of the sparse website. CT/226-229.

* * *

[50] presented[16] cases, Plummer was at best one (1) case shy of legally being deemed a vexatious litigant.

These facts make Plummer's complaint against Alai squarely subject to anti-SLAPP. CT/63-64. Plummer's Complaint incorrectly conflates defamation and absolute litigation privilege. *Rand Res. supra. Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777 (*Dove*) affirmed that the defendant's statements regarding the plaintiff's vexatious litigation could not be defamatory as they were truthful, based on fact, and without malice. The *Dove* court's decision to uphold the defendant's anti-SLAPP based on defamation mirrors Alai's case. Plummer is also a 'vexatious litigant'—according to community attorneys (MJN 33,75) and his litigation records. CT/280.

16. It is important for this Court to note that Plummer has filed his pro per cases in any number of venues and under as many pseudonyms-hence the vexatious motion brought by Defendants did not include all of Plummer's cases—only known local ones. Plummer's vexatious status was also later briefed in a summarily denied writ before this Court under G061310—which outlined his voluminous, unsuccessful pro persona cases.

In light of this analysis, such opinions are protected thereby warranting a reversal of the lower court's decision.

2. The Plummer Pleadings Lack Legally Tenable Claims.

Plummer gaslights on appeal and claims that he was also "defamed" in this Court on appeal EIGHT times with "*blatantly false statements of fact*" in the AOB. RB/10.

* * *

[60] Importantly, Plummer in no way dispels or disproves his vexatious status in this Court. Faring no better in the trial court, he merely submitted a self-serving declaration attesting that he had won cases which the docket showed he lost. While admittedly courts may discretionarily accept self-serving declarations and unauthenticated exhibits as were proffered by Plummer, the practice is frowned upon when controverting and competent evidence is presented by the opposing party. Here, Plummer made claims of prevailing on each case without submitting any certified judgment copies or court records. Moreover, Plummer's pro per dismissals including many which he dismissed *without prejudice*—cases which he claimed he prevailed in—the dockets had no documents to support his claim of prevailing. If Plummer's dismissed cases were favorably determined to him, there was no evidence on the court dockets. None of the referenced dockets showed a single "abstract of judgment", no "satisfaction of judgment", no "writ of execution", no "notice of settlement"—any one of which

are typically associated with a favorable outcome for the movant. Hence, the evidence on the referenced court dockets and certified court judgments demonstrate that Plummer is likely 'vexatious.'

F. Plummer's Failure To Show Malice Bars His Claim.

Pursuant to the principles enunciated in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and the requirements outlined in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), Plummer's [61] status as a limited public figure predicates the imposition of a more stringent standard for his defamation claim. AOB/66-67. Specifically, he must demonstrate that any alleged defamatory statements were made with actual malice—knowledge that the statements were false or with reckless disregard for their truth or falsity. This heightened evidentiary standard is borne out of Plummer's own volitional acts that have cast him into the public limelight, as reflected in his prolific litigation activities, public records, and media exposure, including coverage in law media reviews, as noted in *Reader's Digest Assn. v. Superior Court*, 37 Cal.3d 244 (1984).

Notwithstanding, Plummer's submissions are devoid of compelling proof of malice as necessitated by statute. Despite his extensive history in the public sphere and judicial fora, Plummer has failed to satisfy the burden of proof required for malice as outlined in *Harte-Hanks Communications, Inc. v. Connaughton,* 491 U.S. 657 (1989). In essence, the record is barren of any evidence that Alai knowingly promulgated falsehoods or acted with

a reckless disregard for the truth—a burden unmet and essential to prevail on a defamation claim by someone of Plummer's standing.

Furthermore, as articulated in *Noonan v. Rousselot,* 239 Cal. App. 2d 447, 452–53 (Ct. App. 1966), and reinforced by *Vogel v. Felice,* 127 Cal. App. 4th 1006, 1018 (2005), an inability to properly plead actual malice renders the complaint fatally deficient. This insufficiency substantiates the appropriateness of Alai's anti-[62] SLAPP, buttressed by *Reed v. Gallagher*, 248 Cal. App. 4th 841, 862 (2016), which acknowledges the protections afforded under Civil Code §47(b). The allegations against Alai, grounded in verified facts, are not tainted by malice but rather are shielded by absolute litigation privilege and, at a minimum, a qualified privilege. Thus, absent the requisite showing of malice by Plummer, the claim against Alai cannot withstand legal scrutiny, and the anti-SLAPP denial should, accordingly, be reversed.

V. THE TRIAL COURT ERRONEOUSLY DENIED ALAI'S ANTI-SLAPP MOTION.

A. The Trial Court's Misapplication Of "Nearly Identical" To Starky Contrasted Motions Resulted In An Erroneous Ruling.

The trial court erred in summarily denying Alai's anti-SLAPP as "moot" based on speculation that it was "nearly identical" to another defendant's anti-SLAPP. The trial court fully adopted Plummer's pretextual statements of "identicality." The trial court's presumption

is incorrect. It is important for this Court to observe that in light of his success in the trial court, Plummer seeks to capitalize on his statement on appeal as well. To wit, Plummer here gaslights with "*identical*" EIGHT times in his Respondents' Brief (RB/8,23,24,39,42) seeking to have this Court similarly summarily overlook the clear distinctions between the two defendants. Plummer deliberately blurs Alai's individual identity and her separate position in litigation. Plummer never addresses the non-identicality fully briefed in the Alai AOB. [63] AOB/17-18,27-28. If these were the same defendants with the same position as Plummer misconstrues, they could and would have had one representative law firm and one anti-SLAPP motion, not two. But these are two individual defendants with very distinct positions.

B. Plummer Fails To Sufficiently Establish Authorship Of The Website to Alai.

Plummer makes a number of unsupported assertions as fact including a claim that Alai and the co-defendant "jointly prepared the website" (RB/19) whereas his own evidence is a purported commercial receiving address for hundreds of boxes which he loosely associates with a peer reviewed research article. CT/217,223. Plummer has not conclusively proven anything here as to ownership or authorship of the subject public website, and his claims on appeal must be given proper scrutiny–in light of this Court's prior determinations as to his "borderline frivolous" briefings. Moreover, Plummer attributes authorship of the website and defamatory content in part to attorney "Aljian" and asserts Aljian will be named as a 'Doe Defendant'. CT/49; Complaint ¶7. Plummer also

admits that the registry information determined that Ann B. was the owner of the subject website. RB/16. Plummer's sworn testimony is largely speculative and conjecture—where he makes huge leaps in logic such as alleging Alai's ownership of a foundation without any support for his overreaching claims. CT/125;¶13.

[64] Hence, Plummer has not definitively made any nexus between Alai and alleged authorship of the subject website. To the contrary, Plummer alleges the subject website was authored by others including Ann B., Mr. Aljian, and Mr. Nabili. RB/15-16.

C. Plummer's Unsupported Allegations And Strategic Dismissals Highlight A Pattern Of Indiscriminate Litigation.

The complaint lacks specificity and unjustifiably casts a wide net in attributing authorship of the disputed website, thereby undermining its credibility. It vaguely asserts that Attorney Aljian plays a "role in this malicious scheme," and alludes to a Bar investigation concerning Aljian, signaling an intention to name him. Yet, notably, Aljian has not been added to the action, a conspicuous omission given the gravity of the allegations. CT/1206,1207; ¶¶7,11.

Moreover, Plummer's strategic dismissal of defendants networksolutions.com and web.com *without prejudice* is telling. This procedural maneuver suggests a calculated reservation of the right to reinstate these parties at a later stage, which further illustrates Plummer's indiscriminate approach. Such tactics, coupled with the voluntary

dismissal of the aforementioned defendants, allows for the reasonable inference that Plummer lacks concrete evidence tying any specific party to the authorship or control of the website in question. This pattern of behavior is emblematic of a scattershot litigation strategy rather than one based on a firm foundation of factual certainty.

[65] ***No Nexus to the Website.*** Plummer fails to establish that Alai authored the disputed website, rendering his defamation claim specious at best. As outlined below, Plummer admits that Ann B. owns the subject website and admits he bases his conclusions on conjecture, speculation, and circumstantial inferences. CT/936. Plummer also submits a declaration attesting that he lacks sufficient evidence of any nexus to any one in particular. Plummer offers nothing other than circumstantial evidence which in sum is insufficient to prove Alai's alleged nexus with the website. (CT/936.)

The Court is not required to look beyond Plummer's wholly insufficient defamation complaint, pleading failures, and insufficient evidence establishing any authorship of the website to Alai. Since Plummer has made an insufficient showing of a nexus between the website and Alai, his claim here must also fail on that ground.

VI. THE LAW OF THE CASE DOCTRINE NEITHER APPLIES NOR PRECLUDES DE NOVO REVIEW OF ALAI'S ANTI-SLAPP DENIAL.

Contrary to the trial court's reasoning and Plummer's assertion (RB/19), the Court in G060354 (Nabili appeal)

made no determinations as to Alai, thus rendering the "law of the case" doctrine inapplicable to her.

The doctrine which mandates adherence to legal determinations made in earlier appeals is inapplicable without such precedent. This doctrine does not bind subsequent trials or [66] appeals involving distinct issues or parties. *Morohoshi v. Pacific Home,* 34 Cal.4th 482, 491 (2004) In *Morohoshi*, the California Supreme Court outlined the application of the "unjust decision" exception to the law of the case doctrine: "[W]here there has been a manifest misapplication of existing principles resulting in substantial injustice, or where the controlling rules of law have been altered or clarified by a decision intervening between the first and second appellate determinations.

The doctrine applies only when an appellate court states a principle or rule of law necessary to the decision of the case. *Kowis v. Howard,* 3 Cal. 4th 888, 894 (1992), *also People v. Stanley*, 10 Cal. 4th 764, 787 (1995) [describing the law of the case doctrine and its application to the findings of appellate courts.] Here, the absence of any appellate determination relating to Alai negates the applicability of this doctrine.

However, the doctrine is not an immutable rule but rather a procedural concept which directs the exercise of court discretion. The doctrine does not apply where the appellate court did not address the issue in question. *In re Marriage of Barthold*, 158 Cal.App.4th 1301, 70 Cal. Rptr. 3d 691 (Cal. Ct. App. 2008) Here, the prior appellant neither raised nor did this Court review the

issues of *substantial truth, litigation privilege, Noerr-Pennington doctrine, the Communications Decency Act, and substantial truth*—which form the core of Alai's anti-SLAPP. None of these words even appear in the prior opinion. Hence, it would be manifestly [67] unjust and an unfair application of the law to penalize Alai for a prior defendant's legal theories and strategies—or lack thereof.

The lower court's unwillingness to independently assess Alai's anti-SLAPP and supporting evidence represents not merely reversible error, but an abdication of its core judicial functions. *People v. Barragan*, 32 Cal. 4th 236, 253 (2004) [explaining law of the case doctrine.] ('It is a court's responsibility to ascertain the law applicable to the facts of the case before it, regardless of the parties' failure to do so.')."

A. Alai's Appeal Raises Distinctive Points Which Were Not Considered In The Previous Appeal.

The trial court erroneously adopted Plummer's asserted "law of the case" doctrine to sidestep a substantive analysis of Alai's situation. A court has a duty to exercise its independent judicial assessment on a case-by-case basis. *DiCola v. White Bros. Performance, Inc.,* 129 Cal.App.4th 676, 688 (2005). Contrary to the trial court's inference, the Court in the prior appeal (G060354) issued its ruling without any particularized consideration or adjudication concerning Alai. Therefore, any application of the doctrine is fundamentally misplaced in Alai's instance.

The doctrine, as explicated by the California Supreme Court in *Kowis v. Howard,* 3 Cal. 4th 888, 894 (1992), is confined to actual determinations made by an appellate court. Absent explicit findings regarding Alai, the doctrine remains uninvoked. The discretionary nature of this doctrine, underscored in *George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd.*, 40 Cal. [68] 3d 654, 658 (1985), intimates that the trial court is not imperatively bound by appellate dicta or decisions not intimately connected to Alai's circumstances. Furthermore, the Supreme Court in *Rinaldi v. Yeager*, 384 U.S. 305, 308 (1966), stipulates that a court retains the authority to re-evaluate prior judgments in light of significant discrepancies in litigant identity, factual matrix, or emergent factual revelations.

This Court is not beholden to prior findings by either the trial or appellate courts regarding a different litigant on this *de novo* review. Crucially, had the Court been privy to the evidence currently furnished—including the vexatious litigation motions, the garage conversion, and the conformed Amicus Brief (MJN/5, 10,91)—it is reasonably probable the outcome in the prior appeal would have diverged, particularly since these substantiated facts undermine Plummer's two key defamation assertions.

B. Precedent Warns Against The Conflation Of Separate Cases.

All parties recognize that an anti-SLAPP appeal is subject to *de novo* review. RB/31,18;AOB/30/ A court's mandate to independently assess each circumstance is a

judicial cornerstone. *In re Marriage of Feldman*, 153 Cal. App.4th 1470, 1479. A reviewing court is not bound to adopt prior findings without meticulous examination. *DiRuzza v. County of Tehama*, 323 F.3d 1147, 1157 (9th Cir. 2003). In this instance, the trial court erroneously equated Alai's anti-SLAPP motion as "identical" to one from a different defendant with 700 pages less in evidence, thus

* * *

APPENDIX J — APPELLANT'S OPENING BRIEF IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE, FILED JULY 18, 2023

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION THREE

G062355

MARK B. PLUMMER &
LAW OFFICES OF MARK PLUMMER

Plaintiffs and Respondents,

v.

NILI ALAI,

Defendant and Appellant.

Appeal from Orange County Superior Court
Central Justice Center
Hon. Melissa McCormick
Trial Court Case No. 30-2020-01141868

APPELLANT'S OPENING BRIEF

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Appendix J

[14]**IN THE COURT OF APPEAL**
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION THREE

MARK PLUMMER AND
LAW OFFICES OF MARK PLUMMER

Plaintiffs and Respondents,

v.

NILI ALAI

Defendant and Appellant.

APPELLANTS' OPENING BRIEF

INTRODUCTION

This is an appeal from the denial of an anti-SLAPP motion and attorney disqualification motion. Plaintiff Mark Plummer, an attorney appearing here in pro persona for himself, and his corporation Law Offices of Mark Plummer (collectively "Plummer") sued the digital platform host Networksolutions.com and his former client Nili Alai (Ms. Alai) in 2020 for allegedly defaming him on a website markplummerattorney.com.

Plummer once served as Ms. Alai's legal counsel in a personal injury matter in 2017, and surreptitiously endied their attorney-client relationship on the *eve of trial.* Then, despite his [15]contract being part contingency-based and

the case resulting in zero recovery, Plummer audaciously sued her for unpaid legal fees.

Alai was unwilling to remit to Plummer' s extortionary pre-litigation demands for "$331,000" for "57.8" hours of purported work. During litigation investigations, Alai uncovered that Plummer had been similarly suing his former clients in droves for unsuccessful contingency based cases, and was known in the legal community as a vexatious attorney – having regularly also sued his co-counsel and other local attorneys. She also discovered that Plummer had concealed sanctions received in her case, misrepresented his hourly rate for the purposes of circumventing their contingency-based written agreement and suing for quantum meruit in his 2018 lawsuit, mismanaged her case for personal gain, and violated a number of ethical, business licensing, and permit regulations relevant to her representation.

Ms. Alai therefore filed a cross-complaint for professional negligence (*incompetence*), as well as a number of motions seeking to dismiss Plummer's 2018 complaint. She filed a motion seeking to deem Plummer and his alter ego law firm *vexatious litigants* pursuant to Code of Civil Procedure §391, as well as motions to dismiss his complaint based on his failure to maintain the requisite business licenses and permits. She also filed an Amicus Brief in another Plummer *pro persona* case, attaching evidence of Plummer's *dishonesty, failure to obtain business and occupancy permits,* and false statements in fiscal reports filed under oath.

[16]During the pendency of his first suit, and after his unsuccessful appeal from a denied anti-SLAPP motion awarding Alai costs on appeal, Plummer then furtively sued Ms. Alai a second time in this derivative so-called "defamation" case (without ever serving her) – a clear display of retaliatory behavior following his unfavorable outcome on appeal. In fact, Plummer still has not remitted on her 2020 cost judgment.

Plummer's defamation complaint does not make specific allegations to Ms. Alai, but it claims libel based on phantom and supposed website statements that Plummer is "*incompetent, dishonest*", "*a vexatious litigant*", and his customer facing storefront " . . . *was unsafe and unpermitted.*" Plummer claims that "none of these are true." Yet, none of these statements even appear on the disputed website. Rather, these statements and opinions are expressly what Ms. Alai stated in her cross-complaint and pleadings in the 2018 lawsuit, thus rendering them protected and unactionable due to their absolute litigation privilege under Civil Code §47(b), qualified privilege, First Amendment speech, substantial truth of the statements, as well as the website itself and reposting of legal pleadings being protected by the Communications Decency Act under 47 U.S.C. §230.

Here, Plummer dismissed Networksolutions.com as a defendant in December 2020. Alai filed an Anti-SLAPP in January 2021. Plummer filed his opposition admitting that he claimed as defamatory Alai's two pleadings from the 2018 lawsuit. It was also [17]shown the website lacked substantive content other than informational hyperlinks to various Plummer related pleadings.

During pendency of Alai's anti-SLAPP, Plummer voluntarily dismissed half of his claims against her, now relying solely on ambiguous inferences and conclusory assertions to sustain his remaining defamation claim against her. A careful exam of the disputed digital platform reveals a lack of any defamatory statements, hence fatal to Plummer's libel claim.

Summary of Facts Leading to Appeal. The lower court summarily denied Alai's anti-SLAPP in February 2023 as "moot", on the sole and presumptive basis that it was "nearly identical" to another defendant's anti-SLAPP adjudicated two years prior-which was a full 750 pages *less* in length. The court concluded that it therefore did not need to consider Alai's arguments and slog, and without further explanation denied her motion. The court erroneously treated Alai's Anti-SLAPP as a mirror image of the other defendant's case, and offered no detailed examination of the unique elements inherent in Alai's motion, extensive exhibits, and attorney declarations.

The court seemed to act on the presumption that contradicting its own precedent was untenable. On that basis, the court reasoned that since the appellate court had entered its opinion on another defendant's appeal months prior, the court saw no basis to independently determine such a "identical" Anti-SLAPP filed by Alai. Moreover, the court ruled that "Alai's special [18]motion is denied . . . *in accordance with the court of appeal opinion and for the reasons set forth in that opinion*." However, this Court in G060354 made no such determination whatsoever as to Alai, was not law of the case as to Alai, and expressly

limited its entire ruling to the other defendant. The appellate court also never had a copy of Alai's anti-SLAPP nor was it under review in that appeal.

The trial court's decision was erroneous because Alai's anti-SLAPP should have been granted. The anti-SLAPP statute applies to all of Plummer's derivative claims because they each seek to impose liability on Alai for her litigation investigation of Plummer and her pleading statements in the 2018 case. For the court's characterization of "nearly identical" to apply, we would have to ignore substantial differences between the defendants' motions in terms of content and length. We would also be required to disregard Ms. Alai's in-depth analysis of the alleged statements, the website, her referenced pleadings, and proving non-falsity. As to Alai's defenses, the ruling also overlooks the three key distinguishing legal principles raised by Alai in her motion as well as Plummer's partial retreat through the voluntary dismissal of two causes of action and the words "*dishonest and incompetent*" during pendency of Alai's anti-SLAPP.

As to Plummer's defamation claim, Plummer failed to conclusively prove a nexus between Alai and authorship of the disputed website, and thus failed to prove a *prima facie* case for defamation against Alai. His libel claim is also facially riddled with contradictions, ambiguities, and an inherent lack of proof* * * *.

* * *

[44]time relevant failure to obtain garage conversion permits (CT/1251,1271), (3) unsafe premises (*id.*), and (4) Plummer's unsuccessful pro per litigations (CT/64,280) among others. Hence, Alai's speech, pleadings, and exhibits were presented in the course of litigation, and in furtherance of her right to free speech concerning a public issue.

What is clear is that Plummer has given false information to the court about not having a garage conversion, because he fully admits to the conversion in his declaration. CT/125-126;¶¶15,26. It is also clear that Plummer admits he used the converted garage for a full year without a permit because the City denied his occupancy permit until he built a "2-car carport." *Id.* Plummer also submits testimony admitting he knowingly conducted public depositions in an unpermitted building. CT/937;¶6. However, Plummer sends the court on a wild goose chase about defamation over his garage and denied permits, but his lies and attempts to deceive the court are unraveling in his own submitted evidence. *Id.*

1. Alai's motion to deem Plummer a "vexatious litigant" is protected speech.

Despite Plummer's claim, the website does not state he is a vexatious litigant. CT/226-229. Only Alai's motion to deem Plummer vexatious does. CT/287-927;MJN/19-90. Hence, petitioning the court for a "vexatious litigant," order is protected speech. *Rand Res., LLC v. City of Carson*, 6 Cal.5th 610, 2019.

[45]Further, petitioning the court to deem Plummer a vexatious litigant is protected speech. MJN/10; *Shalant v. Girardi* (2011) 51 Cal.4th 1164. These facts make Plummer's complaint against Alai squarely subject to anti-SLAPP. CT/63-64.In any event, the website's inclusion of these pleadings also does not constitute actionable behavior. *Cox*, *supra.* Plummer's Complaint incorrectly conflates defamation and absolute litigation privilege. *Rand Res. supra.*

Plummer's litigious conduct is also a matter of public interest and goes to public understanding of his professional competence. Plummer's evident propensity to initiate legal action, especially against his own clients and other attorneys, can influence the public's choice in legal representation. MJN/31,75. Plummer's litigious conduct is indicative of his professional behavior and integrity, which are all matters of public concern – much more so here *because* he is a lawyer. As confirmed in *Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883 (*Wolk*), warnings about a professional's tendency (for vexatious litigation) inform potential clients, helping them avoid possible legal complications. Alai's allegations about Plummer's vexatious litigation are protected under the anti-SLAPP statute.

2. Plummer's defamation claim for petitioning is subject to anti-SLAPP.

Drawing upon precedent, Alai's assertions are well-backed by dispositive case law. *Dove Audio, Inc. v. Rosenfeld, Meyer &* [46]*Susman* (1996) 47 Cal.App.4th 777

(*Dove*) affirmed that the defendant's statements regarding the plaintiff's vexatious litigation could not be defamatory as they were truthful, based on fact, and without malice. The *Dove* court's decision to uphold the defendant's anti-SLAPP based on defamation mirrors Alai's case. Alai, like the *Dove* defendant, previously motioned the court to deem Plummer a vexatious litigant – which he is according to community attorneys (MJN 33,75) and his litigation records. CT/280.

As outlined in *Hailstone v. Martinez* (2008) 169 Cal. App.4th 728, 737 (*Martinez*) the 'public interest' within the context of the anti-SLAPP statute is not confined to governmental matters but expansively encompasses private conduct that impacts a broad segment of society or affects a community in a manner akin to a governmental entity. The label of a 'vexatious litigant,' likewise, would not just impact Plummer's ability to file lawsuits, but also impacts his ability to provide effective legal representation as a lawyer, which is a matter of public concern. *Ramirez v. State Bar,* 28 Cal.3d 402, 169 Cal. Rptr. 206, 619 P.2d 399 (Cal. 1980.) An attorney acting as a 'vexatious litigant' especially-against his own clients – can harm the public's trust and expectations of professional conduct in legal representation – as has been done here countless times by Plummer. *Matter of Riley,* 5 Cal. State Bar Ct. Rptr. 315 (Cal. Bar Ct. 2003) An attorney behaving as a "vexatious litigant," could impact their ability to provide effective legal* * * *.

* * *

[66] **6. Plummer is arguably a limited public figure; hence malice is a required element.**

Plummer's prolific litigation activities have not only been a source of public record and interest, but have also been reported in media publications and press coverage. *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 1974. Therefore, for the purposes of his libel claim associated with this controversy, Plummer is by his own admission a *limited-purpose public figure* because he is someone who has thrust themselves into a particular public controversy. *Reader's Digest Assn. v. Superior Court*, 37 Cal.3d 244 (1984). To that end, Plummer regularly attaches press articles about his attorney fee disputes to his pleadings to show his notoriety. For instance, Plummer was also the subject of a recent law media[8] review of his claim here. Consequently, to prevail in his defamation claim, Plummer must demonstrate not only that the alleged defamatory statements were false, but also that they were made with actual malice, a much higher standard as established in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) To win his defamation claim, Plummer must prove the statements were false and made with actual malice, a burden he has not met. Moreover, Plummer's inability to properly plead actual malice under California law (*Noonan v. Rousselot,* 239 Cal. App. 2d 447, 452–53, Ct. App. 1966) renders his complaint insufficient (*Vogel v. Felice*, 127 Cal. App. [67]4th 1006, 1018, 2005) and supports Alai's anti-SLAPP. *Reed v. Gallagher*, 248 Cal. App. 4th 841, 862, 2016.

8. https://reason.com/volokh/2022/10/07/obvious-gripe-site-isnt-false-personation/

Plummer Cannot Prove Malice. Even if the Court finds that the statements are not substantially true–– Plummer still needs to prove that Alai knowingly made false statements or displayed a reckless disregard for the truth as held by the Supreme Court. *Harte-Hanks Communications, Inc. Connaughton* (1989) 491 U.S. 657, 667. However, Plummer has offered no conclusive evidence in this regard. Alai's comments were based on verifiable facts, and any suggestion of malice is purely speculative. For these reasons, even if. Plummer can demonstrate that his lawsuit arises from Alai's non-protected activities, he cannot establish a probability of prevailing on the merits. As such, the anti-SLAPP analysis could and should also end here, because Alai's pleadings and statements are protected and afforded absolute litigation privilege under Civil Code section 47(b), and a qualified privilege.

IV. SECOND PRONG-PLUMMER DID NOT MAKE A PRIMA FACIA SHOWING THAT HE CAN PREVAIL ON THE MERITS OF HIS CLAIMS.

A. A plaintiff has the burden of demonstrating that he has a probability of prevailing on his claims.

Where the anti-SLAPP statute applies, the plaintiff bears the burden of establishing "a 'probability' of prevailing on" the merits of his claims. *Kashian v. Harriman* (2002) 98 Cal.App.4th [68]892,906. A plaintiff ""must provide the court with sufficient evidence to permit the court to determine whether 'there is a probability that the plaintiff will prevail on the claim[s].'"" *Traditional*

*Cat Assn., Inc. v. Gilbreath (*2004) 118 Cal.App.4th 392,13. A plaintiff "'cannot rely on the allegations of the complaint'" to show a probability of prevailing. *Christian Research Institute v. Alnor* (2007) 148 Cal.App.4th 71, 80.

Furthermore, a plaintiff must show how admissible evidence substantiates every element of each of his claims. *Balzaga v. Fox News Network*, LLC (2004) 173 Cal.App.4th 1325, 1336-1337; *Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1236-1239; *South Sutter, LLC v. LJ Sutter Partners, L.P.* (2011) 193 Cal.App.4th 634,670; *Wallace, supra*, 196 Cal.App.4th 1169 at p.1206.) "The plaintiff's showing of facts must consist of evidence that would be admissible at trial." (*Hall, supra,* 153 Cal. App.4th at p.1346, emphasis added.) A plaintiff cannot show that he has a probability of prevailing where an affirmative defense would bar his claims. *Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2006) 136 Cal.App.4th 464, 477-479; *Peregrine, supra,* 133 Cal.App.4th at p. 676 & fn. 11; *Traditional, supra*, 118 Cal.App.4th at pp. 398-399.)

Plummer failed to meet his burden to show admissible evidence substantiating every element of each of his claims, and, in any event all of his claims are barred by the affirmative defenses [69]of substantial truth, litigation privilege, and *Noerr-Pennington* doctrine.

In sum, the anti-SLAPP motion is framed by the existing pleadings, including Plummer's Complaint. Schoendorf v. U.D. Registry, Inc. (2002) 97 Cal.App.4th

227, 236. Given Plummer's failure to produce admissible evidence to support the liability theories set forth in his Complaint, the anti-SLAPP should be granted.

B. Plummer inevitably fails the second prong of the anti-SLAPP analysis.

The anti-SLAPP statute presents a two-fold test: (1) whether the action arises from protected speech, and (2) the likelihood of the plaintiff's success. This step demands that Plummer establish a probability of prevailing on his claims, not just present the existence of triable issues. *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821. Plummer bears the burden of proof, yet has failed to counter with admissible evidence, indicating a misapplication of the anti-SLAPP statute by the trial court.

For a number of legally sufficient reasons as detailed above, Plummer cannot make a *prima facie* case for defamation because: (1) truthful statements are fatal to a defamation claim; (2) Plummer has failed to prove malice; (3) Plummer has the burden to demonstrate the probability of prevailing on his claim; (4) Plummer failed to make a showing of any defamatory statement on the disputed website; and (5) Plummer failed to show conclusive evidence of a nexus of the website to Alai.

* * *

[73]simply 'assert that litigation to which the statement is related is without merit, and therefore the proponent of

the litigation could not in good faith have believed it had a legally viable claim. To adopt such an interpretation would virtually eradicate the litigation privilege for all but the most clearly meritorious claims.'" *Bailey*, *supra*, 197 Cal.App.4th at p. 790.

Here, Plummer's claims against Alai are barred by the litigation privilege. As explained above, Plummer's defamation claim is based on Alai's litigation pleadings filed in the 2018 case, and the related investigative and communicative acts. Alai's acts—including her motions to deem Plummer a vexatious litigant—are protected by the litigation privilege.

Communications related to litigation, and the acts that enable them, are protected under law to ensure parties can effectively present their case in judicial proceedings. *Pettitt v. Levy*, 1972, 28 Cal.App.3d 484, 490-491. Without such protection, the right to petition could be severely compromised, as evidenced by cases upholding the privilege for investigations conducted for litigation (*Gootee v. Lightner,* 1990, 224 Cal.App.3d 587, 593; *Wang v. Heck*,2012,203 Cal.App.4th677,686-687)

D. All of Plummer's claims are also barred by the *Noerr-Pennington* doctrine.

The Noerr-Pennington doctrine, originating from the U.S. Supreme Court cases *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine* [74]*Workers v. Pennington*, 381 U.S. 657 (1965), offers critical immunity from liability for

parties engaged in petitioning activity. The Doctrine holds '[t]hose who petition the government are generally immune from . . . liability.'" *Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 21. It bars "virtually all civil liability" for a defendant's exercise of its right of petition. *People ex rel. Gallegos v. Pacific Lumber Co.* (2008) 158 Cal.App.4th 950, 964-965. This immunity "applies to virtually any tort." (*Ludwig*, at p. 21, fn. 17.)

In the current case, Alai's depiction of Plummer as "vexatious litigant" formed a part of her motion filed in court, an authentic act of petitioning the government. This characterization is not only a crucial tool in maintaining court efficiency and protecting innocent defendants from persistent meritless lawsuits (*Tichinin, supra*, 177 Cal. App.4th at p. 1069), but also a legitimate exercise of the right to petition. Therefore, Alai's activity is protected under the Doctrine. *City of Long Beach v. Bozek*, 31 Cal.3d 527, 534 (1982).

The Doctrine also shields defendants from claims centered on petitioning activities performed during or in anticipation of court proceedings (*Premier, supra*, 136 Cal. App.4th at pp. 478-479). It applies to Alai's pre-litigation and litigation petitioning actions (*Sosa v. DIRECTV, Inc. (9th Cir. 2006) 437 F.3d 923, 940-941*; *Theme Promotions v. News America Marketing FSI* (9th Cir. 2008) 546 F.3d 991, 1006-1008), including Alai petitioning the City revealing Plummer's operations, and other litigation investigations. CT/1282.

[75]Here, the Doctrine bars Plummer's claims which are based on Alai's petitioning activity (grievance with Yorba Linda and petition to deem Plummer a vexatious litigant.) Even though Alai didn't assert the Doctrine in her anti-SLAPP, the court can still consider its application for the first time on appeal as a question of law. *Andrx Pharmaceuticals, Inc. v. Elan Corp.,PLC* (11th Cir.2005)421 F.3d 1227, 1232; *Rowe v. Exline* (2007) 153 Cal.App.4th 1276, 1287-1288.

V. PLUMMER CANNOT PREVAIL ON HIS DECLARATORY RELIEF CLAIM

Plummer's derivative declaratory relief claim, rooted in the same insufficient defamation allegations, is equally untenable. This claim also overbroadly seeks an order labeling the website as "false, malicious, and defamatory", with demands for its immediate removal, and a prohibition on its content being posted elsewhere.

However, to succeed in a declaratory claim, Plummer must present a sufficient *prima facie* evidentiary case, capable of securing a judgment in his favor. The existence of a controversy alone does not suffice to quell an anti-SLAPP against a claim for declaratory relief, as indicated in *South Sutter, supra.* Furthermore, to withstand an anti-SLAPP, a declaratory relief action necessitates the plaintiff to provide substantial evidence that would favor a judgment of relief in their favor, as affirmed in* * * *.

APPENDIX K — MOTION OF THE SUPERIOR COURT OF CALIFORNIA OF THE COUNTY OF ORANGE, FILED FEBRUARY 2, 2021

IN THE SUPERIOR COURT OF CALIFORNIA
OF THE COUNTY OF ORANGE

LAW OFFICES OF MARK B. PLUMMER PC,
AND MARK B. PLUMMER,

Plaintiffs,

v.

NETWORKSOLUTIONS.COM, AND DOES 1
THROUGH 500, INCLUSIVE,

Defendants.

Case: 30-2020-01141868-CU-DF-CJC

Assigned for All Purposes to Judge Melissa McCormick

DEFENDANT NILI N. ALAI, M.D.'s MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF SPECIAL MOTION TO STRIKE PLAINTIFFS' COMPLAINT PURSUANT TO THE CALIFORNIA ANTI-SLAPP STATUTE, CODE OF CIVIL PROCEDURE §425.16 AND REQUEST FOR AN AWARD OF ATTORNEY'S FEES PER §425.16(c)(1)

[TABLES INTENTIONALLY OMITTED]

* * *

[3] speech about Plaintiffs has been public in public fora, involved matters of public interest, and been factual statements made during Plummer's *first* lawsuit against her, which is ongoing.

B. The Plummer Plaintiffs

The Law Offices of Mark B. Plummer physically operates at 18552 Oriente Drive in Yorba Linda in principal Mark B. Plummer's residential garage. *See* Aljian Decl. ¶¶5-7; Exh. F to Alai Decl. According to the Secretary of State LMP currently has only one corporate officer Mark Plummer, also the firm's only attorney. Mr. Plummer[2] was admitted to the California State Bar in 1985. Exh. A to Alai Decl. Plaintiffs have had significantly more than 5 unsuccessful *pro per* lawsuits determined adversely or dismissed against them in the last 7 years. §391(b)(1); RJN Nos. 1-16 Notably, Plummer has also had at least 2 legal malpractice suits filed against him within a recent 12-month period. Plummer underwent a highly contested divorce around 2011 where he filed certain key declarations fueling the motive to his *pro per* lawsuits. Decl. Plummer, generally. Plummer has garnished interest and a certain degree of notoriety over the last ten years.[2] In fact, due to an unspecified number of unsuccessful lawsuits filed in *pro per* by principal Mark B. Plummer and his business LMP against a plethora of local attorneys starting about 2011, Plaintiffs have gained the attention of a number of media outlets and Internet court pleading posting sites[3].

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2. Mr. Plummer will be referred to as "Plummer" and no disrespect is intended.

3. (*See e.g.* /; https://casetext.com/case/alai-v-law-offices-of-mark-b-plummer http://www.ocbar.org/All-News/News-View/smid/

Appendix K

Orange County Bar Association Article "**Plummer sued the law firm [Day/Eisenberg] for conversion and interference with prospective economic advantage**." See http://www.ocbar.org/All-News/News-View/smid/384/ArticleID/358

Courtlisteneer.com Article: "Plaintiff and appellant Mark Plummer (plaintiff) appeals from the trial court's order granting the Code of Civil Procedure section 425.16 (section 425.16) special motion to strike filed by defendants and respondents [attorney] James Bohm (Bohm) and Bohm, Matson, Kegel & Aguilera LLP (his law firm)". "We hold that **the complaint was based protected activity and that the litigation privilege established by Civil Code section 47, subdivision (b), barred the claims asserted therein against Bohm and his law firm**. We therefore affirm the order granting the special motion to strike." *See* https://www.courtlistener.com/opinion/2656142/plummer-v-the-ins-co-ca25/

Calattorneysfees.com Article: This was regarding Law Offices of Mark B. Plummer PC v. Bayuk, Case No. G053836 (4th Dist., Div. 3 Nov. 9, 2017) "The last opinion in the

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384/ArticleID/358; and https://www.calbar.ca.gov/Portals/0/documents/ethics/COPRAC/Recent%20Developments/2010%20Ethics%20Update.pdf) Plummer himself has frequently included certain media and Internet media publications in his motions.

> trifecta reviewed here involved a battle between attorneys representing a client in various proceedings, with the appellant suing for more compensation before finally **admitting at trial that he basically received what was owed, leading the trial judge to enter judgment in favor of the opposing attorneys."** ***See***

* * *

[6] **F. The Website Markplummerlawoffices.com**

Mark B. Plummer holds himself out for business on a public website called Markplummerlawoffices.com for "Law Offices of Mark B. Plummer PC". This website is not the subject of this suit. There, he represents that "attorney mark B. Plummer has been practicing law in Southern California for 32 years". Plummer also claims he "makes it a point to handle rare or unusual cases where there is a need." *See* RJN ¶5 He has posted several public photos. Plummer cited in the first lawsuit against Ms. Alai that his website markplummerlawoffices.com was public information and protected as "Medical-Legal Services [sic] on the internet, both of which are privileged speech". The Court is asked to take judicial notice of Plummer's Anti-SLAPP Motion filed on December 18, 2018 in OCSC 2018-01002061 (conditionally under seal), appellant's brief, and the Opinion in G05772. NOL Exh. TT. Plummer indeed claimed that Ms. Alai's cross-complaint against him was based in part on his Anti-SLAPP statute protected "website [markplummerlawoffice.com] speech about Jocelyn Plummer", and "filing a legal document

with the Secretary of State filings". On September 9, 2020 the appellate court summarily rejected Plummer's appeal, and ruled that Ms. Alai's cross-complaint was not subject to § 425.16. *Wittenberg v. Bornstein* (2020) 50 Cal. App.5th 303, 312

G. The Website Markplummerattorney.com

Plaintiffs claim that a website "maliciously" made false statements regarding Plummer and his business LMP. There is no domain name attached to the Complaint. However, drawing a reasonable inference from attorney Mr. Aljian's Declaration, "markplummerattoney.com" is presumed to be the website. Plaintiffs allege that defamatory statements were published to Mr. Aljian, and claim that Mr. Aljian will be a named Defendant because of his "role", and his "role is being investigated both by Plaintiff's [sic] and the State bar". But Mr. Aljian has not ever been a named defendant. Complaint ¶7. To be clear, what markplummerattorney.com states are three straightforward statements: (1) Plaintiffs sue their own clients, (2) Plaintiffs sue other "associate" attorneys, and (3) that Plaintiffs proceeding in *pro per* have been unsuccessful on a number of these cases. These three factual statements all are substantially true. (*See* RJN Attch. No. 5) (*See e.g.* RJN Nos. 1-16). Plaintiffs fail to plead how any of these facts about Plummer are untrue, or how publicly filed pleadings and court orders in Plummer's other cases are otherwise "defamatory". In any event, the statements are not actionable. Notwithstanding that Plaintiffs demonstrate here a paradigmatic "disturbing" "lawsuit[s] brought primarily to chill the valid exercise of

the constitutional rights" as codified by § 425.16, the truth is also an absolute defense to Plaintiffs' unfounded claims of "defamation". Further, given Plaintiff's demonstrable propensity to relitigate harassing lawsuits in [7]*pro per* against the *same* parties, this Complaint should be dismissed with prejudice. *See e.g.* RJN Nos. 9, 12. Plaintiffs neglect to state in their Complaint that all of the documents on the referenced website are indeed public court documents and appellate opinions from Plummer's various *pro per* cases. A small number of the public court pleadings are those filed in *Plummer vs. Alai*, and others are republication of court of appeals Opinions which are publicly available, thus all are beyond reasonable doubt that any allegations or factual background within those pleadings is also privileged pursuant to Civil Code 47(b). The few photos are also found either on public internet sites, or on the City of Yorba Linda's public website. *See e.g.* Aljian Decl. As explained in this Motion, Plaintiffs cannot demonstrate that they are reasonably likely to prevail on any of their claims of defamation and any other cause of action in their Complaint. Plaintiffs here seek to chill speech which is unflattering to Plummer through a patent abuse of judicial process. Further, Plaintiffs, as sophisticated litigants, must well be aware of the blatantly "frivolous" nature of their conduct here within the meaning of §128.5 and §128.7, authority which the court may elect to exercise here.

II. LEGAL STANDARD

SLAPP suits are "generally meritless suits brought by large private interests to deter common citizens from

exercising their political or legal rights or to punish them for doing so." To combat these types of parasitic suits, the Legislature enacted § 425.16- known as the anti-SLAPP statue. *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055-1056; *see Baral v. Schnitt* (2016) 1 Cal.5th 376, 395; § 425.16, subd. (b)(1). The purpose of §425.16 is "to encourage continued participation in matters of public significance" and to combat lawsuits that "chill the valid exercise of . . . freedom of speech" through "abuse of the judicial process." § 425.16(a) (noting "there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances"). *People ex rel. Lockyer v. Brar*, 115 Cal. App. 4th 1315, 1317 (2004) ("The point of the anti-SLAPP statute is that you have a right *not* to be dragged through the courts because you exercised your constitutional rights."). Accordingly, causes of action arising from "any act . . . in furtherance of [a defendant's] right of . . . free speech . . . in connection with a public issue" may be stricken under the anti-SLAPP statute. § 425.16(b)(1) Courts are required to apply and construe the anti-SLAPP statute broadly to protect the rights of defendants. *Id.* § 425.16(a); *see Dowling v. Zimmerman*, 85 Cal. App. 4th 1400, 1425 (2001) (noting the statute is meant "to provide a swift and effective remedy to SLAPP suit defendants").

* * *

[10] *LLC v. Young Money Entertainment, LLC* (2011) 194 Cal.App.4th 873, 883 It is held that even information in the "nature of consumer protection information," such as a

direct "warning" not to use a person's services, are matters of public interest (*See* e.g., *Carver v. Bonds* (2005) 135 Cal. App.4th 328, 343-344). In any event, the alleged inferences and website at issue here plainly could have been provided to assist consumers choosing among law firms.

California case law recognizes three categories of public issues: "(1) statements 'concern[ing] a person or entity in the public eye'; (2) 'conduct that could directly affect a large number of people beyond the direct participants'; (3) 'or a topic of widespread, public interest.'" *Hilton v. Hallmark Cards*, 599 F.3d 894, 906 (9th Cir. 2010) (finding Paris Hilton was a person "in the public eye" and "a topic of widespread, public interest," and accordingly Hallmark's card was "in connection with a public issue or an issue of public interest"); *see also Seelig*, 97 Cal. App. 4th at 807. There is adequate evidence that the public is likely interested in Plummer. (*See e.g.* Decl. Bayuk, Eisenberg, Satalino) As characters whose personal or *pro per* lawsuits against community attorneys have been publicized for a number of years in the legal community, Plummer has developed some notoriety. See e.g. Decl. Bohm, Bayuk. This interest is further made evident by the content of Plaintiffs' Complaint where he claims that "Mr. ALJIAN's role is bein [sic] investigated both the Plaintiff's [sic] and the State Bar". Complaint ¶7. Plummer bombastically makes unfounded allegations about attorney Aljian. Complaint ¶¶ 7-8. And the Complaint fails to acknowledge that Mr. Aljian testified nearly 3 months prior to Plaintiffs' Complaint that he had nothing to do with the website. (Decl. Aljian, ¶¶5-8, 12)

The State Bar's "mission is to protect the public and includes the primary functions of licensing, regulation and discipline of attorneys". (*See* calbar.ca.gov) The public relies heavily on attorneys in critical matters, hence factual information about attorney conduct is of wide public interest. The Complaint however blatantly aggrandizes undecipherable "defamation" allegations. By Plaintiff Plummer having chosen to conduct himself in the manner demonstrated by the Declarations of attorneys Satalino, Bohm, Bayuk, Eisenberg, Aljian, and others, Plummer has voluntarily subjected himself to inevitable scrutiny and even certain ridicule by other attorneys, and the public and on the Internet.[6] Since Plaintiffs' filing of serial actions against T.H.E. insurance, Plaintiffs have also [11] attracted online and media attention, as reflected by coverage concerning their litigation conduct.[11] The foregoing are online articles of Plaintiffs' litigation conduct in OC Lawyer Magazine, Orange County Bar Association "California Ethics Case", and the CourtListener.[10] Plummer is by his own account, also arguably a public figure who has thrust himself into a bit of a legal limelight.

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6. Plummer's troubles with clients precede his involvement in the litigation with Defendants. *See* https://www.lawyerratingz.com/reviews/1041922/Lawyer-Mark-Plummer.html Lawyer Mark "Plummer has a poor overall rating on LawyerRatingz.com."

"7/30/18 1 1 1 1 1 AVOID. Bad reputation. Doesn›t get the job done. Manipulative with questionable tactics.

6/8/18 1 1 1 1 1 Single proprietor attorney business. Sloppy business management. Poor communication. Manipulative and questionable ethical tactics. Huge inflated ego that makes it impossible to communicate or have productive conversations as he is one-sided to drive his own personal agenda. Avoid."

See Reader's Digest Assn. v. Super. Ct., 37 Cal. 3d 244, 254–55(1984) Ms. Alai can also rely on news articles and similar evidence to establish that Plummer and his company LMP concern an issue of public interest. *See, e.g.*, *Seelig*, 97 Cal. App. 4th at 809 n.5 (taking judicial notice of articles). *See e.g.* OC Lawyer Magazine "Plummer sued the law firm for conversion" and CourtListener.com state Plummer's claims were barred by Civil Code §47(b) against "Bohm and his law firm". Additionally, as noted in the Complaint, the public protection by the Bar also constitutes a matter of public interest. Hence, there is a need for public information about attorneys, or "consumer watchdogs" to fill this gap. *See e.g.* Bohm Decl., Dec. Eisenberg; Decl., Nabili Decl.

C. Ms. Alai's Statements Were Also Protected by The Absolute Litigation Privilege.

Plaintiffs could not establish that there is a probability they would prevail on the merits because, *inter alia*, their claims against Ms. Alai are barred by the litigation privilege established in Civil Code 47 (b). *Navellier v. Sletten* (2002) 29 Cal. 4th 82, 85 (noting that "[a]ny cause of action arising from the defendant's prior litigation activity may appropriately be the subject of a special motion to strike"). It is beyond dispute that Plaintiff already sued Ms. Alai in 2018. "'The principal purpose of [Civil Code] section [47, subdivision (b)] is to afford litigants and witnesses [citation] the utmost freedom of access to the courts without fear of being harassed subsequently by derivative tort actions.' (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 213 [266 Cal.Rptr. 638, 786 P.2d 365].) Additionally, the

privilege promotes effective judicial proceedings by encouraging '"open channels of communication and the presentation of evidence"' without the external threat of liability (*ibid.*)'Finally, in immunizing participants from liability for torts arising from communications made during judicial proceedings, the law places upon litigants the burden of exposing during trial the bias of witnesses and the falsity of evidence". (*Flatley v. Mauro, supra*, 39 Cal.4th at p. 321-322.) "[T]he privilege is 'an "absolute" privilege, and it bars all tort causes of action except a claim of malicious prosecution.' (*Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 360 [7 Cal.Rptr.3d 803, 81 P.3d 244].)

[12] The litigation privilege has been even applied in 'numerous cases' involving 'fraudulent communication or perjured testimony.' (*Silberg v. Anderson, supra*, 50 Cal.3d at p. 218; see, e.g., *Home Ins. Co. v. Zurich Ins. Co.* (2002) 96 Cal.App.4th 17, 20, 22-26 [116 Cal.Rptr.2d 583]; *Doctors' Co. Ins. Services v. Superior Court* (1990) 225 Cal.App.3d 1284, 1300 [275 Cal.Rptr. 674] [subornation of perjury*]; Carden v. Getzoff* (1987) 190 Cal.App.3d 907, 915 [235 Cal.Rptr. 698] [perjury]; *Steiner v. Eikerling* (1986) 181 Cal.App.3d 639, 642-643 [226 Cal.Rptr. 694]; *O'Neil v. Cunningham* (1981) 118 Cal.App.3d 466, 472-477 [173 Cal.Rptr. 422] [attorney's letter sent in the course of judicial proceedings allegedly defaming his client].) Here, any public posting or public pleadings as well as any communications made by Ms. Alai concerning the alleged Plummer conduct were actions taken during litigation. Thus, Ms. Alai's speech is privileged under Civil Code 47(b) and only actionable under malicious prosecution.

This court would correctly conclude that Plaintiffs cannot demonstrate that they have a probability of prevailing here.

D. Plaintiffs Cannot Establish A Reasonable Likelihood of Prevailing on Their Claims

1. Plaintiffs Cannot Prevail on a Cause of Action For Defamation.

Plaintiffs Plummer and LMP claim that alleged statement or speech on Networksolution.com constitutes defamation because "the statement" "were [sic] understood by as Reed Aljian and all those that heard or read such statements in a way that defamed the Plaintiffs". Complaint ¶11 The Complaint makes conclusory inferences, and fails to identity a single statement made by Ms. Alai or anyone that was defamatory. Ms. Alai alleged that Plummer was indeed incompetent and dishonest in her cross-complaint in *Plummer vs. Alai* – but those allegations have an absolute litigation privilege pursuant to Civil Code 47(b). *Navellier v. Sletten* (2002) 29 Cal. 4th 82, 85 Moreover, Ms. Alai's cross-complaint was already the subject of a failed special motion to strike by Plummer in pro per, as well as a failed further appeal in G05772. NOL Exh. TT Plaintiffs further allege that the defamatory statements were false, and knowingly made with reckless disregard as to their truth or falsity. Complaint ¶¶ 4,6. Plaintiffs, however, cannot demonstrate that Ms. Alai made any non-privileged statements or did so with malice, or the requisite probability of prevailing against Ms. Alai on their unfounded claims. Defamation is defined as "a false

and unprivileged publication that exposes the plaintiff 'to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.'" Cal. Civ. Code § 45; *see Nygard Inc.*, 159 Cal. App. 4th at 1048.

The tort of defamation "involves (a) a publication that is (b) false, (c) defamatory, and (d) unprivileged, and that (e) has a natural tendency to injure or that causes special damage." *Taus v. Loftus*, 40 Cal. App. 4th 683, 720 (2007). When the plaintiff is a public figure, he "must also show

* * *

[15] in Plummer's garage at 18552 Oriente. Aljian Decl. ¶¶5-8. Lastly, Plaintiffs fail to prove any pecuniary loss. *Id.*

4. Plaintiff's Declaratory Relief Claim is Also Constitutionally Barred.

Plaintiffs' third claim for "Declaratory Relief" is equally defective and based on the same fatally flawed statements alleged in relation to Plaintiffs' other two claims. Plaintiffs claim that the subject website is "false and malicious, and defamatory per se" and that the "Defendants have no right to post it with the current provider or *any* provider". Complaint ¶27 Plaintiffs here further seek an evergreen gag order of this court that Defendants "*never* post the subject website content, or anything similar at or on anyplace that could be viewed by anybody". *Id.* Notwithstanding that Plaintiffs are

litigating their second lawsuit against Ms. Alai, Plaintiffs' failed defamation claim "spells the demise of all other causes of action" which flow from therein. Equally important, the gag order violates the First Amendment. Plaintiffs also cannot demonstrate that they could prevail on their claim, because the broadly sought relief is a legal impracticality.

5. Plaintiffs' Amended Cause of Action for Impersonation also fails.

On January 25, 2021, after the filing of the Notice of this Motion, Plaintiffs filed their First Amended Complaint (FAC). Plaintiffs added a claim of "false personation" claiming Penal Code §528.5, arguing that the website uses "Plaintiffs' name and address", and "a picture of MARK B. PLUMMER". This is a nonsense claim which lacks any merit. Plaintiffs' name and address can be found on a countless number of public websites and organic searches. Similarly, reposting a public photo posted on a public website fails to satisfy an implausible claim of false personation. For the foregoing reasons, this claim should also be stricken with prejudice.

6. Dismissal Is Not An Option After The Anti-SLAPP Motion Is Filed.

Once an anti-SLAPP motion is filed the plaintiff cannot evade fees by amending or withdrawing the complaint. *Liu v. Moore* (1999) 69 Cal. App. 4th 745, 749-51. Plaintiffs here cannot circumvent their liability under §425.16 and §425.16(c)(1), when they have clearly

asserted facially frivolous claims where the underlying facts directly or indirectly implicate litigation-related activities. *Navellier v. Sletten* (2002) 29 Cal. 4th 82, 85.

CONCLUSION

For the foregoing reasons, Ms. Alai respectfully requests that the Court *grant* this Motion, and specially strike Law Offices of Mark Plummer and Mark Plummer's unverified Complaint with prejudice and without leave to amend pursuant to *Code of Civil Procedure* §425.16, and an award of attorney's fees and costs to the prevailing defendant as mandated by §425.16(c)(1).

[16]Respectfully Submitted,

Dated: January 25, 2021 **LAW OFFICES OF GLORIA JUAREZ**

By: */s/ Gloria Juarez*
GLORIA M. JUAREZ SBN 109115
KAVEH KESHMIRI SBN 285348
Attorneys for Defendant NILI ALAI

APPENDIX L — NOTICE OF MOTION AND MOTION TO DEEM PLAINTIFFS LAW OFFICES OF MARK B. PLUMMER AND MARK B. PLUMMER VEXATIOUS LITIGANTS PURSUANT TO CODE OF CIVIL PROCEDURE § 391; DECLARATIONS IN SUPPORT THEREOF IN THE SUPERIOR COURT OF CALIFORNIA OF THE COUNTY OF ORANGE, UNLIMITED CIVIL DIVISION, FILED JANUARY 25, 2021

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IN THE SUPERIOR COURT OF CALIFORNIA
OF THE COUNTY OF ORANGE
UNLIMITED CIVIL DIVISION

Case: 30-2020-01141868-CU-DF-CJC

LAW OFFICES OF MARK B. PLUMMER PC,
AND MARK B. PLUMMER

Plaintiffs

v.

NETWORKSOLUTIONS.COM AND
DOES 1 THROUGH 500, INCLUSIVE

Defendants.

Appendix L

Assigned for All Purposes to Judge Melissa McCormick

Hearing Date: Thursday April 15, 2021
Hearing Time: 1:30 p.m.
Dept. C13
Reservation No. ____ 73456476

[Filed herewith Declarations in Support, Request for Judicial Notice, and Notice of Lodgment of Exhibits]

[1] **MEMORANDUM OF POINTS AND AUTHORITIES**

I. INTRODUCTION

Defendant Nili Alai ("Ms. Alai") respectfully seeks an order of the Court granting this Motion to Deem Plaintiffs Mark B. Plummer and its *alter ego* Law Offices of Mark B. Plummer vexatious litigants as statutorily codified by *California's Code of Civil Procedure* §§ 391(b)(1), 391(b)(2), and 391(b)(3).

Plaintiff Law Offices of Mark B. Plummer PC is a high frequency litigant who exceeds the threshold of Code of Civil Procedure § 391 of five (5) cases in seven (7) years with adverse rulings to Plaintiff. Squarely within the rule of §391(b)(1), Plaintiff Law Offices of Mark B. Plummer has in *pro persona* filed and maintained at least five Superior Court and appellate cases in the last seven years where final judgements were adverse to Plaintiff or resulted in a dismissal.

In summary, the plaintiff in the current case, "Law Offices of Mark B. Plummer, PC" (LMP) has *at least EIGHT* prior adverse determinations against it as defined by §391(b)(1) based on appellate court case numbers G053836 and G057721, and OCSC case numbers 30-2019-01069271, 30-2018-01014163, 30-2014-00759128, 30-2019-01113991, 30-2015-00785129, and 30-2011-00524331. And Plaintiff's alter ego "Mark B. Plummer" has had at least five prior adverse determinations against him based on appellate court case numbers B246940, OCSC case numbers 30-2016-00831688 and 30-2011-00525808, ADR Case No. 11-2638-AA, and Los Angeles Superior Court Case (LACSC) Number BC479944.

As explained infra, and elucidated by the declarations of the attorneys and clients who have been the subject of the vexatious *pro per* litigation by alter ego Plaintiffs LMP and Mark B. Plummer, without an order from this Court granting this Motion, a substantial number of parties and the courts will be further incumbered with Plaintiffs' unrestrained filing of continued baseless *pro per*, lawyer driven litigations, repeated re-litigation of frivolous cases and motions, and new meritless and harassing cases filed within the courts. Moreover, these Plaintiffs are essentially one and the same with a unity of interests, who *always* appear in each and every case. There can be no doubt that these plaintiffs operate as a single enterprise.

[2] Hence, Defendant's herewith Motion to Deem Plaintiffs a Vexatious Litigant pursuant to *Code of Civil Procedure* §§391(b)(1), 391(b)(2), and §391(b)(3) is based

on just cause and good showing, and must be *granted* in conformity with the laws of this State.

Based on the foregoing, Defendant respectfully moves the Court to *grant* this Motion and deem Plaintiffs Law Offices of Mark B. Plummer and Mark B. Plummer vexatious litigants.

II. BACKGROUND

The California legislature codified the "vexatious litigant" statutes *Code of Civil Procedure* §391 because of flagrant abuse of the courts by certain high frequency *pro per* litigants, conduct precisely demonstrated here by serial Plaintiffs appearing in alter ego as Law Offices of Mark B. Plummer (LMP) and Mark B. Plummer (Plummer). The legislature recognized that these types of litigants can abuse defendants and waste court resources. The definition of a vexatious litigant requires one acting without legal counsel "*in propria personsa*" – and that includes attorneys like Law Offices of Mark Plummer and Mark Plummer, who in some years file more cases in pro per on behalf of themselves than any actual clients. This is because it is assumed that the cost of hiring legal counsel would act as a disincentive to any possible vexatious litigant thus only those representing themselves are so defined. The cost of litigation and attorney fees in the United States can be extreme and even a party that defends a case and wins often faces significant damages in the time lost and the expense of the defense. It is not uncommon for even a simple civil case to cost hundreds of thousands of dollars to defend. And that does not take

into account the lost time, opportunity, and the resulting distress for defendants. Often vexatious litigant attorneys who represent themselves have no attorney fees incurred for filing countless suits. Meanwhile, the defendant(s) continue to pay large amounts of money on defense and have no choice but to incur cost for defending themselves.

As explained here and demonstrated beyond a reasonable doubt in the Request for Judicial Notice (RJN) in support of this Motion, Plaintiffs Plummer and LMP show a blatant and outrageous misuse of the courts as defined by §391(b). Plummer's willful abuse derives from harassing "shakedown" lawsuits filed in pro per. Plummer indeed [3] explains his basis for doing so under oath in his Income and Expense Declaration in ¶7 "*Business is so bad working out of home*" and ¶9 "*Business is slow, costs are high; I need to cover overhead and payroll*". (*See* Exh. E to Decl. Aljian) Here, "[t]he constant suer for himself becomes a serious problem to others than the defendant he dogs. By clogging court calendars, he causes real detriment to those who have legitimate controversies to be determined and to the taxpayers who must provide the courts." (*Taliaferro v. Hoogs (1965) 237 Cal.App.2d 73, 74 (Talifero)*)

III. STATEMENT OF FACTS

Plaintiffs Law Offices of Mark B. Plummer and Mark B. Plummer (collectively "Plummers") are high frequency *alter ego* plaintiffs of each other, who in *pro persona*, initiated and maintained the requisite 5 Superior Court and appellate level cases within the last 7 years which

either ended in judgment or rulings adverse to their position, or in dismissals. *Code of Civil Procedure* §391(b)(1). (RJN Nos. 1-14) (*See* NOL generally) An attorney and his law firm or corporation may be deemed vexatious. *Say & Say, Inc. v. Ebershoff* (1993) 20 Cal.App.4th 1759, 1766-1770

A. Plaintiff "Law Offices of Mark B. Plummer" is a Vexatious Litigant.

In summary, Plaintiff "Law Offices of Mark B. Plummer" (LMP) has had at least EIGHT prior adverse determinations against it based on appellate court case numbers G053836 and G057721, and Orange County Superior Court (OCSC) case numbers 2014-00759128, 2011-00524331, 2018-01014163, 2015-00785129, 2015-00785129, and 2019-0106927. (RJN Nos. 1-8) *Code of Civil Procedure* §391(b)(1).

(1) On Nov 9, 2017 Plaintiff LMP filed Case No. G053836 *Law Offices of Mark B Plummer, PC vs Bayuk et al.* and that case was finally determined adverse to Plaintiff. The named appellant in appellate court case number G053836 was "Law Offices of Mark B. Plummer PC" (LMP). This case qualifies as an adverse determination against LMP because the appellate court affirmed the judgment against LMP in OCSC case number 2014-00759128. The court is asked to take judicial notice of the court records filed in OCSC 2014-00759128 (Evid. Code, § 452, subd. (d)). OCSC case 2014-00759128 shows the filing of the opinion under Appellate Court case number G053836. Under *Garcia v. Lacey (Garcia)* (2014) 231

* * *

[6] 2011-00525808, ADR Case No. 11-2638-AA, and Los Angeles County Superior Court (LACSC) Case Number BC479944. *§* §391(b)(1).

(1) On Jan. 25, 2016, Plaintiff filed the OCSC case captioned *Mark Plummer Vs. Wells Fargo Bank*, N.A. 30-2016-00831688-CU-FR-CJC. As to OCSC case number 30-2016-00831688, the named plaintiff was "Mark B. Plummer" and was dismissed. Under Garcia, OCSC case 2016-00831688 qualifies as an adverse determination against "Mark B. Plummer" because it resulted in a dismissal (Defendant's Notice of Lodgment of Exhibits (NOL); Exhibit D);

(2) In February 2014, Plaintiff "Mark B. Plummer" in *pro per* filed Case. No. B246940 in the Second Appellate District captioned *Plummer v. T.H.E. Ins. Co.*, and that case was finally determined adverse to Plaintiff. As to case B246940, the named appellant is "Mark B. Plummer." Appellate Court case number B246940 qualifies as an adverse determination against "Mark B. Plummer" because it affirmed the judgment against "Mark B. Plummer." (NOL, Exhibit HH);

(3) As to LACSC case number BC479944, the named Plaintiff is "Mark B. Plummer." LACSC BC479944 qualifies as an adverse determination against "Mark B. Plummer" because the judgment was against "Mark B. Plummer" as shown by appellate court case B246940. (NOL, Exhibit HH);

(4) As to OCSC case number 30-2011-00524331, the named plaintiff is "Mark B. Plummer." The court is requested to take judicial notice of the court records filed in OCSC case number 30-2011-00524331 (Evid. Code, § 452, subd. (d)). This case qualifies as an adverse determination against "Law Offices of Mark B. Plummer, PC" because it resulted in a dismissal filed on April 1, 2014;

(5) As to OCSC case number 30-2011-00525808, the named plaintiff is "Mark B. Plummer." OCSC case 30-2011-00525808 qualifies as an adverse determination against "Mark B. Plummer" because it resulted in a dismissal. (NOL, Exhibit P);

(6) On November 28, 2011, Plaintiff Mark Plummer filed OCSC case number 30-2011-00525808-CU-CL-CJC *Mark B. Plummer vs. Bank of America*. This case qualifies as an adverse determination because it resulted in a dismissal.

* * *

[8] unjustifiably permitted to remain pending at least two years without having been brought to trial or hearing. "Finally determined" means that all avenues for direct review (appeal) have been exhausted or the time for appeal has expired. *Fink v. Shemtov* (2010) 180 Cal.App.4th 1160, 1173; *Childs v. PaineWebber Inc.* (1994) 29 Cal.App.4th 982, 994. Voluntarily dismissing the action counts as an adverse decision. *Tokerud v. Capitol Bank Sacramento* (1995) 38 Cal.App.4th 775, 779; (2) **Relitigating as an in**

pro per on more than two occasions either (i) the validity of an earlier final determination against the same defendant or (ii) any of the claims or issues reasonably subsumed within the earlier actions. *Holcomb v. United States Bank Nat'l Ass'n* (2005) 129 Cal.App.4th 1494, 1504. There is a split of authority whether the relitigation must be in the same proceeding. Compare *Camerado Ins. Agency, Inc. v. Superior Court* (1993) 12 Cal.App.4th 838 [same action], with *Homcolb, supra* [not necessarily]. (3) **Repeatedly filing as an in *pro per*** unmeritorious motions and papers, or otherwise engaging in tactics that are frivolous or solely intended to cause unnecessary delay. It falls within the trial court's discretion to determine what qualifies as "repeated" and "unmeritorious" motions/tactics. See *Morton v. Wagner* (2007) 156 Cal.App.4th 963, 971-972 [dozens of motions in a single action]. Multiple requests for the same relief or for reconsideration of prior rulings might qualify. See *Golin v. Allenby* (2010) 190 Cal.App.4th 616, 632.

C. The Term "Litigation" is Broadly Defined.

Garcia v. Lacey (Garcia) (2014) 231 Cal.App.4th 402, 406, 407, states "A court may declare a person to be a vexatious litigant who, in 'the immediately preceding seven-year period has commenced, prosecuted, or maintained in propria persona at least five litigations other than in a small claims court that have been . . . finally determined adversely to the person. . . .' [Citation.] The term '"[l]itigation"' is defined broadly as 'any civil action or proceeding, commenced, maintained or pending in any state or federal court.' [Citation.] A litigation includes an

appeal or civil writ proceeding filed in an appellate court. [Citations.] A litigation is finally determined adversely to a plaintiff if he does not win the action or proceeding, he began, including cases that are voluntarily dismissed by a plaintiff. [Citations.] (Footnotes 4 and 5 omitted.) "An action is counted as being within the "'immediately preceding seven-year period'" so [9] long as it was filed or maintained during that period. [Citation.] The seven-year period is measured as of the time the motion is filed. [Citation.] (*Id.*, at p. 406, footnote 4.)

V. LEGAL ARGUMENT

A. The Court is Authorized to Deem the Plummer Plaintiffs Vexatious Litigants.

"The purpose of the vexatious litigant statutes 'is to address the problem created by the persistent and obsessive litigant who constantly has pending a number of groundless actions and whose conduct causes serious financial results to the unfortunate objects of his or her attacks and places an unreasonable burden on the courts.'" (*In re Kinney* (2011) 201 Cal.App.4th 951, 957-958.) The constant suer for himself is a problem. (*Taliaferro*)

B. Plaintiff Law Offices of Mark B. Plummer is an Alter Ego of Mark Plummer.

Code of Civil Procedure section 391, subdivision (b), can apply to a corporation that acts as the alter ego of an individual. (*Say & Say, Inc. v. Ebershoff* (1993) 20 Cal. App.4th 1759, 1766-1770 and *Hupp v. Solera Oak Valley*

Greens Association (2017) 12 Cal.App.5th 1300, 1313.) There can be no question that Plaintiffs fulfil the criteria of a *pro persona* litigant. (See e.g., NOL Exh. I) "Law Offices of Mark B. Plummer PC (LMP) is a corporation owned and controlled solely by Mark B. Plummer. Plaintiff Law Offices of Mark B. Plummer has no additional attorneys or associates. The residence where LMP is registered and occupied is registered to Mark Plummer. (Decl. Aljian ¶3-6) The one and only attorney on every referenced LMP *pro per* pleadings by is "Mark B. Plummer". (*See e.g.*, NOL Exh. Y) The only corporate officer is "Mark B. Plummer". "Law Offices of Mark B. Plummer" is a sham enterprise, and it has no distinction between the attorney "Mark B. Plummer" and the firm. (Decl. Alai ¶¶3-7) There is no evidence of any separateness between the conduct of Mark Plummer and the manner in which he conducted his activities at 18552 Oriente Drive in Yorba Linda and those of the purported corporation.

Moreover, these Plaintiffs are essentially one and the same with a unity of interests, who *always* appear in each and every case. (*See e.g.*, Exh I) There can be no doubt that these operate as a single enterprise, with flow in a bilateral direction. There is no separation of interests in these alter ego plaintiffs. (Decl. [10] Alai ¶3) There exists a unity of interest and ownership as between Plaintiff Mark B. Plummer as president and sole shareholder and controller of Plaintiff Law Offices of Mark B. Plummer (LMP) that individuality and separateness among said Plaintiffs has ceased and that Plummer is the alter ego of LMP, and LMP is the alter ego of Plummer. Adherence to the fiction of the separate existence of the company

LMP as distinct from Plummer would sanction fraud and promote injustice in that the controlling manager of LMP and the sole controlling shareholder would wrongfully attempt to evade their lawful obligations and ramification of their conduct. Both Superior Court, and the Court of Appeals have ruled and published in opinions that Plaintiffs Law Office of Mark B. Plummer and Mark B. Plummer's party role is in *pro persona*. The OCSC in 30-2018-0100261 has in its Minute Orders that Plaintiff Plummer is in *pro persona*. (*See* NOL Exh. I) There is no case law which in any way controverts the fact that Plaintiff Plummer and his "firm" litigating in *pro per*, which squarely subjects Plummer and LMP to §391(b). And it should be noted that the listed cases for purpose of this Motion are not exhaustive, and do not account for the additional *pro persona* cases these Plaintiffs have filed in Federal and other County State Courts. Logistically, it was impractical for Defendant here to pull each and every dockets and pleading. There are many other cases. (NOL Exh. MM) The Court of Appeals has also ruled Plaintiff's party role "Mark Plummer" for "Law Offices of Mark Plummer" has been *pro persona*. Superior Courts have similarly ruled Plaintiff Mark Plummer was representing himself in all actions and appearing *pro per* as "Law Office of Mark B. Plummer". Based on the foregoing, and additional declarations and facts herein, Defendant contends that "Mark B. Plummer" is the alter ego of plaintiff "Law Office of Mark B. Plummer. This is also based on Plummer's co-mingling of corporate assets and funds, and essentially using the corporation as a personal "piggy bank". (*See e.g.*, Decl. Hedy Plummer)

C. The Plummer Plaintiffs Must be Deemed Vexatious Litigants.

Plaintiff's *alter ego* "Law Offices of Mark B. Plummer" makes it possible for Plaintiff's bidirectional alter ego "Mark B. Plummer" to file in *pro per* a multitude of frivolous and harassing complaints, intended solely for coercion and threat. (*See e.g.*, RJN Nos. 13,14) For example, a filing or pleading is "frivolous" if it is "so devoid of [11] merit and be so frivolous that they can be described as a '"flagrant abuse of the system,"' have 'no reasonable probability of success,' lack 'reasonable or probable cause or excuse' and are clearly meant to '"abuse the processes of the courts and to harass the adverse party than other litigants."' [Citation.]" (*Morton v. Wagner* (2007) 156 Cal. App.4th 963, 972.) Continually pleading the same rejected causes of action – indeed, continuing to file new cases at all — was an entirely frivolous tactic by Plaintiff. As demonstrated in the case of *Plummer vs. Bayuk*, Plummer litigated and relitigated the same frivolous causes of action repeatedly in the trial court, appeals court, and then again in the trial court through two separate and additional actions, which ended adversely to Plaintiff's position. As explained here, Plummer's similar relitigation tactics fared no better in *Plummer vs. T.H.E. Insurance Company*, *Plummer vs. Rezai*, and in the *Plummer vs. Alai*. (*NOL Exh. PP*, and Decl. Bayuk, generally).

D. Plummer is a Vexatious Litigant as Defined by §391(b)(2).

Plaintiff, in *propria persona*, litigated and relitigated, or attempted to relitigate the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined to be adverse to Plaintiff. §391(b)(2). (*See* Decl. Bayuk generally), See RJN. Plaintiff has further repeatedly relitigated the determinations against the defendants in the action Case No. 2018-01014163 *Law Offices of Mark B Plummer, PC vs. Seven to Seven and Advance Occupational and Hand Therapy* listed on Defendant's Notice. (*Code Civ. Proc.*, § 391, subd. (b)(2).) In 2019, Plaintiff then filed a new OCSC 2019-01117435 (and associated Court of Appeal Case G059486), whereby he is relitigating the same matters as determined in the 2018 case- however he named his client although he is filing suit on behalf of himself and retaining revenues as purported case "expenses". Plaintiff's case is lawyer driven litigation for the lawyer- "suer for himself" which is a serious problem to others". (*Taliaferro v. Hoogs (1965) 237 Cal.App.2d 73, 74.*)

E. Plummer Meets the Definition of a Vexatious Litigant Pursuant to §391(b)(3).

Plaintiffs Law Offices of Mark B. Plummer and Mark B. Plummer in *pro persona* repeatedly file and plead unmeritorious motions and papers, or otherwise engage in highly questionable tactics that are frivolous or solely intended to cause unnecessary