IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION II

MICHAEL R. SOLOMON,	)	D.C.A. CASE # E 065066
	)	Consolidated with
Plaintiff and Appellant,	)	D.C.A. CASE #E065684
	)	
-vs-	)	RIVERSIDE SUPERIOR
	)	COURT CASE
DESERT HEALTHCARE DISTRICT	)	
et. al.,	)	NUMBER
	)	PSC 15036434
Defendant and Respondent.	)	
	)	APPELLANT'S
	)	REPLY BRIEF
_____	)	

APPEAL FROM AN ORDER MADE BY THE
HONORABLE DAVID M. CHAPMAN,
RIVERSIDE SUPERIOR COURT,
GRANTING SLAPP MOTION OF DEFENDANTS

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I
REPLY TO THE DISTRICT DEFENDANT'S STATEMENT OF THE CASE

THE DISTRICT DEFENDANTS Opening Brief states, on page 2, first full paragraph that:

> "To prevail on an anti-SLAPP motion, two prongs must be satisfied. First, it must be established that the challenged cause of action arises from protected activity, i.e. conduct in the furtherance of free speech. Here, Defendants-Respondents' speech concerning Solomon's medical condition fits squarely within the purview of the anti-SLAPP statute."
>
> Respondent's Opening Brief, Page 2

This analysis ***ignores*** the ***intrusion*** by THE DISTRICT DEFENDANTS into the private and confidential medical records of SOLOMON to obtain the material Respondents claim they had a constitutional right to publish. In the case of *Shulman vs. Group W. Productions, Inc*., (1998), 18 Cal. 4th 200, 242, 74 Cal. Rptr. 2d. 843, 871, the California Supreme Court specifically **excluded** acts of intrusion from the newsworthy privilege of the First Amendment because:

> "The intrusion claim calls for much less deferential analysis. In contrast to the broad privilege the press enjoys for publishing truthful newsworthy information in its possession, the press has *no* recognized constitutional privilege to violate generally applicable laws in pursuit of material. Nor, even absent an

> independent crime or tort, can a highly offensive intrusion into a **private** place, conversation, or or source of information generally be justified by the plea that the intruder hoped thereby to get good material for a news story. Such a justification *may* be available when enforcement of the tort or other law would place an impermissibly severe burden on the press, but that condition is not met in this case.
>
> In short, the state may not intrude into the proper sphere of the news media to dictate what they should publish and broadcast, but neither may the media play tyrant to the people by unlawfully spying on them in the name of newsgathering.
>
> *Shulman vs. Group W. Productions, Inc*., (1998), 18 Cal. 4th 200, 242, 74 Cal. Rptr. 2d. 843, 871

Respondents have failed to satisfy the first prong of the anti-SLAPP motion because, according to the California Supreme Court, their intrusion into SOLOMON's private and confidential medical records is not protected activity.

Respondent also states, on page 3, last paragraph that:

> "...the burden shifts to plaintiff to make a showing of likelihood of prevailing on the merits using competent admissible evidence. Here, Solomon relies on self-serving declarations filed with hearsay and other inadmissible evidence."

The evidence offered by SOLOMON was that Defendant KATHY GRECO **admitted** to SOLOMON that she had ***illegally*** obtained and distributed confidential medical information about him from Dr. Siddiqi, but stated that "it was Dr. Siddiqi's fault" for answering her questions.

Defendant KATHY GRECO, when told by SOLOMON that these actions violated the privacy laws, stated that she had a right to violate the privacy rights of the District employees and that she would "do the same thing for anyone who works here." (C.T. Case #E065066, 102:5 - 103:8; 106). These admissions by Defendant KATHY GRECO to SOLOMON are memorialized by SOLOMON's written memorandum to the Board of Directors of the Desert Healthcare District (C.T. Case #E065066, 106). These admissions occurred during the employment evaluation interview of Defendant KATHY GRECO about the events forming the basis of this lawsuit by SOLOMON. The statement from Defendant KATHY GRECO that she would "do the same thing for anyone who works here" is one of the primary reasons this lawsuit was eventually filed (C.T. Case #E065066, 102: 25).

The precise language in the Declaration of Michael Solomon reads as follows:

> "13. On October 6, 2014, I had a meeting in my capacity as President of the Desert Healthcare District with Defendant KATHY GRECO to review her performance as C.E.O.. During that meeting, we discussed her wrongful act of obtaining and disclosing my personal and confidential medical records. During the meeting, Defendant KATHY GRECO admitted to me that she had obtained my personal and confidential medical records from Dr. Siddiqi. In fact, she said it was Dr. Siddiqi's fault because he

provided my personal and confidential medical records in response to her request. During the same meeting, she gave the following additional responses:
"HIPPA doesn't apply to this"
"It was Samantha's fault"
"It was Amiee's fault"
"It was Dr. Siddiqi's fault"
"I had to tell Glen in case there was an emergency because he is second in command"
"You're not being fair. I only did it out of love"
"I stopped after Amiee asked me to respect your privacy"
"I would do the same thing for anyone who works here"

14. During the meeting, I made handwritten written notes of the responses of Defendant KATHY GRECO to the various subjects of the evaluation. When I arrived home immediately after the meeting, I transcribed the notes into my computer. Attached hereto, marked Exhibit A, and incorporated herein by reference is a copy of my notes about what Defendant KATHY GRECO admitted to me during our meeting about her disclosure of my personal and private medical information. The form is redacted to exclude all other notes because they concern private personnel issues that are not relevant to this case."

C.T. Case #E065066, 102:5 - 103:8

The California Evidence Code provides as follows:

"Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity.

California Evidence Code Section 1220

The evidence offered by SOLOMON in his Declaration is classified as admissible evidence by *California Evidence Code Section* 1220 because it is an ***admission*** by Defendant and Respondent KATHY GRECO that she intruded into SOLOMON's private and confidential medical information, and that she misused her position as the C.E.O. of Respondent DESERT HEALTHCARE DISTRICT to do so. The Court is not supposed to weigh either the amount or credibility of evidence in a SLAPP motion. If the evidence is admissible, the evidence defeats a SLAPP motion (*Hung vs. Wang*, (1992), 8 Cal. App. 4th 908; *Looney vs. Superior Court*, (1993), 16 Cal. App. 4th 521, 537 - 538; *McGarry vs. University of San Diego*, (2007), 154 Cal. App. 4th 97 (2007). Therefore, the evidence offered by SOLOMON satisfied his burden under the second prong to introduce admissible evidence of intrusion.

Finally, $32,750.00 of attorney fees to draft a simple, generic SLAPP Motion consisting of 23 pages of declarations and points and authorities is excessive and unreasonable. This amounts to $2,109.88 per page, or 9.23 hours per page, for each of the 23 pages that were part of the SLAPP Motion. These figures alone establish the fee request by THE DISTRICT DEFENDANTS is unreasonable, unnecessary,

excessive and an abuse of discretion by Judge Chapman.

II
THE TRIAL COURT RULING ON SPECIAL MOTION TO STRIKE IS WRONG BECAUSE JUDGE CHAPMAN FOUND THE EVIDENCE PROVED THE DISTRICT DEFENDANTS INTRUDED INTO SOLOMON'S PERSONAL AND CONFIDENTIAL MEDICAL RECORDS BUT THEN PROCEEDED TO EVALUATE AND DISREGARD THE ADMISSIBLE EVIDENCE OF INTRUSION BY THE DISTRICT DEFENDANTS

Judge Chapman ruled:

> "Plaintiff offers little evidence of the private information obtained and disclosed. Plaintiff states that Greco admitted to me that she obtained my personal and confidential medical records from Dr. Siddiqi, (Solomon Dec ¶ 13.). It is unclear who Dr. Siddiqi is and whether the records obtained from him are records of the district. However, even if those records are those of the District, those records are not protected from disclosure because the District is a local agency as defined by Government Code Section 6252(a) and, therefore, not a covered agency under Civil Code section 1798.3."
>
> C.T. E065066 pg. 143, last paragraph

During oral argument, Judge Chapman was told that Dr. Siddiqu was Appellant's attending physician (R.T. E065066, 1:17 - 1:19). Judge Chapman further engaged in the following discourse with counsel which indicates that Judge Chapman was well aware that Solomon's privacy had been violated:

THE COURT: "I note, though, that your objection apparently is not to your client's doctor, who apparently is the person that you believe communicated your client's health care condition to the defendants in this matter. Do I understand your position correctly?"

MR. GAREN: Yes, you do. If I may explain.

THE COURT: Of course.

MR. GAREN: Dr. Solomon feels his man saved his life. Mrs. Greco, as the CEO of the healthcare district, contacted him, got him to obtain the information. He was under the impression she had a right to get it. That's why he did it. And the same thing for the hospital.

So we — we felt that certainly they had a right of action against the hospital and the doctor, but we didn't fee that they were the wrongdoers who deserved to be punished. And one of the reason that this lawsuit is here, when Dr. Solomon counseled her about it as a President of the district, in reviewing her performance, when he tried to point out to her that — Mrs. Greco, now — that "Gee, this is wrong, you shouldn't have," she said, "Well, I'd do it again. I'd do it for anyone." And that's why we're here."

R.T. E 065066, 5:4 - 5:25

The statement in the decision of the Trial Court that Plaintiff offered "little evidence of the private information obtained and disclosed" (C.T. E 065066, 153, last paragraph) is in itself a sufficient factual showing to defeat Respondent's SLAPP motion. All that is required to defeat a SLAPP motion is **some** admissible evidence! The admissible admission of wrongdoing by the primary wrongdoer is more

than some evidence!

The law in California is well established that the Trial Court cannot weigh evidence in determining a SLAPP motion. If the Plaintiff presents evidence to support a prima facia case, the SLAPP motion must be denied. The Trial Court cannot weigh the evidence by classifying it as little evidence to support the grant of a SLAPP motion.

This issue was clearly addressed in the case of *Hung v. Wang*, 8 Cal. App. 4th 908 (1992). Although the Court was analyzing *California Civil Code Section* 1714.10, the standard evaluated was the same standard adopted by the legislature in the SLAPP motion statute. The Court of Appeal held:

> "As we construe section 1714.10, the trial court may not make findings as to the existence of facts based on a weighing of competing declarations. Whether or not the evidence is in conflict, if the petitioner has presented a sufficient pleading and has presented evidence showing that a prima facie case will be established at trial, the trial court must grant the petition. This test meets the high standard required under Walker to avoid infringement of the right to jury trial.
>
> *Hung v. Wang*, 8 Cal. App. 4th 908 (1992)

In the case of *McGarry v. University of San Diego*, 154 Cal. App. 4th 97 (2007), the Court of Appeal held:

> "In considering whether a plaintiff has met those evidentiary burdens, the court must consider the pleadings and the evidence submitted by the parties. (§ 425.16, subd. (b)(1), (2).) However, the court cannot weigh the evidence (*Looney v. Superior Court* (1993) 16 Cal. App.4th 521, 537–538 [20 Cal. Rptr. 2d 182]) but instead must simply determine whether the plaintiff's evidence would, if credited, be sufficient to meet the burden of proof. (*Wilcox v. Superior Court*, supra, 27 Cal.App.4th at pp. 823–825 [standard for assessing evidence is analogous to standard applicable to motions for nonsuit or directed verdict].)
>
> *McGarry v. University of San Diego*, 154 Cal. App. 4th 97 (2007)

In the case of *Wilcox v. Superior Court*, 27 Cal. App. 4th 809 (1994), the Court defined what the legislature meant by the phrase, "a probability that the plaintiff will prevail on the claim" as follows:

> "Section 425.16, subdivision (b) requires the plaintiff to establish "a probability that the plaintiff will prevail on the claim." We must first determine what the Legislature meant by a "probability" the plaintiff will prevail. In doing so we look to the Legislative purpose behind the statute as well as the constitutional rights of the plaintiff to due process and a jury trial.
>
> As discussed above, the common features of SLAPP suits are their lack of merit and chilling of defendants' valid exercise of free speech and the right to petition the government for a redress of grievances. (See discussion, ante, pp. 815-817.) Section 425.16 was intended to address those features by providing a fast and inexpensive unmasking and dismissal of SLAPP's. (§ 425.16, subds. (a), (b), (f) and (g); Stokes, SLAPPing Down the Right to Trial by Jury: The SLAPP Legislation Confusion of 1992, supra, 14 Civ. L. Rep. at p. 486.) It is also presumed the Legislature intended to enact a valid statute. (*People v. Davenport* (1985) 41 Cal.3d 247, 264 [221 Cal. Rptr. 794, 710 P.2d 861].) Anti-SLAPP legislation, therefore, must be fast, inexpensive and constitutional

or it is of no benefit to SLAPP victims, the court or the public. In order to satisfy due process, the burden placed on the plaintiff must be compatible with the early stage at which the motion is brought and heard (§ 425.16, subds. (f) and (g)) and the limited opportunity to conduct discovery (subd. (g)). **In order to preserve the plaintiff's right to a jury trial the court's determination of the motion cannot involve a weighing of the evidence.** (*Looney v. Superior Court* (1993) 16 Cal.App.4th 521, 537-538 [20 Cal.Rptr.2d 182].)

Cases involving similar statutes have held the requirement of establishing a substantial or reasonable probability of success means only that the plaintiff must demonstrate the complaint is legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited. If either of these requirements is not met, the motion to strike must be granted; if both are satisfied, it must be denied. (*Hung v. Wang* [455] (1992) 8 Cal.App.4th 908, 931 [824] [11 Cal.Rptr.2d 113].) This standard is much like that used in determining a motion for nonsuit or directed verdict. (See *Hung v. Wang*, supra, 8 Cal.App.4th at pp. 929, 931 [construing Civil Code section 1714.10]; *Rowe v. Superior Court* (1993) 15 Cal.App.4th 1711, 1723 [19 Cal.Rptr.2d 625] [construing section 425.14]; *Looney v. Superior Court, supra*, 16 Cal.App.4th at p. 538 and *Aquino v. Superior Court* (1993) 21 Cal.App.4th 847, 856 [26 Cal.Rptr.2d 477] [construing section 425.13].)

We believe section 425.16, subdivision (b) should be given a similar construction. As discussed above, SLAPP suits are distinguishable from ordinary tort suits by their lack of merit. One of the purposes of section 425.16, like Civil Code section 1714.10 construed in *Hung*, is to eliminate such meritless litigation at an early stage. (§ 425.16, subd. (a); *Hung v. Wang, supra*, 8 Cal.App.4th at p. 931.) This statutory purpose is met by requiring the plaintiff to demonstrate sufficient facts to establish a prima facie case.

Section 425.16, however, is not totally analogous to sections 425.13, 425.14 and Civil Code section 1714.10. One difference is that section 425.16 places an added burden on the plaintiff to meet the defendant's constitutional defenses. (§ 425.16, subd. (b); Stokes, SLAPPing Down the Right to Trial by Jury: The SLAPP Legislation Confusion of 1992, supra, 14 Civ. L. Rep. at p. 491.) Nevertheless, we believe this burden should be met in the same manner the plaintiff meets the burden of demonstrating the merits of its causes of action: by showing the defendant's purported constitutional defenses are not applicable to the case as a matter of law or by a prima facie showing of facts which, if accepted by the trier of fact, would negate such defenses.

Another distinction, one which cross-complainants find significant, is that section 425.16 requires only a showing of "probability" of prevailing while other statutes require the plaintiff to show "a reasonable probability" (*Civ. Code*, § 1714.10) or "a substantial probability" (§ 425.13) of prevailing. According to cross-complainants, absence of the adjectives reasonable" or "substantial" suggests the Legislature intended to impose a lower threshold under section 425.16 than it imposed in similar statutes. There is some support for this argument in *Hung v. Wang*, supra, 8 Cal.App.4th at page 929 in which the court observed,"The adjective 'reasonable' requires the petitioner to do more than demonstrate some chance of winning; the petitioner must show that, given the evidence, he or she has a substantial case." We note, too, Senate Bill No. 1264 originally required a "substantial" probability but was amended in the Assembly to eliminate the adjective "substantial."

We do not believe by eliminating the adjective "substantial" the Legislature intended a threshold lower than a "reasonable probability." Surely it did not mean the court should accept an "unreasonable" probability. Rather, it appears the Legislature eliminated the word "substantial" in order to avoid the implication the trial court was to weigh the evidence which, as noted above, would raise a serious constitutional problem. (See Stokes, SLAPPing Down the Right to Trial by Jury: The SLAPP

> Legislation Confusion of 1992, supra, 14 Civ. L. Rep. at p. 489.) Thus, we believe the test formulated in Hung v. Wang, supra, for determining a "reasonable probability" should apply to motions under section 425.16.

Wilcox v. Superior Court, 27 Cal. App. 4th 809 (1994)

A SLAPP motion is filed before the opportunity for discovery or the opportunity to refine the pleadings or the theories of recovery. At a minimum, Appellant offered sufficient evidence in the form of statements of admission from Defendant GRECO, the C.E.O. of Defendant District, that, if credited, is sufficient to sustain SOLOMON's burden of proof to show Defendants intruded into SOLOMON'S private records and violated SOLOMON's right to privacy under Article 1, Section 1 of the California Constitution. Irrespective of any free speech privilege that may apply, the California Supreme Court has made it clear that the intrusion into SOLOMON's privacy is not a protected activity. Under the rationale of *Shulman vs. Group W. Productions, Inc*., (1998), 18 Cal. 4th 200, 242, 74 Cal. Rptr. 2d. 843, 871, SOLOMON proved intrusion and violation of SOLOMON's right to privacy under Article 1, Section 1 of the California Constitution and the SLAPP motion should have been denied. Therefore, the judgment of the trial court must be reversed and remanded with directions to allow SOLOMON to

proceed with his case.

III
ATTORNEY FEES

It was an abuse of discretion to award $32,750.00 of attorney fees to draft a simple, generic SLAPP Motion consisting of 23 pages of declarations and points and authorities. This amounts to $2,109.88 per page, or 9.23 hours per page, for each of the 23 pages that were part of the SLAPP Motion. These figures alone establish the fee request by Defendant is unreasonable, unnecessary, excessive, and an abuse of discretion..

In addition, SOLOMON's Complaint qualifies as a Public Benefit Action, which will be fully discussed later in this Reply Brief. In May, 2016, the Desert Healthcare District refused to renew the contract of Defendant KATHY GRECO, effectively terminating her employment. SOLOMON sought to drop this Appeal and waive all further compensation because the goal of the litigation had been reached, but Respondents refused to do so. Accordingly, the only real issue in this Appeal is whether or not SOLOMON must pay attorney fees for his public service of obtaining the removal of Defendant Kathy Greco as the C.E.O. of Defendant DESERT HEALTHCARE DISTRICT.

IV
RESPONSE TO THE DISTRICT DEFENDANTS STATEMENT OF FACTS

The District Defendants Statement of Facts conveniently omits the conduct that forms the basis of this lawsuit. These facts omitted by The District Defendants are:

(1) As soon as SOLOMON was admitted to Desert Regional Medical Center, Defendant Kathy Greco misused her position as Chief Executive Officer of the Defendant Desert Healthcare District (the Lessor and Landlord of Desert Regional Medical Center) to obtain the confidential and private personal healthcare information of SOLOMON from SOLOMON's personal physician (Dr. Sidiqui); the staff of Desert Regional Medical Center; and SOLOMON's medical records at Desert Regional Medical Center without the authorization or consent of SOLOMON (C.T. Case Number E065066, 92:19 - 95:19; 99:10 - 103:21).

(2) The information illegally obtained even included a Cat Scan of Plaintiff's brain (C.T. Case Number 065066, 99:25 - 100:6)!

(3) Immediately after upon receipt of the confidential medical information of SOLOMON, Defendant KATHY GRECO contacted

Defendant Kay Hazen, along with Mark Mathews, Glenn Grayman, M.D., and William Grimm, M.D., and other members of the Desert Healthcare staff, and attorneys Best, Best, and Krieger and disclosed the confidential medical information of SOLOMON she obtained without SOLOMON's authorization or consent from SOLOMON's personal physician (Dr.Sidiqui), Defendant Desert Healthcare District staff, Tenet Healthcare and the Desert Regional Medical Center (C.T. Case Number: 065066, 92:19 - 95:19; 99:10 - 103:21).

(4) When SOLOMON filed this action seeking redress for the invasion of SOLOMON's right to privacy, THE DISTRICT DEFENDANTS filed a SLAPP motion contending that they had a right to obtain and communicate SOLOMON's confidential medical information without his consent because he was a public figure and his personal health information was "newsworthy" (C.T. Case Number 065066, 43:8 - 44:28).

(5) In opposition to THE DISTRICT DEFENDANTS' SLAPP Motion, SOLOMON submitted declarations establishing that Defendant KATHY GRECO admitted that she obtained confidential medical information about SOLOMON from SOLOMON's physician (Dr.

Siddiqi); other employees of Desert Regional Medical Center, and SOLOMON's confidential medical records maintained by Desert Regional Medical Center and then published all the confidential medical information obtained without SOLOMON's authorization or consent to various members of the public and the press. None of the information which forms the basis of this Complaint was acquired from SOLOMON's Registered Domestic Partner ("girlfriend") (C.T. Case Number: 065066, 92:19 - 95:19; 99:10 - 103:21).

(6) During SOLOMON's employment evaluation interview of Defendant KATHY GRECO about the events forming the basis of this lawsuit by SOLOMON, Defendant KATHY GRECO **admitted** to SOLOMON that she had obtained and distributed confidential medical information about him from Dr. Siddiqi, but stated that "it was Dr. Siddiqi's fault" for answering her questions. Defendant KATHY GRECO, when told by SOLOMON that these actions violated the privacy laws, stated that she had a right to violate those laws and that she would "do the same thing for anyone who works here." (C.T. Case Number: 065066, 102:5 - 106). These admissions by Defendant KATHY GRECO to SOLOMON are memorialized by SOLOMON's written

memorandum to the Board of Directors of Defendant DESERT HEALTHCARE DISTRICT (C.T. Case No. 065066, page 106). The statement from Defendant KATHY GRECO that she would "do the same thing for anyone who works here" is one of the primary reasons this lawsuit was eventually filed (C.T. Case Number 065066, 102: 25).

(7) Recognizing that Defendant KATHY GRECO had violated SOLOMON's right to privacy, SOLOMON was consulted by Carolyn Caldwell, the C.E.O. of Desert Hospital, who apologized for the violations and expressed the hope that the hospital would not be sued for the violations (C.T. Case Number: 065066, 101:19 - 101:102:4). They are not in fact sued because they were not intentional wrongdoers (C.T. Case Number: 065066, 102:1 - 102:4).

(8) The Trial Court granted THE DISTRICT DEFENDANTS SLAPP motion, finding that the confidential medical records of SOLOMON are not protected because they are "newsworthy" (C.T. Caes Number: 065066, 147 - 148; 152 - 153). There are no reported cases which have addressed the specific question of whether the unauthorized publication or communication of confidential medical records is protected by the "newsworthy" exemption.

(9) However, this action was not limited to the unauthorized publication or communication of his confidential medical records. SOLOMON also alleged that THE DISTRICT DEFENDANTS intruded into his right to privacy by obtaining without authorization his confidential medical records (C.T. Case Number: 065066, 92:19 - 95:19; 99:10 - 103:21). Intrusion is not protected by the First Amendment "newsworthy" privilege (*Schulman vs. Group w. Productions, Inc.* (1998), 18 Cal. 4th 200, 74 Cal. Rptr. 2d 843)

(10) At the SLAPP Motion, SOLOMON introduced his testimony that Defendant KARTY GRECO **admitted** to him that he had obtained his confidential medical records without his authorization (C.T. Case Number: 065066, 102:10 - 102: 25). The California Supreme Court held obtaining confidential medical records without authorization is intrusion and is not protected by the "newsworthy" privilege of the First Amendment to the United States Constitution, as was explained to Judge Chapman at oral argument (R.T., Case Number: 065066, 4:2 - 5:25; 8:2 - 8:19), *Schulman vs. Group w. Productions, Inc.* (1998), 18 Cal. 4th 200, 74 Cal. Rptr. 2d 843.

. (11) The Trial Court failed to limit the newsworthy privilege to

communication and publication, and instead applied the newsworthy privilege to the unauthorized intrusion to obtain the confidential medical information of SOLOMON and granted THE DISTRICT DEFENDANTS SLAPP motion (C.T. Case Number: 065066, 147 - 148; 152 - 153).

(12) The Trial Court further ruled that the newsworthy privilege took precedence over the SOLOMON's right to confidentiality of his medical records (C.T. Case Number: 065066, 147 - 148; 152 - 153).

(13) The Court also found that SOLOMON failed to demonstrate a probability that he could prevail on his claim (C.T. Case Number: 065066, 147 - 148; 152 - 153) or that he was seeking relief solely in the public interest and on behalf of the general public (C.T. Case Number: 065684, 176, last paragraph), and granted the Defendants motions to dismiss and for attorney fees.

The deliberate omission of these facts from the Statement of Facts contained in the Opening Brief of THE DISTRICT DEFENDANTS, together with the continued claim that the information provided by SOLOMON's Registered Domestic Partner forms the basis of this action, is an admission by THE DISTRICT DEFENDANTS that they

cannot prevail on the real evidence.

V
THE PUBLICATION OF PRIVATE MEDICAL INFORMATION BY THE DISTRICT DEFENDANTS SHOULD NOT BE PROTECTED AS FREE SPEECH

SOLOMON's Opening Brief questions whether the publication of private medical information can be protected as free speech to cloak the reprehensible actions of THE DISTRICT DEFENDANTS. THE DISTRICT DEFENDANTS concede they invaded SOLOMON's medical privacy while he was in the hospital attempting to recover from a serious stroke to gain a political advantage over SOLOMON. They violated his right to privacy under Article 1, Section 1 of the California Constitution because they believed their actions were cloaked by the constitutional protection that their activities were newsworthy.

SOLOMON urges that this Court revisit the issue of whether the "newsworthy" privilege permits the publication of illegally obtained confidential medical records without the authorization and consent of the victim.

The publication of information a person knows is confidential medical information that was not authorized for release by the patient

should not be permitted under the newsworthy exception to the First Amendment, even if the publisher had no part in obtaining the personal and confidential medical information.

Without this protection, it is open season on the confidential medical information of government officials and celebrities as well as average citizens. Patients are entitled to privacy when suffering from serious and life threatening medical conditions. A blanket newsworthy privilege allows patients to be victimized by a cruel and uncaring press just seeking the sale of newspapers. Even if the intruder is liable for the invasion of the privacy of a patient, it is indefensible public policy to allow a publisher of confidential medical information with full knowledge it was illegally obtained to escape liability for the publication of confidential medical records just because the records may be newsworthy.

While the California Supreme Court did grant this precise privilege in the *Schulman* case, the people who published the emergency medical communications between the helicopter emergency nurse and the patient lacked the same conscious knowledge of wrongdoing and evil, self-serving motive that Defendant KATHY GRECO and the other

DISTRICT DEFENDANTS displayed. SOLOMON urges this Court to establish a new rule of law that the newsworthy privilege of the First Amendment does not authorize the publication of illegally obtained confidential medical records.

All constitutional rights have some limitations. Just as free speech does not permit a person to yell "fire" in a crowded theater when there is no fire, the "newsworthy" exception should not afford First Amendment protection to publish illegally obtained confidential medical information.

VI
THE CONDUCT OF RESPONDENTS IN OBTAINING SOLOMON'S PRIVATE MEDICAL INFORMATION WAS ILLEGAL AND IS THEREFORE NOT WITHIN THE PROTECTION AFFORDED BY A SLAPP MOTION

In the case of *Flatley v. Mauro*, 39 Cal. 4th 299 (2009) , the California Supreme Court held:

> "We agree with *Paul* that section 425.16 cannot be invoked by a defendant whose assertedly protected activity is illegal as a matter of law and, for that reason, not protected by constitutional guarantees of free speech and petition. A contrary rule would be inconsistent with the purpose of the anti-SLAPP statute as revealed by its language. (*Paul*, supra, 85 Cal.App.4th at p. 1365 ["[T]he activity of which plaintiff complains … was not a valid activity undertaken by defendants in furtherance of their constitutional right [to] free speech"].) Moreover, it would

eviscerate the first step of the two-step inquiry set forth in the statute if the defendant's mere assertion that his underlying activity was constitutionally protected sufficed to shift the burden to the plaintiff to establish a probability of prevailing where it could be conclusively shown that the defendant's underlying activity was illegal and not constitutionally protected. While a defendant need only make a prima facie showing that the underlying activity falls within the ambit of the statute, clearly the statute envisions that the courts do more than simply rubberstamp such assertions before moving on to the second step. (*Wilcox v. Superior Court*, supra, 27 Cal.App.4th at p. 819 ["[I]t is fundamentally fair that before putting the plaintiff to the burden of establishing probability of success on the merits the defendant be required to show imposing that burden is justified by the nature of the plaintiff's complaint"].) Furthermore, as the Attorney General points out in his amicus curiae brief, "[i]f the courts rule that a defendant who has engaged in indisputably illegal behavior … has met the first step of the motion to strike, the defendant can then shift the burden to the plaintiff and force his victim to [marshal] and present evidence early in the litigation before the commencement of full discovery … . [I]f the plaintiff/victim is unable to show a probability of prevailing, he will have to pay the defendant's attorneys fees. (See § 425.16, subd. (c).) These are … grossly unfair burdens to impose on a plaintiff who is himself the victim of the defendant's criminal activity."

* * *

We conclude, therefore, that where a defendant brings a motion to strike under section 425.16 based on a claim that the plaintiff's action arises from activity by the defendant in furtherance of the defendant's exercise of protected speech or petition rights, but either the defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law, the defendant is precluded from using the anti-SLAPP statute to strike the plaintiff's action. In reaching this conclusion, we emphasize that the question of whether the defendant's underlying conduct was illegal as a

> matter of law is preliminary, and unrelated to the second prong question of whether the plaintiff has demonstrated a probability of prevailing, and the showing required to establish conduct illegal as a matter of law—either through defendant's concession or by uncontroverted and conclusive evidence—is not the same showing as the plaintiff's second prong showing of probability of prevailing. With this understanding, we turn to Mauro's claim that even conduct illegal as a matter of law is protected by the anti-SLAPP statute if it is protected by the litigation privilege. (Civ. Code, § 47, subd. (b).)
>
> *Flatley v. Mauro*, 39 Cal. 4th 299 (2006)

In the *Flatley* case, which involved an attorney sending a well-known entertainer a settlement letter the Court determined was extortion, the California Supreme Court held that illegal activity was not subject to the first leg of the SLAPP test. The California Supreme Court held there is no constitutional right to engage in illegal activity.

In the case of *Hill v. National Collegiate Athletic Assn.*, 7 Cal. 4th 1 (1994), the California Supreme Court defined the invasion of privacy as illegal conduct in the following passage:

> "Based on our review of the Privacy Initiative, we hold that a plaintiff alleging an invasion of privacy in violation of the state constitutional right to privacy must establish each of the following: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy.
>
> *Hill v. National Collegiate Athletic Assn*., 7 Cal. 4th 1 (1994)

In the case of *Susan S vs. Israels*, (1997), 59 Cal. App. 4th 1290, 67 Cal. Rptr. 42, the Court explained the violation of the victim's constitutional right to privacy as follows:

> In *Hill vs. National Collegiate Athlwetic Assn.,* (1994), 7 Cal. 4th 1, 20, 26 Cal. Rptr. 2d 834, 865, P. 2d. 633, our Supreme Court held a cause of action exists for violation of the right of privacy under article 1, section 1 of the California Constitution. A plaintiff alleging an invasion of privacy in violation of the state constitutional right to privacy must establish the following (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by the defendant constituting a serious invasion of privacy"
>
> *Susan S vs. Israels*, (1997), 59 Cal. App. 4th 1290, 1294-95 67 Cal. Rptr. 42

In this case, THE DISTRICT DEFENDANTS ***admitted*** that they ***illegally*** intruded into SOLOMON's privacy; acquired his private and confidential medical information; and then published it to the general public (C.T. Case #E065066, 102:5 - 103:8).

This intrusion by Defendant KATHY GRECO and the other District Defendants constitutes an illegal act, i.e. the violation of the right to privacy established by Article 1, Section 1 of the California Constitution. Therefore, THE DISTRICT DEFENDANTS are legally prohibited from establishing that they are engaging in protected activity in publishing confidential medical records because they obtained those

records illegally.

Appellant urges the Court to protect the medical privacy of all California residents by classifying the *publication* of confidential medical records and information as illegal activity in violation of the right to privacy established by Article 1, Section 1 of the California Constitution and therefore excluded from the First Amended "newsworthy" protection by the rule established by the California Supreme Court in the case of *Flatley v. Mauro*, 39 Cal. 4th 299 (2006).

VII
SOLOMON HAS ESTABLISHED THAT THE INTRUSION INTO HIS PRIVATE MEDICAL RECORDS BY THE DISTRICT DEFENDANTS IS NOT ENTITLED TO PROTECTION UNDER THE NEWSWORTHY PRIVILEGE OF THE FIRST AMENDMENT

SOLOMON discussed this issue extensively in his Opening Brief and in Chapters I and II of this Reply Brief. For the reasons stated in those other discussions, the intrusion by THE DISTRICT DEFENDANTS into the confidential medical information of SOLOMON is not protected activity under the newsworthy privilege of the First Amendment, and Judge Chapman erred in granting the SLAPP motion. The judgment must be reversed and remanded with directions

to proceed.

VIII
SOLOMON NEED NOT ESTABLISH A PROBABILITY THAT HE CAN PREVAIL ON THE MERITS BECAUSE THE DISTRICT DEFENDANTS CANNOT SHOW THAT SOLOMON'S CAUSE OF ACTION ARISES FROM PROTECTED ACTIVITY

The issue of prevailing on the merits only becomes an issue after THE DISTRICT DEFENDANTS have satisfied their burden of slowing that the cause of action arises from the protected activity. This Court need not and should not reach the issue of prevailing on the merits because THE DISTRICT DEFENDANTS have not satisfied their burden of showing that the cause of action arose from protected activity. Therefore, SOLOMON should not be required to establish a probability that he can prevail on the merits.

IX
SOLOMON SATISFIED THE SECOND PRONG AND SHOWED THE PROBABILITY OF PREVAILING AT TRIAL

Solomon has established a probability that he can prevail on the merits.

THE DISTRICT DEFENDANTS contend that the Declaration of Plaintiff Solomon containing the admission by Defendant GRECO is inadmissible under the hearsay rule. However, while the District

Defendants objected to this testimony, the Trial Court order did not sustain any of the evidentiary objections offered by Defendant District (C.T. 169 - 170).

California Evidence Code Section 1220 reads as follows:

> "Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party either in his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity."

California Evidence Code Section 1220

The statement of Defendant Greco admitting that she engaged in the conduct forming the basis of the Complaint, both in her individual capacity and as the C.E.O. of the Defendant Desert Healthcare District, is clearly made admissible evidence by *California Evidence Code Section* 1220. This explains why Judge Chapman failed to sustain the evidentiary objections of the District Defendants.

The Memorandum of Points and Authorities filed by THE DISTRICT DEFENDANTS in support of their SLAPP motion claim a right to distribute Solomon's private and confidential medical records to the general public because those records are "newsworthy". The cite reads:

> "This act arose from protected activity for the purposes of the anti-SLAPP statute because the acts were in furtherance of the defendants' right of petition or free speech. By virtue of this matter relating to the health and ultimate availability of a public official, as required under the anti-SLAPP statute."
>
> C.T. Case Number 065066, 43:15 - 43:20

The Opening Brief of THE DISTRICT DEFENDANTS goes on to present allegations from the Solomon Complaint regarding the **motive** of the District Defendants for violating his right to privacy. While the issue of motive is relevant to assess damages, the motive of THE DISTRICT DEFENDANTS has nothing to do with the legal liability of THE DISTRICT DEFENDANTS for the intrusion into and publication of SOLOMON's confidential medical records, especially in terms of a SLAPP motion. The only issue is whether Solomon established a probability of prevailing at trial.

SOLOMON offered admissible evidence proving the intrusion into SOLOMON'S private medical records by THE DISTRICT DEFENDANTS. The admissible evidence proving the intrusion into SOLOMON's private medical records establishes that SOLOMON has a probability of prevailing at trial for the purposes of a SLAPP motion because it is, at a minimum, constitutes credible evidence that sustains

SOLOMON's burden of proof to establish a violation of SOLOMON's right to privacy under Article 1, Section 1 of the California Constitution..

IX-A
THE STATUTORY PROVISION THAT PLAINTIFF HAS ESTABLISHED THERE IS A PROBABILITY THAT THE PLAINTIFF WILL PREVAIL ON THE CLAIM MEANS THAT PLAINTIFF WILL PROBABLY PREVAIL ON THE FACTS PLEAD IN THE COMPLAINT AND IS NOT LIMITED TO THE PRECISE LEGAL THEORY PLEAD IN THE COMPLAINT

This issue was fully briefed in SOLOMON's Opening Brief, and THE DISTRICT DEFENDANTS have not challenged SOLOMON'S argument in their Opening Brief. The cases of *Nguyen-Lam v. Cao*, 171 Cal. App. 4th 858, 873, 90 Cal. Rptr. 3d 205, 217 (2009); *Martin vs. Inland Empire Utilities Agency*, (2011.), 198 Cal. App. 4th 611, 130 Cal. Rptr. 3d 410; and *Hecimovich vs. Encinal School Parent Teacher Organization,* 203 Cal. App. 4th 450, 468-469, 137 Cal. Rptr. 3d 455 (2012) (cited extensively in SOLOMON's Opening Brief) constitute published precedent on this issue. THE DISTRICT DEFENDANTS, in their opening brief, do not contest SOLOMON's interpretation of those cases.

Since SOLOMON demonstrated that a probability that he could recover on his claim, the SLAPP motion should have been denied. This which would have allowed SOLOMON to have moved to amend his complaint to state a legal theory for violation of his right to privacy under Article 1, Section 1 of the California Constitution under the facts plead in the original complaint and established by the declarations filed in connection with the SLAPP motion. This result is consistent with the opinions issued in the cases of *Nguyen-Lam v. Cao*, 171 Cal. App. 4th 858, 873, 90 Cal. Rptr. 3d 205, 217 (2009); *Martin vs. Inland Empire Utilities Agency*, (2011), 198 Cal. App. 4th 611, 130 Cal. Rptr. 3d 410; and *Hecimovich vs. Encinal School Parent Teacher Organization,* 203 Cal. App. 4th 450, 468-469, 137 Cal. Rptr. 3d 455 (2012) in which the Court disregards pleading defects and uses the underlying facts in the Complaint and the affidavits to determine whether a SLAPP motion should be granted or denied.

IX-B
VIOLATION OF RIGHT TO PRIVACY UNDER ARTICLE 1, SECTION 1 OF THE CALIFORNIA CONSTITUTION

SOLOMON's Opening Brief established a reasonable probability that SOLOMON will prevail on a cause of action for violation of

SOLOMON's right to privacy under Article 1, Section 1 of the California Constitution.

THE DISTRICT DEFENDANTS argue that Solomon cannot satisfy the second prong of the *C.C.P. Section* 425.16 motion of showing the probability of prevailing at trial. However, in their opening brief, THE DISTRICT DEFENDANTS completely and utterly fail to address the argument in Solomon's Opening Brief that the facts presented to the Trial Court in the SLAPP Motion are sufficient to state a cause of action for a violation of Solomon's constitutional right to privacy under Article 1, Section 1 of the California Constitution as established by the cases of *Susan S vs. Israels*, (1997), 59 Cal. App. 4th 1290, 67 Cal. Rptr. 42 and *Hill vs. National Collegiate Athlwetic Assn.,* (1994), 7 Cal. 4th 1, 20, 26 Cal. Rptr. 2d 834, 865, P. 2d. 633. SOLOMON introduced admissible evidence to prove that THE DISTRICT DEFENDANTS violated Solomon's constitutional right to privacy under Article 1, Section 1 of the California Constitution. This satisfies the second prong of a Slapp motion. By failing to address their potential liability for violation of Solomon's constitutional right to privacy under Article 1, Section 1 of the California Constitution, THE

DISTRICT DEFENDANTS have conceded this issue.

IX-C.
LIABILITY OF DISTRICT FOR VIOLATION OF CALIFORNIA CIVIL CODE SECTION 1798.24

SOLOMON concedes that the provisions of *California Civil Code Section* 1798.3(b) precludes a finding of liability for violation of *California Civil Code Section* 1798.24

IX-D.
LIABILITY OF INDIVIDUAL DEFENDANTS FOR VIOLATION OF *CALIFORNIA CIVIL CODE SECTION* 1798.53

California Civil Code Section 1798.53 reads as follows:

> "Any person, other than an employee of the state or of a local government agency acting within his or her official capacity, who intentionally discloses information, not otherwise public, which they know or should reasonably know was obtained from personal information maintained by a state agency or from other "records"
> within a "system of records" (as those terms are defined in the Federal Privacy Act of 1974 maintained by a federal government agency, shall be subject to a civil action, for invasion of privacy, by the individual to whom the information pertains."

California Civil Code Section 1798.53

Solomon concedes that the provisions of *California Civil Code Section* 1798.3(b) preclude a finding of liability for violation of *California Civil Code Section* 1798.53 against Defendant DESERT

HEALTHCARE DISTRICT. However, this statute does not preclude a finding of liability against the individual Defendants GRECO and HAZEN.

California Civil Code Section 1798.53 precludes a finding of liability against an employee of a local government agency only when the employee is acting within his or her official capacity.

On page 24 of their Opening Brief, The District Defendants claim that:

> "Greco was acting solely in her official capacity as CEO of the District while obtaining and transmitting the information, i.e. she was determining Solomon's fitness to perform his roll and initiating succession planning."
>
> Respondent's Opening Brief, page 24

However, the allegations of the Complaint (C.T. Case Number 065066, pages 1 - 10) do not allege that Defendant GRECO was, in fact, acting within her official capacity as the C.E.O of the District while obtaining and transmitting the information, and it is difficult to imagine how the unlawful invasion of SOLOMON's confidential medical information could possibly fall within the course and scope of Defendant GRECO's official capacity as the C.E.O. of the District.

While THE DISTRICT DEFENDANTS may eventually be able to establish that the misconduct of Defendant GRECO was within the course and scope of her employment, this is a factual issue that cannot be resolved at the pleading stage or on a SLAPP motion. SOLOMON has established a sufficient probability to satisfy the second prong of a SLAPP motion that Defendant GRECO, as an individual defendant, is liable to SOLOMON for violating *California Civil Code Section* 1798.53.

Finally, THE DISTRICT DEFENDANTS attempt to confuse the facts by continually misrepresenting the record. THE DISTRICT DEFENDANTS continually claim they are *only* being sued for *repeating* the information that SOLOMON's registered domestic partner provided to them. This is **not true!**

In the first paragraph of Article III of SOLOMON's opening brief reads as follows:

> Plaintiff's Registered Domestic Partner disclosed to an employee (Samantha Prior) of the Defendant DESERT HEALTHCARE DISTRICT that Plaintiff **appeared to have** suffered a stroke and was being taken to Desert Regional Medical Center for treatment.. (C.T. 54:27 - 55:4; 91:1 - 91: 92:1).L The disclosure of this information is **not** the basis of this lawsuit. No communication that originated from Plaintiff's Registered Domestic Partner ("girlfriend") to Samantha Prior about the fact

> that Plaintiff **appeared to have** suffered a stroke and was taken to Desert Regional Medical Center for treatment is the basis of this lawsuit. **None** of the information that is the subject of this Complaint was obtained from Plaintiff's Registered Domestic Partner ("girlfriend").
>
> Appellant's Opening Brief, Page 10

This is a direct quote from SOLOMON's Points and Authorities in opposition to the SLAPP motion (C.T. Case Number 065066, 76:9 - 76:18). The information provided by SOLOMON's domestic partner is not the basis of this claim.

The basis of this claim is the confidential medical information Defendant GRECO illegally obtained by misusing her position as the CEO of Defendant DESERT HEALTHCARE DISTRICT to access the confidential medical records of SOLOMON from DESERT REGIONAL MEDICAL CENTER and from his attending physician, Dr. Siddiqui (C.T. Case Number 065066, 76:17 - 76:27). THE DISTRICT DEFENDANTS also claim that obtaining and distributing this information is not prohibited by *California Civil Code Section* 1798.53 because the information illegally obtained by Defendant GRECO is not information "maintained" by a state or local government agency.

Again, Defendant GRECO **admitted** that she came into this information through the exercise of her apparent authority as the CEO of Defendant Desert Healthcare District. Whether or not this information then becomes information that is "maintained" by the Desert Healthcare District is a question of fact that cannot be resolved at a SLAPP motion. The evidence of a violation by Defendant GRECO of *California Civil Code Section* 1798.53 was sufficient to show that SOLOMON had a reasonable probability of success as to Defendant GRECO.

IX-E.
CALIFORNIA CIVIL CODE 1798.55 CLAIMS ARE MOOT

SOLOMON sought a declaration under *California Civil Code Section* 1798.55 that the violations by Defendant GRECO constituted legal grounds for termination under the statute. THE DISTRICT DEFENDANTS assert that since Defendant DESERT HEALTHCARE DISTRICT is excluded from the definition of an agency by *California Civil Code* 1798.3(b), *California Civil Code Section* 1798.55 does not apply to the violations by Defendant GRECO.

Subsequent to this appeal, but **before** THE DISTRICT DEFENDANTS filed their opening brief, the employment of Defendant

GRECO was terminated by The Desert Healthcare District. Accordingly, since Defendant GRECO no longer works for The Desert Healthcare District, whether her misconduct is a basis to terminate her employment under *California Civil Code Section* 1798.55 is moot. Since she is no longer employed by Defendant DESERT HEALTHCARE DISTRICT, it no longer matters whether *California Civil Code Section* 1798.55 provides a legal cause for Defendant THE DESERT HEALTHCARE DISTRICT to terminate an employment relationship with Defendant KATHY GRECO that no longer exists.

The only question is why THE DISTRICT DEFENDANTS are wasting the time of this Court with this moot argument.

X
IS THE PUBLICATION OF SOLOMON'S CONFIDENTIAL MEDICAL RECORDS PROTECTED BY THE NEWSWORTHY PRIVILEGE OF THE FIRST AMENDMENT

THE DISTRICT DEFENDANTS cite one new case in support of their argument that the publication of confidential medical records is protected by the newsworthy privilege of the First Amendment.

The case is *Gilbert vs. Medical Economics Co*., (10th Cir., 1981), 665 F.2d 305, 308. In this case, a newspaper was investigating

physicians who should have been denied the right to practice because of medical malpractice mistakes. This particular article was about an anesthesiologist who had harmed several patients. The newspaper published the physicians name, picture, and other information, and included a discussion about the physician's psychiatric and marital problems. However, the opinion of the Court does not disclose whether the discussion of the physician's psychiatric problems in the news article was based on obtaining confidential medical information. From the context of the opinion, it appears that the information about the physicians psychiatric and marital problems were based on information generally known in the medical community and by her physician peers. The whole idea of the article was the failure of physicians to adequately self-police themselves, and the case dates back to 1981 when there was very little self-policing of physicians.

This case has no application to the facts of the SOLOMON case because it is not clear from this case that the physicians records that were published were, in fact, confidential. Therefore, this case provides no authority to either grant or deny the newsworthy protection to the information published by THE DISTRICT DEFENDANTS. In addition,

it is from the Tenth Circuit and therefore is not binding precedent within the Ninth Circuit Court of Appeals.

THE DISTRICT DEFENDANTS also extensively discuss *Alim vs. Superior Court*, (1986), 185 Cal. App. 3d 144, 229 Cal. Rptr. 599 and *Schulman vs. Group w. Productions, Inc.* (1998), 18 Cal. 4th 200, 74 Cal. Rptr. 2d 843. Each of these cases was completely analyzed and distinguished by SOLOMON in his opening brief, and further analysis need not be repeated here.

SOLOMON does not believe the *Alim* case applies to these facts for the reasons fully developed in SOLOMON's Opening Brief.

SOLOMON believes the rule of the *Schulman* case with respect to the newsworthy privilege afforded to the publication of illegally obtained confidential medical information should be reconsidered.

However, the *Schulman* opinion carefully excluded the intrusion into the victim's privacy from the application of the newsworthy privilege under the First Amendment. Solomon also briefed this issue extensively both in his Opening Brief and this Reply Brief. The failure of THE DISTRICT DEFENDANTS to contest it in their Opening Brief constitutes a concession of this issue to SOLOMON.

XI
STANDARD OF REVIEW ON ATTORNEY FEES

SOLOMON agrees that the standard of review of the amount of attorney fees SOLOMON was ordered to pay is an abuse of discretion. SOLOMON must establish that Judge Chapman exceeded all bounds of reason in making the award. SOLOMON argues that an award of $32,750.00 of attorney fees for drafting a simple, generic SLAPP Motion consisting of 23 pages of declarations and points and authorities amounting to $2,109.88 per page, or 9.23 hours per page, satisfies this burden of proof. The fee request by Defendant is unreasonable, unnecessary and excessive and exceeds all bounds of reason and must be reviewed and reduced by this Court.

The specific details of SOLOMON's objections to these fees are set forth at length in the Clerk's Transcript for Case Number 065684 from pages 99:24 p- 106:14 and need not be repeated in this Reply Brief.

XII
PUBLIC BENEFIT EXCEPTION UNDER C.C.P. 425.17

California Code of Civil Procedure Section 425.17 provides that the rules for SLAPP motions do not apply to any action brought solely

in the public interest or on behalf of the general public. While the standard for reviewing the amount of attorney fees awarded is abuse of discretion, SOLOMON'S defense of the public benefit exception is an issue of law that must be resolved *de novo* by this Court on appeal (*Westwood Village vs. Luskin*, (2014), 233 Cal. App. 4th 135, 143. It is not reviewed for an abuse of discretion as argued by The District Defendants.

This issue was addressed in the case of *All One God Faith, Inc. v. Organic & Sustainable Industry Standards, Inc*., 183 Cal. App. 4th 1186 (2010). In this case, the Court held that the application of the public benefit exception under *California Code of Civil Procedure* 425.17 is reviewed *de novo* as an issue of law because:

> We review the question of whether section 425.17 is applicable under the circumstances presented here under the same independent standard of review we applied to OASIS's appeal. (See *Navarro v. IHOP Properties, Inc*., supra, 134 Cal.App.4th at pp. 839, 840–841.) Furthermore, the question before us is one of statutory construction, which poses a question of law. (*R & P Capital Resources, Inc. v. California State Lottery* (1995) 31 Cal.App.4th 1033, 1036 [37 Cal.Rptr.2d 436].) "Our primary task in construing a statute is to determine the Legislature's intent. [Citation.] Where possible, 'we follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law .' [Citation.]" (*Jarrow Formulas, Inc. v. LaMarche*, supra, 31 Cal.4th at p. 733, original ellipsis.) Generally, exceptions to a statute are construed narrowly to cover "only those circumstances

> which are within the words and reason of the exception." (*Hayter Trucking, Inc. v. Shell Western E&P, Inc*. (1993) 18 Cal. App.4th 1, 20 [22 Cal. Rptr.2d 229]; see also *Club Members for an Honest Election v. Sierra Club* (2008) 45 Cal.4th 309, 316 [86 Cal.Rptr.3d 288, 196 P.3d 1094] (Club Members).) " 'The literal meaning of the words of a statute may be disregarded to avoid absurd results or to give effect to manifest purposes that, in the light of the statute's legislative history, appear from its provisions considered as a whole.' [Citation.]" (*In re Enrique Z.* (1994) 30 Cal.App.4th 464, 469 [36 Cal.Rptr.2d 132].)
>
> *All One God Faith, Inc. v. Organic & Sustainable Industry Standards, Inc.*, (2010) 183 Cal. App. 4th 1186

Therefore, this Court must grant *de novo* review the Public Benefit Exception claimed by SOLOMON.

XII-A
NATURE OF RELIEF SOUGHT FALLS WITHIN THE PUBLIC BENEFIT EXCEPTION

In order to fall within this statutory protection, the plaintiff cannot seek any relief greater than or different from the relief sought for the general public or a class of which the plaintiff is a member. A claim for attorney's fees, costs, or penalties does not constitute greater or different relief for purposes of this subdivision.

The statutory provision does not limit the application of this section to the relief actually sought in the Complaint. The statute refers to the actual relief sought by the Plaintiff in the lawsuit.

Prior to the filing of this lawsuit, Plaintiff filed a Government Code Claim (C.T. Case No. E065684, 80 - 96.). The Government Code Claim stated:

> "In lieu of litigation and payment of money, your claimants are willing to settle this claim by having the district take the following actions:
>
> 1. Termination of Kathy Greco, who is the person primarily responsible for these wrongdoings;
>
> 2. the resignation of Director Kay Hazen in exchange for an agreement by the Claimants and the Desert Healthcare District not to pursue her personally for any of the wrongdoings, including the illegal transfers of taxpayer funds to the Desert Healthcare Foundation, a private non-profit corporation, and an agreement not to make a public release of this claim.
>
> or, in the alternative,
>
> for Director Kay Hazen to remain in office and not be given a release from liability by your claimants or the Desert Healthcare District wrongdoings but instead to have the Desert Healthcare District release a copy of this claim and a settlement agreement based hereon to the general public and the press;
>
> 3. The dissolution of the Desert Healthcare Foundation, a private non-profit corporation;
>
> 4. The initiation of legal action to recover the monies illegally diverted from the Desert Healthcare District to the Desert Healthcare Foundation, a non-profit private corporation, including the initiation of a action against Carlos Campos and Best, Best, and Krieger, who, as the District's Attorney, should have issued formal written opinions to each board member notifying each of us that these transfers were an illegal

expenditure of taxpayer funds.

5. The replacement of Best, Best, and Krieger as attorneys for the Desert Healthcare District.

In the event, and **only** in the event that the District and the individuals reject this proposal, your claimants request compensatory damages, punitive damages, and attorney fees in the sum of $10,000,000.00 to be paid jointly and severally by the wrongdoers herein, KATHY GRECO, KAY HAZEN, MARK MATTHEWS, CARLOS CAMPOS, BEST, BEST, AND KRIEGER, ATTORNEYS AT LAW; the Desert Healthcare District; and the Desert Healthcare Foundation.

(C.T. Case No. E065684, 95 - 96.)

This California Government Code claim, filed in advance of any litigation, provides conclusive proof that the relief SOLOMON sought by this lawsuit falls within the public benefit exception of *California Code of Civil Procedure Section* 425.17.

In addition, SOLOMON's counsel renewed this offer to counsel for THE DISTRICT DEFENDANTS before Defendants appeared in this action or incurred any substantial costs. The testimony regarding this conversation is found in C.T. Case No. E065684, , 119:19 - 120:5) and reads as follows:

"54. On September 1, 2015, after this action was filed, but before any appearance was made by Defendant, I personally had a telephone call with Defendants counsel, Jeffrey A. Morris. I told him that this case would be dismissed without payment of any

money, attorney fees, or court costs if the Board agreed to terminate the employment of Defendant KATHY GRECO. This conversation is noted on Defendants Exhibit C of Defendants lodgment in support of Motion for Attorney Fees. Mr. Morris promised to discuss this with the Board.
55. When I did not hear back from Mr. Morris, I again telephoned him to inquire as to the status of this offer. Mr. Morris replied that the offer was rejected outright."

C.T. Case No. E065684, 119:19 - 120:5

On May 25, 2016, after the Board of Directors of Defendant DESERT HEALTHCARE DISTRICT voted not to renew the employment contract of Defendant and C.E.O. KATHY GRECO, effectively terminating her employment, Counsel for SOLOMON again contacted JEFFREY MORRIS by e-mail and offered to dismiss the entire case with each party to bear their own fees and costs. The exact text of the e-mail reads:

"I have heard a rumor that the Desert Healthcare District voted to non-renew the contract of Kathy Greco and that her employment will end on July 31, 2016.

If this is true, and Kathy is in fact separated from the District, my clients objectives in this lawsuit have been achieved. As I made clear to you from our first telephone conversation, all my client wanted from this lawsuit was that the employment of Kathy Greco by the Desert Healthcare District be terminated. The fact that
the District chose to not renew her contract as opposed to discharging her is completely insignificant - all my client wanted was for her not to be employed, and how and why she was

unemployed was not significant to him.

Therefore, my client is willing to try to work out an arrangement where the lawsuit/appeal is dismissed with each party to bear their own fees and costs for the entire lawsuit, meaning that the current attorney fee and cost award is vacated.

I have already filed my opening brief for the consolidated appeal, so we have 100 days to work this out (your 40 days plus your 60 day extension).

If your clients are interested in pursuing such a resolution, please let me know.

Clark Garen"

Mr. Morris replied that the Joint Powers Authority which was defending this lawsuit for THE DISTRICT DEFENDANTS was not interested in this type of settlement, and the offer was rejected outright.

These pre and post filing communications clearly establish that this lawsuit was not seeking any relief greater than or different from the relief sought for the general public or a class of which the plaintiff is a member, especially since a claim for attorney's fees, costs, or penalties does not constitute greater or different relief for purposes of this subdivision. Therefore, SOLOMON established his eligibility for the public benefit exception to the SLAPP statute.

XII-B
ENFORCEMENT OF AN IMPORTANT RIGHT AFFECTING THE PUBLIC INTEREST AND CONFERS A SIGNIFICANT BENEFIT ON THE PUBLIC

The District Defendants argue that SOLOMON's lawsuit was not brought solely in the public interest, citing the case of *Westwood Village vs. Luskin* (2014), 233 Cal. App. 4th 135. A reading of this case establishes that SOLOMON satisfies the public benefit criteria.

In the *Westwood Village* case, Luskin gave 40 million dollars to his foundation, which in turn donated 40 million dollars to build a conference center on the campus of U.C.L.A. After the donation, the University decided to explore building a commercial hotel instead of a conference center with the donation from the private foundation of the Luskins. The Luskins sent a letter to the University supporting this change in purpose.

The Plaintiff's sued the University to challenge the commercial development, and also sued the Luskins and their foundation because the Plaintiffs' claimed the change in propose made the 40 million dollar donation illegal. The Court agreed that the suit against the University fell within the public benefit exception, but found that since neither the Luskins or their foundation had any control over the conversion of the

project to a commercial hotel or any participation in the conversion of the project, the lawsuit insofar as it sought relief against the Luskins and their foundation fell outside the public benefit exception because the action against the Luskins and their foundation would not confer a public benefit. The rationale of this case has no bearing on the facts of SOLOMON.

SOLOMON falls within the statutory protection because his action, if successful, would enforce an important right affecting the public interest, and confer a significant benefit, both pecuniary and non-pecuniary, on the general public or a large class of persons.

The sole objective of SOLOMON's lawsuit was the removal of C.E.O. Kathy Greco, a person who was using her official position to violate the privacy rights of District employees and who was counseling the illegal diversion of District taxpayer funds to projects outside the District. This confers a significant benefit, both pecuniary and non-pecuniary, on the general public.

XII-C
PRIVATE ENFORCEMENT WAS NECESSARY

In order to fall within the statutory protection, SOLOMON must have proved that private enforcement is necessary and places a

disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter.

The Board of Directors of Defendant DESERT HEALTHCARE DISTRICT, on numerous occasions, refused to terminate Defendant KATHY GRECO. Then, after this litigation had been pending for more than a year, the Board of Directors of Defendant DESERT HEALTHCARE DISTRICT suddenly decided that SOLOMON was right and voted to refuse to renew her contract, effectively terminating her employment.

Without SOLOMON's action in filing this lawsuit, the termination of Defendant KATHY GRECO would not have occurred.

Furthermore, private enforcement places a disproportionate burden on SOLOMON. In his Declaration, SOLOMON states,

> "I am currently unemployed and recovering from a stroke,. The total value of all my worldly assets, consisting primarily of my personal residence, is less than $250,0000.00"
>
> C.T. Case No. E065684, 78:10 - 78:12

Under these facts, *California Code of Civil Procedure Section* 425.17 prohibits an award of attorney fees under *California Civil Code Section* 425.16.

XIII
CONCLUSION

The Motion to Dismiss under *California Code of Civil Procedure Section* 425.16 must be reversed and remanded to the Trial Court for further proceedings, and the order granting THE DISTRICT DEFENDANTS an award of attorney fees be reversed.

Dated: October 31, 2016

LAW OFFICES OF CLARK GAREN

BY

/s/ Clark Garen
CLARK GAREN,
ATTORNEY FOR PLAINTIFF

CERTIFICATE OF WORD COUNT
PER C.R.C. 8.204(b)(10(C)(1)

I, CLARK GAREN, STATE AND DECLARE:

1. I am the attorney of record for the appellants who prepared the foregoing brief.

2. The Word Perfect Program on which this Opening Brief was prepared calculates the word count of this entire brief to be 10,613 words.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

EXECUTED ON OCTOBER 31, 2016 AT NORTH PALM SPRINGS,

CALIFORNIA

/s/ Clark Garen
CLARK GAREN

PROOF OF SERVICE BY MAIL
(1013a, 2015.5 C.C.P.)

STATE OF CALIFORNIA)
COUNTY OF RIVERSIDE) S.S.

I am a citizen of the United States and a Resident of the County Aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is: P. O. BOX 1790, PALM SPRINGS, CALIFORNIA 92263.

On October 31, 2016, I served the within APPELLANT'S OPENING BRIEF on the Plaintiffs and Respondents by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at PALM SPRINGS, CALIFORNIA addressed as follows:

JEFFREY A. MORRIS,
DEVANEY, PATE, MORRIS & CAMERON, LLP,
ONE BETTER WORLD CIRCLE, SUITE 300,
TEMECULA, CALIFORNIA 92590

On October 31, 2016, I served the within APPELLANT'S OPENING BRIEF on the Trial Judge by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at PALM SPRINGS, CALIFORNIA addressed as follows:

HONORABLE DAVID M. CHAPMAN,
C/O CLERK OF THE COURT,
3255 EAST TAHQUITZ WAY,
PALM SPRINGS, CALIFORNIA 92262

On October 31, 2016, I served one electronic copy of the within APPELLANT'S OPENING BRIEF on the Supreme Court of California and California District Court of Appeal, Fourth Appellate District, Division 2 by electronically filing by following the procedure set up for electronic filing by the Court of Appeal for the Fourth Appellate District, Division 2 on their web side.

I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

EXECUTED ON OCTOBER 31, 2016 AT PALM SPRINGS, CALIFORNIA

/s/ Clark Garen
CLARK GAREN, DECLARANT