Docket No. E065066
[Consolidated with Docket No. E065684]
(Superior Court Case No. PSC1503643)

COURT OF APPEAL OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

MICHAEL R. SOLOMON,
Plaintiff and Appellant,

v.

DESERT HEALTHCARE DISTRICT, et al.,
Defendants and Respondents.

RESPONDENT'S BRIEF

Appeal from a Judgment of the Superior Court of California
In and for the County of Riverside
Honorable David M. Chapman

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION II	Court of Appeal Case Number: E065066/E065684
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APPELLANT/PETITIONER: Michael R. Solomon RESPONDENT/REAL PARTY IN INTEREST: Desert Healthcare District, et al.	

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(Check one): ☒ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE

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1. This form is being submitted on behalf of the following party *(name)*: Defendants/Respondents

2. a. ☐ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☒ Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	Nature of interest *(Explain):*
(1)	Special District Risk Management Authority	Joint Powers Authority for Desert Healthcare District, et al.
(2)		
(3)		
(4)		
(5)		

☐ Continued on attachment 2.

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

Date: May 12, 2016

Jeffery A. Morris
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I. STATEMENT OF THE CASE

This appeal arises out of the Trial Court's order granting Defendants-Respondents' motion, under Code of Civil Procedure, section 425.16, to strike the complaint as a "Strategic Lawsuit Against Public Participation," or "SLAPP" suit. Plaintiff-Appellant, Michael Solomon ("Solomon"), an elected director of Defendant-Respondent, Desert Healthcare District (the "District"), alleges Defendants-Respondents disclosed private medical information relating to a medical emergency he suffered and in doing so, violated California Information Practices Act, Civil Code, section 1798, et seq. However, the California Information Practices Act does not apply to the facts of this case, so the complaint fails as a matter of law. Moreover, this information was disclosed as a matter of public concern, specifically, the ability of a publicly elected official to fulfill his duties, and thus, is protected and privileged speech.

This complaint is based upon allegations that Defendants-Respondents, Kay Hazen ("Hazen"), another elected director of the District, and Kathy Greco ("Greco"), CEO of the District, obtained and then disclosed private medical information relating to the emergency treatment of a stroke suffered by Solomon. Solomon claims that Hazen and Greco were involved in a scheme to illegally expand the service area of the District to distribute taxpayer funds to organizations outside the District service area, including organizations with which Hazen had business

interests; that Solomon opposed Greco and Hazen's plans; and that the disclosures were made to, among other things, "create a question in the mind of the public and electorate about the mental competence of Plaintiff [Solomon] … and his ability to continue as a Director of the Desert Healthcare District ..." (CT 7; Complaint, ¶ 21.) This is protected speech, as such, Defendants-Respondents filed the special motion to strike Plaintiff's complaint, pursuant to California's anti-SLAPP statute.

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 furtherance of free speech. Here, Defendants-Respondents' speech concerning Solomon's medical condition fits squarely within the purview of the anti-SLAPP statute. As articulated by Solomon in his complaint the discussion of his medical condition was to determine if he was able to perform his duty as director of a public healthcare district—a matter of public concern. Thus, the Trial Court correctly ruled that the statements were protected activity triggering California's anti-SLAPP statute.

Second, if the defendant satisfies the first prong, the burden shifts to plaintiff to make a showing of likelihood of prevailing on the merits using competent admissible evidence. Here, Solomon relies solely on self-serving declarations filled with hearsay and other inadmissible evidence, and thus, he failed to present competent admissible evidence to show a likelihood of

prevailing on the merits. Even if Solomon produced competent admissible evidence—which he has not—Solomon's complaint fails as a matter of law because the California Information Practices Act statutory relief does not apply to the facts of this case. And further, this speech is privileged newsworthy speech, which is as a complete defense to Solomon's pleaded claims *and* similar claims Solomon could feasibly bring. Therefore, the Trial Court correctly found that Solomon did not show a probability of prevailing on his claims.

If a defendant prevails on a special motion to strike, the anti-SLAPP statute provides for *mandatory* attorneys' fees. Having prevailed on the special motion to strike, Defendants-Respondents are legally entitled to their attorneys' fees. The Trial Court awarded $32,750 in attorneys' fees, reduced from the requested amount of $48,527.10, as billed by Defendants-Respondents' litigation counsel and general counsel. This amount is reasonable considering the nature of the allegations and the complaint at issue. Moreover, if the ruling is affirmed, Defendants-Respondents are entitled to all fees incurred in connection with this appeal.

This Court should AFFIRM the Trial Court's decision and strike Solomon's complaint and the award of attorneys' fees.

II. STATEMENT OF JURISDICTION

This appeal is taken from the Trial Court's order granting the Defendants-Respondents' anti-SLAPP motion, under California Code of

Civil Procedure section 425.16, and subsequent entry of judgment. Accordingly, Defendants-Respondents do not challenge this Court's jurisdiction.

III. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Is Defendants-Respondents' speech protected under the anti-SLAPP statute, California Code of Civil Procedure, section 425.16?
2. Did Solomon show a reasonable probability of prevailing on his claims using competent admissible evidence?
3. Were the attorneys' fees awarded by the Trial Court reasonable?

IV. STANDARD OF REVIEW

Because it is a constitutional issue, the Court of Appeal's review of a trial court's grant or denial of a motion to strike under California's anti-SLAPP statute is reviewed de novo. (*Vargas v. City of Salinas* (2011) 200 Cal.App.4th 1331, 1341.) However, the review of the amount of attorney fees awarded is reviewed for abuse of discretion. (*Lunada Biomedical v. Nunez* (2014) 230 Cal.App.4th 459, 487, review denied (Jan. 21, 2015).) Specifically, "[a] trial court's attorney fee award will not be set aside 'absent a showing that it is manifestly excessive in the circumstances.'" (*Ibid*.)

V. TRIAL COURT'S RULINGS

A. Trial Court's Ruling on Special Motion to Strike

The Trial Court correctly explained that to prevail on an anti-SLAPP motion, a defendant must first make a prima facie showing that the suit arises from defendant's exercise of free speech or petition rights as defined in Code of Civil Procedure, section 425.16(e). Among the conduct protected is conduct in furtherance of the exercise of the constitutional right of free speech in connection with a public issue or an issue of public interest. (CCP § 425.16(e)(4).) The Trial Court cited case law explaining that, "public interest" within the meaning of the anti-SLAPP statute includes not only governmental matters, but also private conduct that impacts a broad segment of society and/or that affects a community in a manner similar to that of a governmental entity. (*Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 479; *Kurwa v. Harrington, Foxx, Dubrow & Canter, LLP* (2007) 146 Cal.App.4th 841, 846.)

After articulating this standard, the Trial Court held:

> A healthcare district, a specific category of special district, is a form of local government… The statements at issue here were according to Plaintiff's own allegations made to discredit a public official as part of an alleged scheme by Greco and Hazen to illegally gain access to the use of taxpayer funds. As such, these statements are protected… (Clerk's Transcript, E065066 ("CT") 143; Clerk's Transcript, Attorney's Fees ("CT AF") 2–3.)

Having found the Defendants-Respondents' conduct was protected, the Trial Court moved to the second prong where the burden shifts to plaintiff to establish a "probability" that the plaintiff will prevail on the asserted claims. The claims here are under Code of Civil Procedure, section 1798, et seq. In analyzing the second prong, the Trial Court held:

> Plaintiff cannot demonstrate a probability of prevailing because the statements made were not disclosures of personal information obtained from information maintained by a state agency… 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… (CT 143; CT AF 3–4.)

The District is not a state agency, and thus, the Plaintiff-Appellant cannot prevail on these claims.

What's more, the Trial Court opined that Solomon offered "little evidence" in support of his claims. Specifically the Court stated:

> Plaintiff offers little evidence of the private information obtained and disclosed. Plaintiff states that Greco "admitted to me that she had obtained my personal and confidential medical records from Dr. Siddiqi." (Solomon Decl. Paragraph 13.) It is unclear who Dr. Siddiqi is and whether the records obtained from him are records of the District. (CT 143; CT AF 4.)

The Court ultimately looped back to the inapplicability of the statute, "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." (CT 143.) Defendants-Respondents' special motion to strike was GRANTED.

B. Trial Court's Ruling on Attorneys' Fees Motion

After, the Trial Court's ruling on the special motion to strike, Defendants-Respondents' filed a motion for attorneys' fees. The Trial Court GRANTED Defendants-Respondents' motion holding: "the Court awards and finds that the reasonable attorney fees are in the amount of $32,750.00." (CT AF 150.)

The Trial Court summarized the facts of the case and asserted Defendants-Respondents' were entitled to attorneys' fees after prevailing on the special motion to strike. Then the Trial Court went on to articulate why the public benefit exemption did not apply to this case:

> Plaintiff's complaint is not a Public Benefit Action. As to the relief sought, Plaintiff seeks general, special and punitive damages. These damages are personal relief not available to the general public. "The statutory language of 425.17(b) is unambiguous and bars a litigant seeking 'any' personal relief from relying on the section 425.17(b) exception." (*Club Members for An Honest Election v. Sierra Club,* [2008] *supra*, 45 Cal.4th [309] at 316.) (CT AF 151.)

Having found the exception did not apply, the Trial Court awarded attorneys' fees under the anti-SLAPP statute.

VI. STATEMENT OF FACTS

On or about the morning of August 4, 2014, Solomon suffered a medical emergency. His Registered Domestic Partner, Amiee Wyant

("Wyant"), was transporting him to the emergency room and called the District's Operations Support Manager, Samantha Prior ("Prior"). (CT 54-55, Decl. Greco, ¶ 2.) According to Prior, Wyant was aware that Prior's sister-in-law worked at the emergency room and asked Prior to notify the emergency room to be ready to treat a "possible stroke." (*Id.*) Prior informed the District's Executive Director Greco that Solomon was or would be admitted to the emergency room for treatment of a suspected stroke. (*Id.*)

Greco contacted the Board of Directors and Vice President Dr. Glen Grayman to discuss succession issues, continued leadership continuity under the circumstances regarding Solomon, and seek direction. (CT 55, Decl. Greco, ¶ 3.) Greco then made phone calls to the other members of the Board of Directors for the District and relayed the following information:

- The fact that Solomon was being admitted (per the information provided by Wyant);
- The suspected diagnosis (per the information provided by Solomon's Registered Domestic Partner, Wyant); and
- The fact that she had been in contact with Board Vice President Grayman regarding his availability for immediate District business. (*Id*.)

The calls to the Board of Directors triggered at least one "get well" inquiry from a Director. (CT 52–53, Decl. Hazen, ¶ 2.)

In addition to her telephone calls, Greco sent text messages to Solomon's cell phone, which she believed to be in the possession of Wyant. (CT 55, Decl. Greco, ¶ 4.) On August 4, 2014, Greco sent the following message to Wyant:

> Hi Aimee [Wyant] and Mike [Solomon] – [W]e are all thinking positive thoughts. Please let us know if there's anything else we can do. We felt like we were circling every wagon we could think of to help! Here's to the Siddiqi Team! Please let us know your progress. Best, DHCD Family.

Notably, in stating that she was "circling every wagon," Greco reaffirmed that she was communicating with multiple parties.

The following day Greco sent another text message to Wyant, stating:

> Hi – Sam said that Mike [Solomon] was going home today. Please let me know if there is anything we can help with. I don't want to bother Mike [Solomon] with any District business; please let me know if we should go to Glen for any signatures we may need …. Keeping positive thoughts – Kathy [Greco].

(CT 55, Decl. Greco, ¶ 5.) This inquiry was met with the following response from Wyant:

> Kathy [Greco], we are waiting for discharge papers. Michael [Solomon] will be unable to perform district functions for a few days at least . . . we will have to see what the docs say. Please respect our privacy and do not discuss his condition with anyone. Thank you. – Amiee Wyant. (CT 55, Decl. Greco, ¶ 6.)

Thereafter, Greco instructed staff that they were no longer to discuss or inquire about Solomon's condition with anyone per Wyant's wishes. (CT 56, Decl. Greco, ¶ 7; Decl. Solomon, ¶ 11.)

Based on the above facts, Solomon filed a government claim on January 12, 2015. (CT 60.) Thereafter, on January 29, 2015, a newspaper published an article concerning Solomon's claims against Defendants-Respondents, including "violating health privacy" laws. (CT 60.) Numerous articles followed publishing statements such as, "Solomon was admitted to Desert Regional Medical Center in August after suffering a stroke" and Greco shared that information "with other board members, district staff and attorneys in an attempt to 'create a question in the minds of the public and electorate about (his) mental competence.' " (CT 60–68, quotes from CT 65.)

VII. SUMMARY OF ARGUMENT

To succeed on an anti-SLAPP motion, two prongs must be satisfied: (1) the claims arise from protected speech and (2) plaintiff cannot demonstrate a probability of success on said claims using competent admissible evidence. Both prongs are met here.

With regard to the first prong, the Defendants-Respondents' speech concerning Solomon's medical condition fits squarely within the purview of the anti-SLAPP statute. As articulated by Solomon in his complaint, the discussion of his medical condition was to determine if he was able to

perform his duty as director or a public healthcare district—a matter of public concern. Thus, the Trial Court correctly ruled that the District's statement were protected activity triggering California's anti-SLAPP statute and its ruling should be affirmed.

Moving to the second prong, Solomon cannot demonstrate a probability of prevailing on the merits for the following reasons. First, Solomon has not submitted competent admissible evidence in support of his claims, instead he has only submitted declarations filled with hearsay other inadmissible evidence. Second, the California Information Practices Act, Civil Code, section 1798, et seq., does not apply to the facts of this case, and thus, Solomon's complaint fails as a matter of law. Third, Defendants-Respondents' speech is privileged newsworthy speech, which is as a complete defense to Solomon's pleaded claims ***and*** similar claims Solomon could feasibly bring. Therefore, the Trial Court correctly found that Solomon did not show a probability of prevailing on his claims and the Trial Court's ruling should be affirmed.

Because both prongs are satisfied, the Trial Court correctly granted Defendants-Respondents' motion striking the complaint. Having prevailed, Defendants-Respondents were entitled to attorneys' fees, which the Trial Court appropriately awarded. The amount of attorneys' fees awarded by the Trial Court was reasonable considering the facts of this case, and thus, no abuse of discretion occurred and the award should be affirmed.

VIII. ARGUMENT

A. Anti-SLAPP Legal Standard

A SLAPP suit—a strategic lawsuit against public participation—seeks to chill or punish a party's exercise of constitutional rights to free speech or to petition the government for redress of grievances. The Legislature enacted Code of Civil Procedure section 425.16 to provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055-1056.)

Pursuant to CCP section 425.16(b)(1), a litigant may move to strike "[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 or California Constitution in connection with a public issue...." Although the statute refers to "lawsuits brought primarily to chill exercise" of rights of free speech and petition, defendant need not show that the lawsuit was brought with the subjective intent to "chill" these rights. (*Equilon Enterprises, LLC v. Consumer Cause, Inc*. (2002) 29 Cal.4th 53, 58–59.) Nor need defendant demonstrate that plaintiff's complaint actually had a "chilling" effect on his or her First Amendment rights. (*Id.*)

In evaluating an anti-SLAPP motion, the trial court first decides whether the defendant has made a threshold showing that the challenged cause of action arises from protected activity. (*Rusheen*, 37 Cal.4th at

1056.) In analyzing whether the moving party has met its burden of showing that the suit arises from protected activity, the court considers "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (CCP § 425.16, subd. (b)(2).)

If the court finds a showing has been made that the challenged cause of action arises from protected activity, it then determines whether the complaining party has demonstrated a probability of prevailing the claim. (*Equilon Enterprises, LLC*, 29 Cal.4th at 67.) "Put another way, the plaintiff 'must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.'[citations]" (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal. 4th 811, 821 (citations omitted).) The "plaintiffs' burden as to the second prong of the anti-SLAPP test is akin to that of a party opposing a motion for summary judgment." (*Navellier v. Sletten* (2003) 106 Cal.App.4th 763, 768 (*Navellier II*).) If the plaintiff fails to carry that burden, the cause of action is "subject to be stricken under the statute." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89 (*Navellier I*).)

B. Prong 1: Defendants-Respondents' Speech is Protected Under the Anti-SLAPP Statute

Section 425.16, subdivision (e) describes four categories of conduct that constitute an "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" within the meaning of subdivision (b)(1): "(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; (4) or 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."

1. Defendants-Respondents' Speech is Protected as it was in Connection with a Public Issue or an Issue of Public Interest

A statement or other conduct is "in connection with a public issue or an issue of public interest" (Cal. Civ. Code, § 425.16, subd. (e)(4)) if the statement or conduct concerns a topic of widespread public interest and contributes in some manner to a public discussion of the topic.) (*Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 898.) A cause of action "aris[es] from" protected activity within the meaning of section 425.16, subdivision (b)(1) if the defendant's act underlying the cause of action, and on which the cause of action is based, was an act in furtherance of the

defendant's right of petition or free speech in connection with a public issue. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78; *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1001.)

Here, the speech of which Solomon complains was in furtherance of Hazen and Greco's right of free speech and concerns a matter of public interest, specifically, the fitness of a political figure for office. (CT 7; Complaint, ¶ 21.) By Solomon's own admission, the content of the communication was in connection with a public issue or an issue of public interest. (CT 7; Complaint, ¶ 21.) The complaint states:

> [The] reason for these disclosures by Defendant DESERT HEALTHCARE DISTRICT, Defendant KATHY GRECO, and Defendant KAY HAZEN was to … create a question in the mind of the public and electorate about the mental competence of Plaintiff Michael R. SOLOMON, M.D. and his ability to continue as a Director of the Desert Healthcare District…

(CT 7; Complaint, ¶ 21, ll. 17-25.) Speech concerning a matter of public interest is *per se* protected free speech. (Cal. Civ. Code, § 425.16, subd. (e)(4).)

Solomon pleads that the allegedly confidential information was disclosed in order to create doubt about his competency in the minds of the public at large in order to oust him as the Director of a healthcare district, a public entity. Thus, his own complaint articulates that this matter involves the competence of a public official to adequately perform his functions in

the public office he holds—a matter of public concern. The complained of speech absolutely constitutes speech concerning a matter of public interest, which is *per se* protected speech.

Further, speech is "in connection with an issue of public interest" if the statement or conduct concerns a topic of widespread public interest and **contributes in some manner to a public discussion of the topic**. (*Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 898 (emphasis added).) Here, the speech is of public interest and "contributed to public discussion" as evidenced by the *multiple* news articles were written in the local media following the filing of the government tort claim, and the present lawsuit. These articles discuss the District, the disclosure of Solomon's medical information, the reasons therefore, and the related litigation. (CT 60–68.)

2. Defendants-Respondents' Was Not Illegal to Preclude Anti-SLAPP Protection

Solomon argues that Defendants-Respondents' conduct was not a protected activity because it was illegal. However, Solomon cannot simply allege Defendants-Respondents' conduct is illegal. Rather there is a specific evidentiary burden he is required to meet for this argument—a burden Solomon cannot fulfill.

California courts have created a very *narrow* exception to the anti-SLAPP statute that does not provide protection for illegal conduct that has been "conceded" or is determinable as a matter of law based on

"uncontroverted evidence." (*Flatley v. Mauro* (2006) 39 Cal.4th 299.) For example, in *Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, the court held that Paul failed to meet the first prong of the test because section 425.16 does not exist to protect illegal activity. The *Paul* Court rejected the proposition that every allegation of illegality falls outside the anti-SLAPP statute. The Court relied heavily on Paul's concession of the illegality of his conduct, noting:

> [D]efendants have effectively conceded the illegal nature of their election campaign finance activities for which they claim constitutional protection. Thus, there was no dispute on the point and we have concluded, as a matter of law, that such activities are not a valid exercise of constitutional rights as contemplated by section 425.16.

(*Paul*, at p. 1367.)

The court of appeal in *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 911, held the *Paul* decision **does not apply to conduct that is simply alleged to have been illegal**: "If that were the test, the statute (and the [litigation] privilege) would be meaningless."

In *Flatley*, the California Supreme Court analyzed the issue of illegal conduct and the anti-SLAPP statute and articulated a clear legal standard: "Thus, the test for illegality is whether (1) the defendant has 'conceded' illegality, or (2) the 'uncontroverted and conclusive evidence' establish illegality as a matter of law." (*Flatley, supra*, 39 Cal.4th at p. 320.) This is Solomon's burden.

Here, Defendants-Respondents have never conceded their conduct was illegal and they do not do so now. Thus, Solomon cannot rely on the first option for establishing his illegality argument. Moving to the second option, a review of the record does not find "uncontroverted and conclusive" evidence establishing Defendants-Respondents' actions were illegal as a matter of law.

Solomon admits information was obtained from his Registered Domestic Partner who voluntarily provided it, this is not illegal. Then Solomon alleges Defendant-Respondent Greco obtained information from his doctor, but this is insufficient as well. First, it is not even clear that obtaining information from Solomon's doctor under these circumstances is illegal as a matter of law. Second, the record is devoid of evidence ***from Greco*** admitting that she obtained information from Solomon's doctor in this manner. As articulated by the Trial Court below:

> Plaintiff offers little evidence of the private information obtained and disclosed. Plaintiff states that Greco "admitted to me that she had obtained my personal and confidential medical records from Dr. Siddiqi." (Solomon Decl. Paragraph 13.) It is unclear who Dr. Siddiqi is and whether the records obtained from him are records of the District. (CT 143; CT AF 4.)

The only evidence Solomon provides in support of this allegation is his own controverted, largely inadmissible declaration based on hearsay. As articulated in the *Kashian* and *Paul* decisions, a plaintiff cannot simply allege the conduct was illegal, and that is essentially all Solomon has done

here. The largely inadmissible declaration and argument made by counsel is not sufficient to meet the standard of "uncontroverted and conclusive" evidence that is required here.

The illegality exception in *Flatley* was created to prevent defendants who intentionally engage in criminal conduct from finding a protection in the anti-SLAPP statute. No such deterrence is warranted here. No uncontroverted and conclusive evidence establishes Defendants-Respondents' conduct gives rise to an illegality exception under *Flatley*.

Defendants-Respondents meet their burden of demonstrating that the challenged cause of action arises from protected activity, and thus, the burden shifts to Solomon.

C. Prong 2: Solomon Cannot Establish a Probability of Prevailing on the Merits

To satisfy the second prong, Solomon must establish a reasonable probability that he will prevail on the claim. (Code of Civ. Proc., §425.16(b).) "The adjective 'reasonable' requires the [plaintiff] to do more than demonstrate some chance of winning; the [plaintiff] must show that, given the evidence, he or she has a substantial case." (*Hung v. Wang* (1992) 8 Cal.App.4th 908, 929.) Specifically, a "plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment." (*Premier*

Med. Mgt. Systems. Inc. v. California Ins. Guar. Ass'n (2006) 136 Cal.App.4th 464, 476.)

In moving for relief under section 425.16, defendants do not have the burden to show a plaintiff cannot demonstrate a probability of prevailing on his claims; their only burden is to establish that the claims fall within the ambit of the statute. Thus, the fact that Defendants-Respondents also make arguments directed toward the second probability-of-prevailing prong does not relieve Solomon of his own statutory burden, that is, to make a prima facie showing of facts which would, if proved at trial, support a judgment in plaintiff's favor. (*Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1239, *citing Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1219, 1239.)

1. Solomon Fails to Produce Competent Admissible Evidence

Once the burden shifts, the plaintiff may not rely on his complaint, but instead must provide **competent admissible evidence**. (*Paiva v. Nichols* (2008) 168 Cal.App.4th 1007, 1017; *Gilbert v. Sykes* (2007) 147 Cal.App.4th 13, 26.) The burden is on plaintiff to produce evidence that would be admissible at trial, i.e., to proffer a prima facie showing of facts supporting a judgment in plaintiff's favor. (*Chavez v. Mendoza* (2001) 94 Cal.App.4th 1083, 1087.) Thus, evidence that could never be admitted at trial because of the hearsay rule, the parol evidence rule, or a privilege cannot overcome an anti-SLAPP motion. (*Fashion 21 v. Coalition for*

Humane Immigrant Rights of Los Angeles (2004) 117 Cal.App.4th 1138, 1148.) Affidavits or declarations "on information and belief" are hearsay and hence inadmissible evidence to show a "probability" that plaintiff will prevail. (*Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1497.)

Here, the **only** evidence Solomon submitted in support of his claims are two self-serving declarations (his own and one from his Registered Domestic Partner Wyant), and one associated exhibit (his own notes containing nothing but hearsay statements allegedly made by Greco). This evidence is comprised of largely inadmissible evidence as more fully described on a line-by-line basis in Defendants-Respondents' evidentiary objections provided to the Trial Court. (CT 108–125.) To meet his burden under the second prong, Solomon is required to provide evidence that can be admitted at trial, i.e., evidence that complies with the hearsay rule, privilege, etc. (*Fashion 21*, *supra*, 117 Cal.App.4th at 1148.) Solomon has not done that here, and thus, he fails to meet his evidentiary burden. (CT 108–125.)

What's more, the evidence cited to in his Opening Brief often does not support his contention and/or is not citing to admissible evidence. For example, on page 10 of Solomon's opening brief he contends Defendants-Respondents "distribut[ed] his private and confidential medical records to the general public because they were 'newsworthy' (CT #E065066, 38:16-38:24)." But upon review of the cited transcript pages, Solomon is citing

the summary of argument from Defendants-Respondents' Points and Authorities in support of its Special Motion to Strike, quoting Solomon's complaint. First and foremost, argument from motions and pleadings is not admissible competent evidence to satisfy his evidentiary burden under an anti-SLAPP motion. (*Paiva, supra,* 168 Cal.App.4th at 1017.) Second, the cited passage does not state that Defendants-Respondents in fact distributed Solomon's private and confidential medical records. Rather, it is quoting Solomon's allegation to that effect from his complaint. This citation is misleading to the Court and does not support Solomon's contention.

By further example, on page 8 of Solomon's Opening Brief, he contends "Defendants initiated this attack on Plaintiff because they wanted to distract the public from their nefarious plan to steal one billion dollars from the residents of the Desert Healthcare District (RT #E065684, 1:14-2:20)." But upon review of the cited transcript pages, Solomon is citing his counsel's oral argument at the hearing for Defendants-Respondents attorneys' fees motion. Such oral argument—based solely on speculation—is **not** competent admissible evidence to meet Solomon's evidentiary burden, and should not be considered for such purpose in this appeal. Solomon cites this same oral argument to support multiple contentions throughout his Opening Brief.

Solomon's citations should be *carefully* scrutinized as they often do not support the contention for which they are provided and/or do not cite to

admissible evidence. Again, the only actual evidence submitted by Solomon were his and his Registered Domestic Partners' declarations and single associated exhibit. This evidence is wholly inadequate, as they are riddled with hearsay and other inadmissible evidence. Solomon has not produced sufficient competent admissible evidence to show a reasonable probability of prevailing on his pleaded claims; therefore, the Trial Court's ruling should be affirmed.

2. As a Matter of Law Solomon Cannot Prevail on his Pleaded Claims Under the Civil Code

Solomon pleaded claims under Civil Code, sections 1798.24, 1798.53, and 1798.55. Each of these fails as a matter of law because they do not apply to the District, the District officers and employees, and/or the type of information allegedly obtained or disseminated.

a) Solomon's Claim under Civil Code, section 1798.24 Fails as a Matter of Law

Section 1798.24 states, "[a]n **agency** shall not disclose any personal information…" (Emphasis added). Section 1798.3(b) defines "agency" for the purposes of this chapter as "every state office, officer, department, division, bureau, board, commission, or other state agency." The definition goes on to specifically *exclude* from its definition a "local agency," as defined under subsection (a) of section 6252 of the Government Code.

The District is not a state agency, instead it is a **local** agency under Government Code, section 6252. Thus, the District is excluded from the

definition of an "agency" as used in this chapter and section 1798.24 has no application here. Correspondingly, Greco and Hazen are employed by the District, a local agency, and thus, are not "officers" of a state agency. Solomon's claim under Civil Code, section 1798.24 against the District, Greco, and Hazen fails as a matter of law.[1]

b) Solomon's Claim under Civil Code, section 1798.53 Fails as a Matter of Law

Section 1798.53, prohibits any "person, other than an employee of the state or of a local government agency acting solely in his or her official capacity" from intentionally disclosing "information maintained by **a state agency** or from "records" within a "system of records" (as these terms are defined in the Federal Privacy Act of 1974 (P.L. 93-579; 5 U.S.C. 552a)) maintained by a **federal government agency**."

This claim fails for two reasons. First, because 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. (CT 55–56, Decl. Greco, ¶ 3, 8; CT 102, Decl. Solomon, ¶ 13.) Second, the information at

[1] Section 1798.45 creates a private right of action for violations of this chapter. Specifically, section 1798.45 holds that for violations of this section individuals may bring a civil action against "an agency." Therefore, arguably, for *any* violation of this chapter a civil action may only be brought against an "agency" as defined for the purposes of this chapter, which does not include the District. Nevertheless, Defendants-Respondents will provide an analysis under each section pleaded by Solomon.

issue was not information "maintained" by a state or federal government agency.

According to Greco, the information at issue was provided to Prior by Solomon's Registered Domestic Partner Wyant, then Greco was notified by Prior of Solomon's condition by Prior. (CT 54–55, Decl. Greco, ¶¶ 2–7; CT 98, Decl. Solomon, ¶ 5.) Put more simply, Solomon's Registered Domestic Partner Wyant, made a phone call to relay the information, which subsequently made it to Greco. (CT 56, Decl. Greco, ¶ 8.) As such, the information transmitted was ***not*** information "maintained" by a state or federal government agency.

In his declaration, Solomon alleges that in addition to the information obtained from his Registered Domestic Partner Wyant, Greco obtained information from his doctor, Dr. Siddiqui. (CT 102, Decl. Solomon, ¶ 13.) Even assuming—without conceding—this were true, this claim still fails because information coming from Solomon's doctor, is ***not*** information "maintained" by a state or federal government agency. (CT 55-56, Decl. Greco, ¶ 3, 8; CT 54, Decl. Hazen, ¶ 3; CT 102, Decl. Solomon, ¶ 13.) Therefore, this section does not apply and Solomon's claim fails as a matter of law.

c) Solomon's Claim under Civil Code, section 1798.55 Fails as a Matter of Law

Section 1798.55 holds, "[t]he intentional violation of any provision of this chapter … by an officer or employee **of any agency** shall constitute a cause for discipline, including termination of employment." (Emphasis added.) Again, section 1798.3(b) defined "agency" for the purposes of Civil Code, section 1798.53, and specifically *excludes* from its definition a "local agency," as defined under subsection (a) of section 6252 of the Government Code. The District is a local entity under Government Code, section 6252. Thus, section 1798.55 is inapplicable to the District's officers and employees, here Greco and Hazen, and Solomon's claim under section 1798.55 fails as a matter of law.

3. Newsworthiness is a Complete Defense to Solomon's Pleaded Claims and Other Feasible Claims

Although Solomon only pleaded causes of action under California Information Practices Act, Civil Code section 1798 et seq., the alleged disclosure of private facts are not actionable in this matter. However, even expanding Solomon's complaint to include a theory of disclosure of private fact, fails because newsworthiness is a defense. (*Alim v. Superior Court* (1986) 185 Cal.App.3d 144, 150 (claims under § 1798.53 subject to same special defenses as common law privacy torts, including newsworthiness); *Shulman v. Group W. Productions* (1998) 18 Cal.4th 200, 214 (describing newsworthiness as "a complete bar to common law liability"); *Buzayan v.*

City of Davis (2013) 927 F.Supp.2d 893, 905.) Solomon must show the speech is not of legitimate public concern, a showing he cannot make. (*Shulman*, 18 Cal.4th at 214–215.)

While the discussion on what constitutes newsworthy information spans volumes at both the Federal and State level, the determination really boils down to several key issues, the most important of which is whether the information is of legitimate public interest. (*Id*.) In *Shulman*, the court stated, "[t]he contents of the publication or broadcast are protected only if they have '**some substantial relevance** to a matter of legitimate public interest.' " (*Id*. at 224, *quoting Gilbert v. Medical Economics Co*. (10th Cir. 1981) 665 F.2d 305, 308 (internal citations omitted) (emphasis added).) *Shulman* continues:

> Newsworthiness [is not] governed by the tastes or limited interests of an individual judge or juror; a publication is newsworthy if some reasonable members of the community could entertain a legitimate interest in it. Our analysis thus does not purport to distinguish among the various legitimate purposes that may be served by truthful publications and broadcasts. As we said in *Gill v. Hearst*, [citations] "the constitutional guarantees of freedom of expression apply with equal force to the publication whether it be a news report or an entertainment feature ....

(*Id*. at 225, *quoting Gill v. Hearst Pub. Co*. (1953) 40 Cal.2d 224, 229 (internal citations omitted).) Lastly, the court in *Shulman* concludes:

> Thus, newsworthiness is not limited to "news" in the narrow sense of reports of current events. "It extends also to the use of names, likenesses or facts in giving information to the public for purposes of education, amusement or enlightenment, when the public may reasonably be expected to have a legitimate interest in what is published."

(*Id*. at 225, quoting Rest.2d Torts, § 652D, com. j, p. 393.)

As explained by the *Shulman* Court, what is "newsworthy" is broadly defined. Here, Solomon is an elected official serving as a director on the board of a public healthcare district. His physical and mental health is of legitimate public interest. Whether he had a stroke or subsequent brain damage has a direct relationship to his ability serve in his role as an elected director. (CT 7; Complaint, ¶ 21.) The public has an interest in knowing whether a public official has been injured to the extent he or she can no longer reasonably serve in their elected public official role.

Solomon cites a variety of privacy related cases; but he misses the mark with these. The question is not whether medical information is protected by a right of privacy, such question is too simple. Privacy rights are not absolute and must be balanced against competing needs of disclosure:

> [The] right of privacy is neither absolute nor globally vague, but is carefully confined to specific sets of interests that must inevitably be weighed in the balance against competing interests before the right is judicially recognized.

(*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 26–27.) The question at issue is whether Defendants-Respondents' need for obtaining the information and the newsworthiness, on balance, outweighs Solomon's desire for absolute privacy. The facts here are that Solomon's Registered Domestic Partner Wyant provided the information (lowering the reasonable expectation of privacy), Solomon was an elected public official (lowering the reasonable expectation of privacy), there was strong public need to obtain the information (i.e., elected officials ability to hold office), and the information was newsworthy (i.e., the public has an interest in the information and there were published articles on the topic). Evaluating these facts as a whole and balance, the interest tips in favor Defendants-Respondents.

In *Alim*, the action was based in part on a newspaper's disclosure of truthful information about a former state official. The court said: "Almost any truthful commentary on public officials or public affairs, no matter how serious the invasion of privacy, will be privileged. By volunteering his services for public office the official (as opposed to the ordinary employee) waives much of his right to privacy." (*Alim*, 185 Cal.App.3d at 229.) There, the court stated "we view the press disclosure of information bearing on the fitness for office of a public official as within the protective ambit…" of constitutional protections. (*Id*.)

Here, Solomon is a public official in a public office and the content of the communication is related to his ability to serve in that role. Clearly, some intrusion into Solomon's privacy is warranted in light of the public's interest and right to know such information. Further evidence that this is a newsworthy issue is the fact that several newspaper articles were published on the subject. (CT 60–68.) The fact the information did actually appear in the news demonstrates its newsworthiness. As the information conveyed by Defendants-Respondents is newsworthy, Solomon's current claims, and any related claim that could be pleaded, are barred.

D. The Attorneys' Fees Awarded by the Trial Court Are Reasonable and the Public Benefit Exception Does Not Apply

The standard of review of the amount of attorney fees awarded is reviewed for abuse of discretion. (*Lunada Biomedical v. Nunez* (2014) 230 Cal.App.4th 459, 487, review denied (Jan. 21, 2015).) Specifically, "[a] trial court's attorney fee award will not be set aside 'absent a showing that it is **manifestly excessive** in the circumstances.'" (*Id.*, *quoting Raining Data Corp. v. Barrenechea* (2009) 175 Cal.App.4th 1363, 1375.) Similarly:

> A decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.' [Citations.] In the absence of a *clear showing that its decision was arbitrary or irrational*, a trial court should be presumed to have acted to achieve legitimate objectives and, accordingly, its discretionary determinations ought not be set aside on review. [Citation.]… Accordingly, an abuse of discretion transpires if "the trial

> court *exceeded the bounds of reason*" in making its award of attorney fees.

(*Premier Medical Management Systems, Inc. v. California Ins. Guarantee Ass'n* (2008) 163 Cal.App.4th 550, 557 (emphasis added, quotations and citations omitted).) This is a high standard to meet.

1. The Attorneys' Fees Awarded by the Trial Court Are Reasonable

The Trial Court awarded $32,750 in attorneys' fees, reduced from the requested amount of $48,527.10, as billed by both Artiano Shinoff & Holtz, APC ("Artiano firm"), Defendants-Respondents' litigation counsel and Best Best & Krieger, LLP ("BBK firm"), Defendants-Respondents' general counsel, in the successful defense of this matter. (CT AF 147.)

"[E]ach fee application under section 425.16, subdivision (c) must be assessed on its own merits ... taking into account what is reasonable under the circumstances." (*Premier Medical Management Systems, Inc., supra,* 163 Cal.App.4th at 561.) Here, the accusations Solomon made were serious, i.e., Defendants-Respondents obtained and disclosed Solomon's confidential medical information (CT 2–3, Complaint, ¶¶ 8–12) and Defendants-Respondents developed a "conspiracy to illegally" distribute taxpayer funds totaling a $1,000.000,00 to enhance their private business affairs (CT 3–4, Complaint, ¶¶ 13–18). Through his complaint, Solomon attempted the destruction of Hazen, Greco and the District's professional reputations; attacked Hazen and Greco's livelihoods and personal financial

misfortune; and otherwise attempted to undermine the efforts of the District. (CT 1–13.)

The fees Defendants-Respondents incurred to defend themselves against these accusations are reasonable and within the prevailing legal market, and even so, were reduced by the Trial Court. (CT AF 16–59.) The fees are not "manifestly excessive" under the circumstances and do not "exceed all bounds" of reason. Therefore, the award of attorney's fees should be affirmed.

Then, assuming the Trial Court's ruling is affirmed, Defendants-Respondents shall recover attorney fees associated with defending the appeal pursuant to Rules of Court, rule 3.1702(c). (*Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 785 (holding appellate attorney fees recoverable under section 425.16).)

2. The Public Benefit Exception Does Not Apply

Solomon's suit was not brought in the solely public interest. For a public interest or class action to be within the public interest exemption from the anti-SLAPP law (C.C.P. 425.17), the action must be brought **solely** in the public interest or on behalf of the general public, and the exemption does not apply to an action that seeks a more narrow advantage for a particular plaintiff. (*Save Westwood Village v. Luskin* (2014) 233 Cal.App.4th 135.)

Here, Solomon was seeking relief for an injury that only pertained to **himself**, i.e., the alleged obtaining and disclosure of his own medical records. (CT 1–13.) Solomon makes allegations of defrauding taxpayers and conspiracies in business affairs. (CT 3–4, Complaint, ¶¶ 13–18.) However, he does not actually make any claims based on these allegations and does not provide any evidence in support of these wild allegations. (CT 1-13, complaint showing pleaded claims.) Accordingly, Solomon's lawsuit was for his own interest, not the public benefit and this exception does not apply.

The Trial Court held that this exception does not apply and its ruling is reviewed for an abuse of discretion. Under the facts of this case, and the nature of the complaint and pleaded claims, the Trial Court's ruling is within sound reason and does not reach the threshold of "exceeding all bounds" of reason. Therefore, the denial of this exception, and award of attorneys' fees should be affirmed.

IX. CONCLUSION AND SUMMARY OF REQUESTED RELIEF

Defendants-Respondents' speech is protected under the anti-SLAPP statute and Solomon failed to produce sufficient competent admissible evidence to demonstrate a probability of prevailing on the merits of his claims. Accordingly, Defendants-Respondents respectfully request this Court AFFIRM the Trial Court's ruling striking the complaint in its entirety.

Further, the Trial Court did not abuse its discretion in ruling that the public benefit exception did not apply to this case, and awarding $32,750 in attorneys' fees. Therefore, Defendants-Respondents respectfully request this Court AFFIRM the Trial Court's award of attorneys' fees.

Respectfully submitted,

DEVANEY PATE MORRIS & CAMERON, LLP

Dated: August 23, 2016

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CERTIFICATE OF WORD COUNT

The text of this brief consists of 7,721 words as counted by the Microsoft Word version 2010 word processing program used to generate the brief.

Dated: August 23, 2016

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COURT OF APPEAL
STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION II

Court of Appeal No. E065066
(consolidated with Court of Appeal No. E065684)
Solomon v. Desert Healthcare District, et al.
[Riverside County Superior Court Case No. PSC1503643]

DECLARATION OF PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF RIVERSIDE:

I am and was at all times herein mentioned over the age of 18 years and not a party to the action in which this service is made. At all times herein mentioned I have been employed in the County of Riverside in the office of a member of the bar of this court at whose direction the service was made. My business address is One BetterWorld Circle, Suite 300, Temecula, California 92590.

On August 23, 2016, I served the following document(s): **RESPONDENT'S BRIEF**

☒ **BY MAIL** by depositing in the United States Postal Service mail box at Temecula, California 92590, a true copy thereof in a sealed envelope with postage thereon fully prepaid and addressed as follows:

ATTORNEY FOR PLAINTIFF/APPELLANT Clark Garen, Esq. Law Offices of Clark Garen P.O. Box 1790 Palm Springs, CA 92263 Tel: 760/668-7777 / Fax: 760/288-4080 Email: clarkgaren@msn.com	Superior Court of California Appeals Division 4100 Main Street Riverside, CA 92501 Tel: (951) 777-3147

☒ **BY ELECTRONICALLY** per California Rules of Court, Rule 8.212, as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 24, 2016, at Temecula, California.

Ruth Ann Elphic

Ruth Ann Elphic