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FILED
TULARE COUNTY SUPERIOR COURT
VISALIA DIVISION
DEC 20 2019
STEPHANIE CAMERON, CLERK
BY: *[Signature]*

6 ATTORNEYS FOR Defendant CITY OF TULARE

**Exempt from Filing Fees Pursuant
To Government Code Section 6103**

8 SUPERIOR COURT OF CALIFORNIA, COUNTY OF TULARE
9 CIVIL DIVISION

10 JAMES GREGORY NUNLEY, an individual,
11 Plaintiff,
12 vs.
13 CITY OF TULARE and DOES 1 through 25,
14 inclusive,
15 Defendants.

Case No.: 280739

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANT CITY OF TULARE'S SPECIAL
MOTION TO STRIKE PLAINTIFF'S
COMPLAINT (CCP § 425.16)**

**DATE: 2/24/2020
TIME: 8:30 AM
DEPT.: 1**

Complaint filed: October 9, 2019
Trial Date: TBD

18 Plaintiff JAMES GREGORY NUNLEY ("PLAINTIFF") brings this action against Defendant
19 CITY OF TULARE ("CITY") for the sole purpose of continuing to attempt to exert improper influence
20 over the CITY. Having failed to exhaust the administrative process and exert his political influence by
21 traditional means, PLAINTIFF now brings this SLAPP (Strategic Lawsuit Against Public Participation)
22 against the CITY, who now seeks to stop PLAINTIFF'S SLAPP'ing.

23 **I. FACTUAL AND PROCEDURAL BACKGROUND**

24 PLAINTIFF was elected to the CITY'S Council in 2016. (Declaration of Daniel W. Rowley, Ex.
25 A ("Workplace Harassment Report"), sec. I(A).) His time on the CITY'S Council has not been without
26 controversy: in August 2018, PLAINTIFF was sued for failing to pay development fees to the CITY,
27 failing to submit appropriate paperwork to the CITY on development and building projects he was
28 associated with, and improperly asserting his status as a member of CITY Council with CITY staff

1 (Request for Judicial Notice, Ex. B (“*Frost* Complaint”)); and an independent investigation began in
2 October 2018 concerning PLAINTIFF’S conduct with and threats made to CITY staff concerning
3 development and building projects he was associated with (Workplace Harassment Report). In the year
4 leading up to the filing of this action, PLAINTIFF faced several lawsuits against him or associated entities
5 concerning various breach of contract matters. (VCU276064 (*Quad Knopf, Inc. v. Greg Nunley, et al.*,
6 filed October 24, 2018), VCU276784 (*Visalia Lumber Co. v. Great Valley Builders, Inc., et al.*, filed
7 December 26, 2018), VCL189370 (*Quinn Rental Services, Inc. v. Great Valley Builders, Inc., et al.*, filed
8 May 29, 2019), and VCU278812 (*Quinn Rental Services, Inc. v. Great Valley Builders, Inc., et al.*, filed
9 May 29, 2019).) PLAINTIFF is also facing criminal charges stemming from a motor vehicle incident
10 occurring on May 31, 2019. (VCM387165 (*People vs. James Greg Nunley*, filed October 15, 2019).)
11 Notwithstanding, PLAINTIFF claims herein that he “has developed a good reputation for himself and his
12 business enterprises.” (Request for Judicial Notice, Ex. C (“Complaint”), ¶ 8.)

13 On March 16, 2019, PLAINTIFF filed a claim pursuant to the Government Claims Act seeking
14 \$16,500,000.00 in damages for alleged libel, defamation, slander, and intentional interference with
15 prospective economic advantage. (Complaint, ¶ 5; Declaration of David Overstreet, Ex. D (“Claim”).)
16 The CITY rejected his claim on April 18, 2019, and this action followed. (Complaint, ¶ 6.) PLAINTIFF
17 has never identified the specific statements or conduct purported to be libelous, defamatory, slanderous,
18 or interfering with his business activities. (Claim; Complaint, *passim*.) He has also never sought review
19 of any development- or building-related issues with City Council. (Complaint, *passim*; Tulare Mun. Code,
20 §§ 8.56.090 (development fee adjustments), 10.12.020 (planning permit or procedures).) The **operative**
21 **time period of the alleged conduct is between September 19, 2018, and March 19, 2019**, the time of
22 his claim. (Gov. Code, § 911.2(a); *Shively v. Bozanich* (2003) 31 Cal.4th 1230, 1246, fn. 9.)

23 The gravamen of PLAINTIFF’S action relates to defamatory statements by unspecified persons at
24 unspecified times concerning vague categories of his conduct arising from his development and building
25 projects under review with the CITY’S development process. (Complaint, ¶¶ 10, 12, 14, 16, 20, 22, 25,
26 30.) Of note, the categories of PLAINTIFF’S conduct allegedly commented upon by the CITY concern:
27 (1) his failure to pay development fees to the CITY; and (2) his failure to submit appropriate paperwork
28 to the CITY on development and building projects he was associated with. (Complaint, ¶¶ 12, 14, 22; see

1 also *Frost* Complaint.) Notably, PLAINTIFF'S allegations against the CITY in this action mirror the
2 allegations against him in the *Frost* matter. (*Frost* Complaint, *passim*.)

3 PLAINTIFF also contends that the CITY has modified how the CITY conducts business with him,
4 leading to disruptions with various economic relationships, both existing and future. (Complaint, ¶¶ 12,
5 30, 32.) The CITY'S alleged conduct, however, has never been challenged by way of any administrative
6 appeals process. (Complaint, *passim*; see Tulare Mun. Code, § 10.20.010, et seq.; see also Tulare Mun.
7 Code, § 10.12.010, et seq.) PLAINTIFF alternatively contends that the intentional acts interfering with
8 his business prospects were done so negligently. (Complaint, ¶¶ 35-41.) For the reasons described below,
9 PLAINTIFF brought this lawsuit for the improper purpose of exerting the Court's authority over the CITY,
10 which he has been unable to do by sitting as a Council member, for engaging in its authorized duties of
11 overseeing development and building within the CITY, participating in the litigation process, and
12 investigating workplace harassment claims and should be stricken pursuant to Code of Civil Procedure
13 section 425.16.

14 II. SLAPP LAW

15 In enacting the Special Motion to Strike pursuant to Code of Civil Procedure section 425.16, the
16 Legislature noted that there was a disturbing increase in lawsuits brought primarily to chill the valid
17 exercise of the constitutional rights of freedom of speech and petition for redress of grievances, commonly
18 known as SLAPP suits. (See Code Civ. Proc., § 425.16(a).) The purpose of this legislation is to encourage
19 continued participation in matters of public significance, without the participation being chilled through
20 abuse of the judicial process and to eliminate meritless litigation at an early stage. (*Macias v. Hartwell*
21 (1997) 55 Cal.App.4th 669, 672; *Bradbury v. Superior Court* (1996) 49 Cal.App.4th 1108, 1113.) Thus,
22 Section 425.16 was enacted to curtail SLAPP suits by providing an economical and expeditious remedy.
23 (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 647, n. 3.)

24 The typical SLAPP suit is brought to obtain an economic advantage over the defendant, not to
25 vindicate a legally cognizable right of the plaintiff, and typically involves alleged causes of action for
26 defamation, various business torts (such as interference with prospective economic relations), and
27 intentional infliction of emotional distress. (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 815-
28 816, overruled in part by *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) In fact,

1 the focus in a SLAPP suit is not necessarily prevailing on the underlying allegations, but rather to “punish”
2 those who oppose them by threatening ruinous damages and imposing litigation costs for exercising their
3 free speech rights. (*Dixon v. Superior Court* (1994) 30 Cal.App.4th 733, 741.)

4 Section 425.16(b)(1) provides that “[a] cause of action against a person arising from any act of
5 that person in furtherance of the person’s right of petition or free speech under the United States
6 Constitution or the California Constitution in connection with a public issue shall be subject to a Special
7 Motion to Strike, unless the Court determines that the plaintiff has established that there is a probability
8 that the plaintiff will prevail on the claim.” Section 425.16(e) elaborates the four types of “acts” within
9 the ambit of a SLAPP:

- 10 (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding,
11 or any other official proceeding authorized by law;
- 12 (2) any written or oral statement or writing made in connection with an issue under consideration or
13 review by a legislative, executive, or judicial body, or any other official proceeding authorized by
14 law;
- 15 (3) any written or oral statement or writing made in a place open to the public or a public forum in
16 connection with an issue of public interest; or
- 17 (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the
18 constitutional right of free speech in connection with a public issue or an issue of public interest.

19 The Court engages in a two-part test to determine whether an action is a SLAPP suit subject to a
20 Special Motion to Strike. First, the Court decides whether the moving party has made a threshold showing
21 that the challenged cause of action arises from protected activity in connection with a public issue, by
22 demonstrating that the facts underlying the Complaint fits into one of the statutory categories. (*Wilcox v.*
23 *Superior Court, supra*, 27 Cal.App.4th at 820; see also *Braun v. Chronicle Publishing Co.* (1997) 52
24 Cal.App.4th 1036, 1042-1043.) If the Court determines that the first prong has been met, **the Special**
25 **Motion to Strike shall be granted**, unless the complainant provides the Court with sufficient evidence
26 to permit the Court to determine whether there is a probability that the complainant will prevail on his
27 claims. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 965; *Navellier v. Sletten* (2002) 29 Cal.4th 82, 88; *DuPont*
28 *Merck Pharmaceutical Co. v. Superior Court* (2008) 78 Cal.App.4th 562, 568.)

1 Section 425.16 establishes a procedure where the trial court evaluates the merits of the lawsuit
2 using a summary judgment-like procedure at an early stage of the litigation. (*Varian Medical Systems, Inc.*
3 *v. Delfino* (2005) 35 Cal.4th 180, 192.) The parties are permitted, indeed encouraged, to file competent
4 evidence, such as declarations, in support of their position. (Code Civil Proc., §425.16(b)(2); *Wilson v.*
5 *Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.) Most importantly, **a complainant cannot**
6 **amend the Complaint** before the hearing on the Anti-SLAPP Motion, **in order to avoid the Anti-**
7 **SLAPP Motion.** (*Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1280.)

8 **A. Automatic Stay On Discovery**

9 Pursuant to Code of Civil Procedure section 425.16(g), the filing of the instant Motion
10 automatically stays all discovery. Should the Court consider a request by PLAINTIFF to conduct
11 discovery, he must first demonstrate falsity of the alleged statements: “plaintiffs who bring defamation
12 actions subject to the constitutional malice standard cannot show good cause for discovery on the question
13 of actual malice without making a prima facie showing that the defendant's published statements contain
14 provably false factual assertions.” (*Paterno v. Superior Court* (2008) 163 Cal.App.4th 1342, 1349.)
15 Therefore, prior to the Court allowing discovery, PLAINTIFF must first demonstrate the CITY’S
16 allegedly defamatory statements were false, which he cannot do. (*Ibid.*)

17 **III. ARGUMENT**

18 **A. Step 1 – The CITY’S Alleged Conduct**

19 **Was Made in Connection with an Authorized Proceeding**

20 PLAINTIFF’S allegations arise from “his interactions with the CITY regarding real estate
21 development projects.” (Complaint, ¶ 10.) These allegations are made in connection with the CITY’S
22 development process, all of which is authorized by law and, therefore, subject to Anti-SLAPP protection.

23 ***CITY’S Development Process and Investigatory Authority***

24 The CITY Council oversees implementation of the General Plan, which governs the development
25 of property within the CITY. (Tulare Mun. Code, § 10.04.010, et seq.) The CITY Council, of which
26 PLAINTIFF is a sworn member, is the “final authority on zoning ordinance amendments, ***appeals***, general
27 plan and specific plan amendments, ***development agreements***, ***subdivisions*** and ***other permit***
28 ***procedures....***” (*Id.* at § 10.12.020 (emphasis added).) Council may receive recommendations from

1 various committees or staff on development issues: Planning Commission; Planning and Building
2 Director; Building Official; City Engineer; and Site Plan Review Committee. (*Id.* at § 10.12.030, et seq.)
3 Real estate development projects, such as those PLAINTIFF’S contends are at-issue herein (without
4 specifically identifying them), are ultimately submitted to the CITY Council for review and approval.

5 The CITY also enforces the development process by expressly delegating investigation authority
6 to its Planning and Building Director, the Senior Planner, the Assistant Planners, the Chief Building
7 Inspector, and the Building Inspectors for violations of its processes. (Tulare Mun. Code, § 1.60.010
8 (citing Title 4 (Building Regulations) and Title 10 (Zoning).) This authority includes the issuance of
9 citations and making warrantless arrests for violations. (*Ibid.*) The CITY’S Building Official, among many
10 others, is “authorized to inspect a building or structure or make entry upon the premises for the purpose
11 of determining if the building, structure, or premises are safe where reasonable cause exists that the
12 building is substandard, unsafe or hazardous.” (*Id.* at 4.20.040.)

13 ***Development Fees, Construction, and Building Permitting***

14 Development fees are imposed against new developments to cover the increased cost “of providing
15 public facilities and improvements required by new development.” (Tulare Mun. Code., § 8.56.030.)
16 Development fees are set by the City Engineer and must be contested by filing an appeal with the CITY
17 Council “at the time of the filing of the request for a building permit.” (*Id.* at 8.56.070, 8.56.090.)
18 Ordinarily, the issuance of building permits are conditioned on the payment of development fees. (*Id.* at
19 8.56.040.) In other words, if development fees have not been paid, no building permit can be issued, which
20 means no construction or related activities can occur. But, development fees can be deferred until the final
21 inspection, as authorized by the City Manager (for residential only) or the CITY Council (for non-
22 residential). (*Id.* at 8.56.080.) In other words, a developer can defer fees and begin construction with
23 appropriate permits, paying fees at the end of the construction process when the final inspection is called.
24 The final inspection is critical because no building permit can be issued, no occupancy of any structure
25 can be made, and no utilities can be connected until the final inspection has occurred and been approved.
26 (*Id.* at 8.46.040, 4.70.060.)

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1 ***The Alleged Conduct was Made in Connection with Authorized Proceedings***

2 PLAINTIFF alleges two causes of action for defamation and slander per se arising from statements
3 concerning PLAINTIFF'S failure to pay fees and/or submit paperwork to the CITY. (Complaint, ¶¶ 14,
4 22.) He qualifies the defamatory statements as having been made "in the context of real estate developers
5 need to properly interact with the CITY in connection with commercial land development and/or home-
6 building construction" (*Id.* at ¶ 18) and "the procedures relating to real estate development in the CITY"
7 (*Id.* at ¶ 23). Whatever PLAINTIFF'S intent by his vague pleading, the allegations clearly arise from one
8 or more aspects of the CITY'S development process, which is authorized by law and, therefore subject to
9 Anti-SLAPP protection. Whether PLAINTIFF'S allegations stem from negotiations of a development
10 agreement, enforcement of building permits (e.g., review of plans, inspections of property, etc.), and/or
11 deferred development fees, they are all arise from the CITY'S authorized processes. (see *City of*
12 *Montebello v. Vasquez* (2016) 1 Cal.5th 409, 423 (contract negotiations are protected activity).)

13 PLAINTIFF also alleges two causes of action for intentional and negligent interference with
14 economic relationship arising from his development and building activities. (Complaint, ¶¶ 30, 36-38.)
15 As noted above, these activities are governed by the CITY'S development processes and
16 statements/conduct made in connection with these authorized proceedings are protected. Since the alleged
17 statements/conduct of the CITY fall within the first prong, the Court must grant the Motion, unless
18 PLAINTIFF can demonstrate a likelihood of prevailing on the merits, which he cannot.

19 **B. Step 2 – PLAINTIFF Cannot Demonstrate a Likelihood of Prevailing on the Merits**

20 PLAINTIFF'S actionable allegations (if any) are limited to September 19, 2018, through March
21 19, 2019. PLAINTIFF does not specifically allege what the statements/conduct were or by whom, but that
22 they arise from PLAINTIFF'S development and building activities with the CITY, which gives context to
23 why they are privileged under Civil Code section 47. Also fatal to PLAINTIFF'S claims is his failure to
24 exhaust the administrative process the CITY maintains for development projects; issues PLAINTIFF now
25 takes with the development process are now time-barred.

26 ***Failure to Exhaust the Administrative Process is Fatal to PLAINTIFF'S Claims***

27 The CITY'S development and building process is not difficult to follow, particularly for members
28 of its ultimate authority, the CITY'S Council, or experienced real estate developers. For example, if a

1 developer takes issue with the Planning Commission on a matter under consideration for his subdivision,
2 he must appeal that decision to the CITY Council within 10 days of the decision. (*Id.* at 10.20.020.) If a
3 developer takes issue with the determination of development fees, he must appeal that decision to the
4 CITY Council. (*Id.* at 8.56.090.) If a developer takes issue with an inspection by the Building Official, he
5 must appeal that decision to the CITY Council within 10 days of the decision. (*Id.* at 10.12.040, 10.12.050,
6 10.20.010 (noting that Planning and Building Director is final authority on the interpretation,
7 administration and enforcement of Title 10, with Council acting as the appellate body overseeing
8 appeals).) The appeal process is just as easy to follow: “The appeal shall state the name of the person
9 making the appeal, the decision that is being appealed and the reasons for the appeal, including an error,
10 abuse of discretion or a decision that is not supported by the evidence in the record.” (*Id.* at 10.20.020.)
11 Here, however, PLAINTIFF has not filed an appeal of any decision made by the CITY, nor its committees
12 or officials, as prescribed under the CITY’S Municipal Code. Accordingly, any decision which could have
13 been appealed is now barred, and cannot be litigated by this lawsuit.

14 ***Official Acts Privilege***

15 Statements made in the proper discharge of an official duty are absolutely privileged. (Civil Code,
16 § 47(a).) Accordingly, statements made by the CITY engaged in the policy-making process concerning
17 development within the CITY, as described above, are privileged and not actionable. (see *Royer v.*
18 *Steinberg* (1979) 90 Cal.App.3d 490, 501.)

19 ***Litigation Privilege***

20 PLAINTIFF’S allegations mirror those made against him and his related entities in the *Frost*
21 matter, which raised four causes of action stemming from his failure to pay fees and/or submit paperwork
22 to the CITY. (*Frost* Complaint, *passim* (alleging non-payment of Development Impact Fees on the Oak
23 Creek Apartments and Hidden Oak Development projects and 2088 Diamonte Drive property, along with
24 falsifying documents submitted to the CITY related to those projects/properties).) Practically speaking,
25 PLAINTIFF is bringing this action for his being sued in the *Frost* matter. Accordingly, statements/conduct
26 by the CITY during the course of the *Frost* litigation are absolutely privileged. (Civ. Code, § 47(b); *Gootee*
27 *v. Lightner* (1990) 224 Cal.App.3d 587, 591-595; *Silberg v. Anderson* (1990) 50 Cal.3d 205, 211-214;
28 *Foothill Federal Credit Union v. Superior Court* (2007) 155 Cal.App.4th 632.)

1 ***Official Investigation Privilege***

2 PLAINTIFF’S allegations likewise mirror those made against him in the workplace harassment
3 investigation by Dan Crowley. (Workplace Harassment Report.) Accordingly, statements/conduct by the
4 CITY during the course of an authorized investigation are absolutely privileged and not actionable. (Gov.
5 Code, §12940(j) and (k); *Guarino v. County of Siskiyou* (2018) 21 Cal.App.5th 1170, 1180-1181 (holding
6 a public entity employer's internal investigation of plaintiff's wrongdoing an “official proceeding
7 authorized by law”); see also *Laker v. Board of Trustees of Calif. State Univ.* (2019) 32 Cal.App.5th 745,
8 758.)

9 **C. Defendants are Entitled to Attorneys’ Fees and Costs**

10 In any action subject to Code of Civil Procedure section 425.16(b), a prevailing defendant is
11 entitled to recover his attorneys’ fees and costs. (Code Civ. Proc., § 425.16(c); *City of Los Angeles v.*
12 *Animal Defense League* (2006) 135 Cal.App.4th 606, 627.) California courts have held that the phrase
13 “prevailing party” should be interpreted broadly and applied to partially successful defendants. (See *Mann*
14 *v. Quality Old Time Service, Inc.* (2006) 139 Cal.App.4th 328, 340; *Computer Express, Inc. v. Jackson*
15 (2001) 93 Cal.App.4th 993, 1018.) In addition, Section 425.16 permits use of the Lodestar adjustment
16 method, whereby the Lodestar is the number of hours reasonably expended multiplied by the reasonable
17 hourly rate. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1136.) The CITY seeks its attorneys’ fees and
18 costs in this Motion.


19 **IV. CONCLUSION**

20 For the reasons described above, PLAINTIFF’S Complaint should be stricken, or, in the alternative,
21 the First, Second, Third, and Fourth causes of action should be stricken, and the CITY should recover its
22 attorneys’ fees and costs in preparing this Motion in response to this meritless lawsuit.

23 Respectfully submitted.

24 DATE: December 19, 2019

OVERSTREET & ASSOCIATES

25
26 By: 
27 DAVID M. OVERSTREET, IV
28 CHESTER E. WALLS
 Attorneys for Defendant CITY OF TULARE

1 **PROOF OF SERVICE**

2 I am employed in the County of Fresno, California; I am over the age of eighteen years and not
3 a party to the within cause; my business address is: 1300 E. Shaw, Suite 125, Fresno, CA 93710.

4 On December 19, 2019, I served the foregoing document(s) described as **MEMORANDUM OF**
5 **POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT CITY OF TULARE'S**
6 **SPECIAL MOTION TO STRIKE PLAINTIFF'S COMPLAINT (CCP § 425.16)** on the interested
7 parties, by placing ___ the original X a copy(ies) addressed as follows:

8
9 James H. Wilkins, Esquire
10 Alyson A. Berg, Esquire
11 WILKINS, DROSHAGEN & CZESHINSKI, LLP
12 6785 N. Willow
13 Fresno, California 93710
14 Email: j.wilkins@wdcllp.com
15 Email: alyson@wdcllp.com
16 *Attorney for Plaintiff, James Gregory Nunley*

17 X (By U.S. Mail) I caused each envelope, with postage fully prepaid, to be placed in the
18 designated area for outgoing mail in accordance with this office's practice, whereby mail is deposited in a
19 U.S. mailbox in the City of Fresno, California after the close of the day's business.

20 I declare under penalty of perjury under the law of the State of California that the foregoing is
21 true and correct. Executed on December 19, 2019, at Fresno, California.

22 
Victoria M. Falcon-Alonzo