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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

JOHN LARSON et al., Plaintiffs and Appellants, v. THOMAS E. FRAYSSE et al., Defendants and Respondents.	B270061 (Los Angeles County Super. Ct. No. BC580579)

APPEAL from an order of the Superior Court of Los Angeles County, Michael Johnson, Judge. Affirmed.

The Blue Law Group, Michael K. Blue and Neil M. Sholander for Plaintiffs and Appellants.

Buchalter, Harry W.R. Chamberlain II, Robert M. Dato and Efrat M. Cogan for Defendants and Respondents Thomas E. Fraysse, Eric J. Danowitz and Knox Ricksen LLP.

Peter Scalisi for Defendant and Respondent Stephen Lawrence Philipson.

INTRODUCTION

John Larson and his company Allied Injury Management, Inc. (collectively, Larson) appeal from an order granting a motion under Code of Civil Procedure section 425.16 (section 425.16) to strike the complaint he filed against a law firm, Knox Ricksen LLP, and attorneys Thomas Fraysse, Eric Danowitz, and Stephen Philipson for extortion and related causes of action. Larson alleged the defendants attempted to extort him by threatening to accuse him of a crime unless he paid them. Larson argues the trial court erred in ruling that Larson's complaint arose from protected speech or petitioning activity within the meaning of section 425.16 and that Larson could not establish a probability of success on his claims because the litigation privilege barred all of his causes of action. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Criminal Indictments and Qui Tam Action*

On June 18, 2014 an Orange County grand jury returned indictments in two related cases alleging multiple counts of insurance fraud. The indictments alleged, among other things, that a network of healthcare providers paid kickbacks to doctors and chiropractors in exchange for writing prescriptions for workers' compensation patients, and then submitted fraudulent bills and liens to workers' compensation insurance carriers. Four of those insurance carriers filed a qui tam action against the criminal defendants in Los Angeles Superior Court on June 27, 2014. (*People ex rel. Redwood Fire and Casualty Insurance Company v. Ahmed* (Super. Ct., L.A. County, 2014, No.

BC549995).)[1] Their complaint sought disgorgement of the health care providers' allegedly ill-gotten profits and imposition of penalties and assessments pursuant to Insurance Code section 1871.7. The superior court unsealed the qui tam complaint in September 2014.[2]

Knox Ricksen represents the insurance carriers in the qui tam action. Two Knox Ricksen partners, Thomas Fraysse and Eric Danowitz (collectively with Knox Ricksen, the Knox

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[1] """Qui tam is short for the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur*, which means 'who pursues this action on our Lord the King's behalf as well as his own.'"" (*State ex rel. Wilson v. Superior Court* (2014) 227 Cal.App.4th 579, 586, fn. 1.) "A qui tam action is one brought under a statute that allows a private person to sue as a private attorney general to recover damages or penalties, all or part of which will be paid to the government. [Citation.] Under California law, a qui tam action is brought on behalf of the People of the State of California, and the People are "'[t]he real party in interest.'"" (*People ex rel. Strathmann v. Acacia Research Corp.* (2012) 210 Cal.App.4th 487, 491-492, fn. omitted.) "[T]he use of qui tam actions is venerable, dating back to colonial times, and several such statutes were enacted by the First Congress." (*Iskanian v. CLS Transp. Los Angeles, LLC* (2014) 59 Cal.4th 348, 382.)

[2] When a qui tam plaintiff initiates the lawsuit, "the complaint is sealed until the Attorney General or political subdivision decides whether to intervene and proceed with the case." (*State ex. rel. Hindin v. Hewlett-Packard Co.* (2007) 153 Cal.App.4th 307, 313.) The complaint may remain sealed for up to 60 days and is not served until after the court unseals it. (Gov. Code, § 12652, subd. (c)(2).)

Ricksen defendants), had investigated physicians indicted by the grand jury, including Eduardo Anguizola, who allegedly received kickbacks to prescribe and dispense compound creams through clinics he purportedly owned. Fraysse and Danowitz discovered that some of Anguizola's clinics were actually owned, operated, or managed by Larson. Fraysse and Danowitz suspected Larson shared in the kickbacks paid by clinics managed by Allied Injury Management.

In September 2014 Knox Ricksen obtained evidence from the grand jury proceedings purportedly confirming Larson had some involvement in the alleged scheme. Knox Ricksen, however, did not name Larson as a defendant in the qui tam action, nor was Larson added to the criminal indictment at that time. In April 2015 the superior court stayed the qui tam action pursuant to Insurance Code section 1871.7, subdivision (f)(4).[3]

Stephen Philipson is a sole practitioner who has represented clients in insurance cases adverse to Knox Ricksen. In mid-2014, Philipson, Fraysse, and Danowitz met multiple times with Larson or his attorney in this case, Michael Blue, to discuss the action against Anguizola and potentially Larson. These meetings, the number and timing of which the parties dispute, give rise to this lawsuit.

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[3] Insurance Code section 1871.7, subdivision (f)(4), provides in pertinent part: "If at any time both a civil action for penalties and equitable relief pursuant to this section and a criminal action are pending against a defendant for substantially the same conduct, whether brought by the government or a private party, the civil action shall be stayed until the criminal action has been concluded at the trial court level."

B. *The Complaint*

In June 2015 Larson filed this action against the Knox Ricksen defendants and Philipson for extortion and seven other causes of action.[4] The allegations in Larson's operative first amended complaint described an adversarial relationship between Larson and Knox Ricksen. In particular, Larson alleged he "had been a manager for medical providers who administered treatment on a lien basis to patients who had filed valid workers compensation claims," he "held a contractual relationship with said medical providers," and "[a] number of those liens were the result of workers compensation claims denied by insurance companies represented by . . . Knox-Ricksen."

Against this backdrop, Larson alleged Philipson acted as an employee or agent of Knox Ricksen and arranged a series of five meetings Larson attended from June to November 2014. Larson alleged Fraysse and Danowitz attended between two and four of the five meetings as partners of Knox Ricksen and were "acting in the ordinary course of business of the partnership and/or with the authority of the partnership in committing the acts alleged." Larson alleged Philipson attended all of the meetings and acted "within the scope of his agency or employment when he harmed [Larson]."

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[4] The other causes of action were attempted extortion, intentional infliction of emotional distress, intentional misrepresentation, interference with contractual relations, interference with prospective economic advantage, civil conspiracy, and unfair competition in violation of Business and Professions Code section 17200 et seq.

Larson alleged that, prior to the first meeting on or about June 18, 2014, Philipson contacted Larson "for the purposes of arranging for a personal meeting." At the meeting, Philipson allegedly "threatened to accuse [Larson] of a crime by adding [Larson] to pending criminal proceedings unless [Larson] were to pay money." Larson did not allege anyone else attended the June 18 meeting.

Larson alleged Philipson arranged two more "personal" meetings on or about July 15, 2014 and August 15, 2014. Larson alleged that at these meetings Philipson again threatened to accuse Larson of criminal wrongdoing unless Larson "pa[id] money." Larson alleged Philipson demanded Larson "facilitate and persuade [his] managed medical providers to withdraw all of [their] liens and accounts receivable flowing from certain workers compensation claims denied by insurance companies represented by Defendant Knox-Ricksen." Larson again did not allege anyone else attended the July or August meetings.

Larson alleged that two more "personal" meetings occurred on or about September 15, 2014 and November 15, 2014, and that, in addition to Philipson, Fraysse and Danowitz attended "as partners of Knox-Ricksen." According to Larson's allegations, at the September and November meetings both Philipson and Fraysse allegedly "threatened to accuse [Larson] of a crime by adding [Larson] to pending criminal proceedings unless [Larson] were to pay money." Larson alleged that at the November meeting Philipson, as he had at the July and August meetings, demanded Larson "facilitate and persuade [his] managed medical providers to withdraw all of [their] liens and accounts receivable flowing from certain workers compensation claims denied by insurance companies represented by Defendant Knox-Ricksen."

Larson did not allege Danowitz threatened or even spoke to Larson.

C. *The Special Motions To Strike*

The defendants filed special motions to strike Larson's complaint pursuant to section 425.16, joined in each others' motions, and submitted supporting declarations. The defendants' version of events differed dramatically from the version alleged in Larson's complaint and described in the declaration Larson would submit in opposition to the special motions to strike.

The defendants denied Philipson had any affiliation with Knox Ricksen, conceded they met with Larson several times but on different dates than those alleged in the complaint, and denied Larson's allegations of extortion and other wrongdoing. Fraysse and Danowitz explained that they knew Philipson as an opposing counsel in lien consolidation proceedings and qui tam actions and that Philipson helped facilitate the meetings between Larson and Knox Ricksen attorneys.

Philipson stated in his declaration that he first met with Larson on an unspecified date in June 2014 to discuss what Philipson described as "a resolution of pending claims and litigation." A psychologist and mutual acquaintance of Philipson and Larson, Anthony Francisco, also attended that meeting. In his declaration in support of the special motions to strike, Francisco stated he arranged the meeting between Philipson and Larson so that Larson could determine whether he "needed the legal services and advice of [Philipson] to facilitate a resolution in

the collection of liens." Philipson then contacted Knox Ricksen "to set up settlement discussions relating to the qui tam action."[5]

Fraysse and Danowitz met with Philipson and Blue on June 23, 2014, July 14, 2014, and October 14, 2014. Larson attended only the second and third meetings. Philipson said he attended the meetings to "represent[ ] Mr. Larson's interests, not the interests of the insurance companies represented by the Knox-Ricksen firm and its attorneys." Fraysse stated "the purpose of the meetings was to attempt to resolve all claims as to the prescriptions written by Anguizola and paid for by our clients, as well [as] potential claims against Larson and the entities in which he held an ownership interest." According to Fraysse, Philipson initially indicated Anguizola was interested in discussing settlement. Anguizola, however, did not attend any of the meetings.

Everyone who attended the June 23, July 14, and October 14, 2014 meetings signed a document entitled Agreement Regarding Confidentiality on the date of each meeting. The agreements corresponding to the June and July meetings stated the purpose of the meetings was to "compromis[e], settl[e,] or resolv[e], in whole or in part, a dispute involving Anguizola Entities and associated companies." Those agreements defined the Anguizola Entities to include Larson and "associated

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[5] Fraysse explained, "It is not unusual for qui tam defendants to contact [Knox Ricksen] after the unsealing of the complaint to engage in settlement discussions." Here, however, the first meeting with the Knox Ricksen defendants occurred in June 2014, and, according to the defendants, the court in the qui tam action did not unseal the complaint until September 2014.

companies." The agreement corresponding to the October meeting referred to a dispute involving the "Larson Entities" instead of the "Anguizola Entities," and defined those entities to include Larson and Allied Injury Management, among other companies.[6]

Each of the confidentiality agreements provided that "all statements made during the meeting, and all documents prepared for or during the meeting are protected from disclosure in any state or federal court proceeding . . . unless all participants consent in writing to such disclosure." The agreements also stated, "The meeting process is to be considered settlement negotiations for the purpose of all state and federal rules . . . protecting disclosures made during or in connection with the meeting from later discovery or use in evidence." The signatories agreed "there shall be no liability for any participating individual or entity as a result of conduct engaged in during or in connection with the meeting." Finally, each confidentiality agreement provided that, in the event the meeting did not fully resolve the dispute, the agreement will continue "in full force and effect, covering all communication between the parties for a period of fourteen (14) calendar days." The agreements provided that, after the expiration of the 14-day period, "communication

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[6] The third agreement stated the purpose of the October 14, 2014 meeting as "compromising, settling or resolving, in whole or in part, a dispute involving Friedman and associated companies." The reference to "Friedman" appears to be an unintended holdover from a form document. The agreement likely intended to refer to the "Larson Entities," and the only signatories to the agreement other than Fraysse and Danowitz were Philipson, Larson, and Blue.

between the parties will not be subject to this confidentiality agreement." Fraysse and Philipson denied threatening Larson. They contended, however, that the terms of the confidentiality agreements and "mediation confidentiality" precluded them from disclosing what the parties actually said during the meetings.

On the first step of the two-step analysis under section 425.16 (see *Baral v. Schnitt* (2016) 1 Cal.5th 376, 384), the defendants argued that Larson's alleged causes of action arose entirely from prelitigation settlement discussions and that section 425.16 protects attorneys' communications in connection with their representation of clients in a pending or anticipated judicial proceeding. On the second step, the defendants argued that Larson could not prevail on the merits because the absolute litigation privilege under Civil Code section 47, "mediation confidentiality," and the terms of the confidentiality agreements "barred" Larson's claims.

D. *Larson's Opposition to the Special Motions To Strike*

Larson opposed the special motions to strike and submitted supporting declarations from himself and Blue. Larson stated in his opposition there were four meetings (not five, as alleged in the complaint), the first of which occurred on June 18, 2014 between him and Philipson. Larson contended the other meetings occurred on June 23, 2014, July 14, 2014, and October 14, 2014 (rather than, as he had alleged in his complaint, on or about June 18, 2014, July 15, 2014, August 15, 2014, October 15, 2014, and November 15, 2014).

Larson's opposition distinguished between what he called the "first meeting" on June 18, 2014 with Philipson and the other

meetings with Fraysse and Danowitz.[7] With regard to the first meeting, Larson argued Philipson's communications were not protected activity under section 425.16 because "[d]efendants have failed to deny this meeting took place" and thus "effectively concede the June 18, 20[14] Meeting existed outside the scope of any claims of privilege." Larson argued that at this meeting Philipson informed him "he would be included in 'the next round of indictments' unless Larson were to pay money to Knox-Ricksen and also withdraw liens held by Allied Medical Management then opposed by certain of Knox-Ricksen's clients." Larson contended the litigation privilege did not protect such statements, adding that "[n]o non-disclosure agreement was discussed or executed relating to the June 18, 2014 meeting."

With regard to the statements made at subsequent meetings with Fraysse and Danowitz, Larson argued the statements were not prelitigation settlement communications because the Knox Ricksen defendants "repeatedly conceded they had no intention of making Larson a Defendant [in the qui tam action] at the times of the Meetings." Larson contended the Knox Ricksen defendants "had no awareness of Larson's supposed involvement [in the alleged criminal scheme] until September of 2014," when the grand jury proceedings were unsealed. Thus,

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[7] Larson alleged in his complaint that the "first meeting" occurred on June 18, 2014, but Larson stated in his declaration in support of his opposition to the special motions to strike only that the meeting "took place in June of 2014 ('First Meeting')." Neither Philipson nor Francisco stated in his declaration that any meeting occurred on June 18. Instead, they referred to "a few other meetings" occurring on unspecified dates and a meeting on an unspecified date in June 2014.

Larson argued, the Knox Ricksen defendants could not have had a good faith intent to settle with Larson (or at least not at the time of the June or July meetings). In support of this argument, Larson pointed to the Knox Ricksen defendants' special motion to strike, which acknowledged (1) Fraysse and Danowitz thought Anguizola, not Larson, would be at the meeting on June 23; (2) Larson was not indicted by the Orange County grand jury; and (3) Larson's involvement in the alleged fraud was not "initially apparent." Larson also argued these facts showed the defendants' alleged threats had no logical relation to any court proceeding.

Larson also argued that, even if the Knox Ricksen defendants could show their communications qualified as protected activity, Philipson could not meet this burden with regard to the June 18 meeting. Thus, Larson argued, his complaint contained mixed causes of action, all of which would survive a special motion to strike so long as the complaint "contains meritorious allegations not within the purview of [section 425.16]." He argued he met that burden by alleging meritorious causes of action in connection with the first meeting. The statements made at that meeting, Larson argued, "were not made in serious consideration of litigating against Larson" and "would qualify as criminal extortion as [a] matter of law." Larson also contested the defendants' characterization of the meetings as "mediation."

E. *The Ruling*

After ruling on a variety of evidentiary objections (none of which the parties challenge on appeal), the trial court concluded Larson's causes of action "all arise from a series of settlement

meetings . . . the principal subject [of which] was the possible resolution of qui tam claims against [Larson]." The court ruled the causes of action thus arose "from litigation conduct that is protected under the anti-SLAPP statute." The court rejected Larson's argument that the allegedly extortionate statements fell outside the scope of section 425.16 because evidence of extortion was not "established by clear and undisputed evidence."

The trial court also concluded Larson failed to present admissible evidence supporting a prima facie case in his favor because all of Larson's causes of action "are based upon the settlement meetings between the parties, and statements made at the meetings are protected by the litigation privilege" under Civil Code section 47, subdivision (b). The trial court also ruled the confidentiality agreements signed in connection with the three later meetings precluded Larson's claims arising from those meetings. With regard to the June 18, 2014 meeting (which was not the subject of a confidentiality agreement), the trial court ruled Larson's evidence was "so conclusory and insubstantial that it does not meet [his] burden." The court stated: "The only evidence which directly addresses such a meeting is the declaration of [Larson], which does not identify the date of the meeting, provides no evidence that Philipson was acting on behalf of the [Knox Ricksen] Defendants, and gives an entirely conclusory description of Philipson's statements."

The trial court awarded the defendants their reasonable attorneys' fees and entered judgment in their favor on January 5,

2016. Larson timely appealed from the order granting the special motions to strike.[8]

DISCUSSION

A. *Section 425.16*

"A strategic lawsuit against public participation, or SLAPP suit, is one which 'seeks to chill or punish a party's exercise of constitutional rights to free speech and to petition the government for redress of grievances.'" (*Contreras v. Dowling* (2016) 5 Cal.App.5th 394, 404; see *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055.) "Section 425.16 . . . provides a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights."[9] (*Contreras*, at p. 404; see

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[8] An order granting a special motion to strike under section 425.16 is appealable. (Code Civ. Proc., §§ 425.16, subd. (i), 904.1, subd. (a)(13); see *Russell v. Foglio* (2008) 160 Cal.App.4th 653, 659 [an order granting a special motion to strike under section 425.16 is "specifically, statutorily appealable"].) We grant the request filed by the Knox Ricksen defendants to take judicial notice of an order of the United States Bankruptcy Court filed November 1, 2017. That order approved a settlement between the defendants in this case and Allied Injury Management and authorized the trustee for Allied Injury Management to abandon and dismiss its appeal in this case.

[9] Section 425.16, subdivision (b)(1), provides, "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has

Rusheen, at p. 1055.) "The statute 'authorizes a defendant to file a special motion to strike any cause of action arising from an act in furtherance of the defendant's constitutional right of petition or free speech in connection with a public issue.'" (*Contreras*, at p. 404; see *Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 1546-1547.)

In ruling on a motion under section 425.16, the trial court engages in a two-step process: "First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. [Citation.] If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success." (*Baral*, *supra*, 1 Cal.5th at p. 384; see *Contreras*, *supra*, 5 Cal.App.5th at pp. 404-405.) We review the trial court's rulings on both the first and second steps independently under a de novo standard of review. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325; *Rusheen*, *supra,* 37 Cal.4th at p. 1055; *Malin v. Singer* (2013) 217 Cal.App.4th 1283, 1293.)

1. *Step One: Protected Activity*

At the first step, the defendant has the burden to show the challenged causes of action arise from acts in furtherance of the defendant's right of free speech or right of petition under one of the categories set forth in section 425.16, subdivision (e).[10]

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established that there is a probability that the plaintiff will prevail on the claim."

[10] Section 425.16, subdivision (e), states: "As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in

(*Contreras*, *supra*, 5 Cal.App.5th at pp. 404-405; see *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78; *Finton Construction, Inc. v. Bidna & Keys, APLC* (2015) 238 Cal.App.4th 200, 209.) The defendant must identify all allegations of protected activity and show the challenged cause of action arises from that protected activity. (*Baral*, *supra*, 1 Cal.5th at p. 396; *Rusheen*, *supra*, 37 Cal.4th at p. 1056.)

"In deciding whether the 'arising from' requirement is met, a court considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.'" (*City of Cotati*, *supra*, 29 Cal.4th at p. 79; see *Contreras*, *supra*, 5 Cal.App.5th at p. 408.) "Thus, the court is not limited to examining the allegations of the complaint alone but rather considers the pleadings and the factual material submitted in connection with the special motion to strike." (*Contreras*, at p. 408; accord, *Karnazes v. Ares* (2016) 244 Cal.App.4th 344, 353-354; see, e.g., *Navellier v. Sletten* (2002) 29 Cal.4th 82, 90 [examination of relevant documents revealed that each act or

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connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."

omission about which the plaintiffs complained fell within section 425.16].)

2. *Step Two: Prima Facie Showing of Merit*

If the moving party fails to demonstrate that any of the challenged claims for relief arise from protected activity, the court denies the motion to strike without reaching the second step. (*City of Cotati*, *supra*, 29 Cal.4th at pp. 80-81; *Trilogy at Glen Ivy Maintenance Assn. v. Shea Homes, Inc.* (2015) 235 Cal.App.4th 361, 367.) If the defendant satisfies the first step, however, "the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated." (*Baral*, *supra*, 1 Cal.5th at p. 396; see *Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.) "'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."' [Citation.] 'We consider "the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based." [Citation.] However, we neither "weigh credibility, [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law."'" (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820; accord, *Contreras*, *supra*, 5 Cal.App.5th at p. 405; see *Baral*, at p. 385 [the court "accepts the plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law"].)

A special motion to strike under section 425.16, "'like a summary judgment motion, *pierces* the pleadings and requires an evidentiary showing.'" (*Mission Springs Water District v. Verjil* (2013) 218 Cal.App.4th 892, 909; see *Contreras*, *supra*, 5 Cal.App.5th at p. 405; *Finton Construction, supra,* 238 Cal.App.4th at p. 213.) "Consequently, '[t]he prima facie showing of merit must be made with evidence that is admissible at trial. [Citation.] Unverified allegations in the pleadings or averments made on information and belief cannot make the showing.'" (*Contreras*, at p. 405.)

B. *Larson's Complaint Arises from Protected Activity*

1. *The Alleged Statements Were Prelitigation Settlement Communications Under Section 425.16*

"'Under the plain language of section 425.16, subdivision (e)(1) and (2), as well as the case law interpreting those provisions, all communicative acts performed by attorneys as part of their representation of a client in a judicial proceeding or other petitioning context are per se protected as petitioning activity by the anti-SLAPP statute.'" (*Contreras*, *supra*, 5 Cal.App.5th at pp. 408-409; accord*, Cabral v. Martins* (2009) 177 Cal.App.4th 471, 479-480.) Courts construe section 425.16 broadly to apply to communications that "'relate[ ] to the substantive issues in the litigation and [are] directed to persons having some interest in the litigation.'" (*Seltzer v. Barnes* (2010) 182 Cal.App.4th 953, 962; see *Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255, 1268 ["'courts have adopted "a fairly expansive view of what constitutes litigation-related activities within the

scope of section 425.16"""]; *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 908 [same].)

Protected communications include demand letters or other settlement communications sent or made in anticipation of litigation. (*Malin*, *supra*, 217 Cal.App.4th at p. 1293; see *Flatley*, *supra*, 39 Cal.4th at p. 322, fn. 11 [prelitigation communications including demand letters are within the scope of section 425.16]; *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115 [protected activity includes "'communications preparatory to or in anticipation of the bringing of an action or other official proceeding"']; *Stenehjem v. Sareen* (2014) 226 Cal.App.4th 1405, 1413 ["communications that are preparatory to or in anticipation of litigation are protected under section 425.16, subdivision (e)(2), even though they occur before litigation is actually pending"]; *Neville*, *supra*, 160 Cal.App.4th at p. 1268 [same].)

Larson alleged that, in a series of meetings, the defendants "threatened to accuse [him] of a crime by adding [him] to pending criminal proceedings unless [he] were to pay money." Larson's eight causes of action all arise from the same, allegedly extortionate statements. Indeed, Larson concedes the "gravamen" of the complaint is this threat, first perpetrated by Philipson.

Contrary to Larson's suggestions, the meetings and alleged threats did not occur in a vacuum. Instead, his allegations explain he managed several medical providers who provided treatment to patients "on a lien basis" and filed workers' compensation claims that insurance companies represented by Knox Ricksen denied, thus leaving Larson and his medical providers uncompensated for treatment they claimed they

provided. Assuming Larson's medical providers administered legitimate treatments to these patients, Larson had a legitimate dispute with Knox Ricksen's clients.

Larson also alleged that Philipson and Fraysse were agents or employees of Knox Ricksen and that they attended the meetings within the scope of their agency. Larson alleged that, in at least three meetings, Philipson demanded Larson and his companies withdraw their claims for payment that Knox Ricksen's insurance carrier clients had denied. Thus, despite Larson's attempt to characterize the meetings as "personal," they related to his business and its quest for compensation for services provided to patients who filed workers' compensation claims with insurance companies represented by Knox Ricksen. Even as alleged, the statements by Philipson and Fraysse relate to substantive issues in potential litigation and were directed to Larson, a person having an interest in that litigation. (See *Seltzer*, *supra*, 182 Cal.App.4th at p. 962; *Neville*, *supra*, 160 Cal.App.4th at p. 1266.)

But we are not limited to examining the allegations of the complaint. (See *City of Cotati*, *supra*, 29 Cal.4th at p. 79; *Contreras*, *supra*, 5 Cal.App.5th at p. 408.) The declarations submitted by Philipson, Fraysse, Danowitz, and Francisco in support of the special motions to strike tell a (mostly) consistent, logical story about the impetus for the meetings with Larson and his counsel. They explained that Philipson, after meeting with Larson and Francisco, arranged the meetings with the Knox Ricksen attorneys to help Larson resolve potential litigation against him arising from the conduct alleged in the grand jury indictments. Fraysse and Danowitz wanted to meet with Larson because his name had surfaced in their investigation of the

claims in the qui tam action. Although Fraysse and Danowitz originally thought Philipson contacted them on behalf of Anguizola, they nevertheless pursued settlement negotiations with Larson. The confidentiality agreements signed in connection with three of the meetings confirm the purpose of the meetings was to "compromis[e], settl[e], or resolv[e], in whole or in part, a dispute" between Larson and his businesses, on one side, and clients of Knox Ricksen, on the other.

Thus, considering the allegations in Larson's complaint and the evidence submitted in connection with the special motions to strike, the defendants met their burden of showing Larson's causes of action arose from protected activity under section 425.16. All of Larson's causes of action arise from communicative acts taken by lawyers acting within the scope of their representation of clients in anticipation of litigation. (See *Contreras*, *supra*, 5 Cal.App.5th at pp. 408-409; *Malin*, *supra*, 217 Cal.App.4th at p. 1293.) "Put another way," Larson's causes of action "would have no basis in the absence of" the defendant's protected activities. (*Contreras*, at p. 412.)

2. *Larson Did Not Demonstrate Extortion as a Matter of Law*

Larson argues section 425.16 does not protect the alleged threats because they constitute extortion. In *Flatley v. Mauro*, *supra*, 39 Cal.4th 299 the Supreme Court articulated an exception to section 425.16 for a demand letter that was so

extreme it constituted criminal extortion as a matter of law.[11] (See *Flatley*, at p. 332, fn. 16.) In general, "[e]xtortion is not a constitutionally protected form of speech." (*Id.* at p. 328.) But allegations of extortion remove an otherwise protected communication from the scope of section 425.16 only where "either the defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law." (*Flatley*, at p. 320; see *City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 424 ["conduct must be illegal *as a matter of law* to defeat a defendant's showing of protected activity," and "[t]he defendant must concede the point, or the evidence conclusively demonstrate it, for a claim of illegality to defeat an anti-SLAPP motion at the first step"]; *Bergstein v. Stroock & Stroock & Lavan LLP* (2015) 236 Cal.App.4th 793, 804; *Seltzer*, *supra*, 182 Cal.App.4th at p. 964.) This exception "is very narrow and applies only in undisputed cases of illegality." (*Zucchet v. Galardi* (2014) 229 Cal.App.4th 1466, 1478; see *Cross v. Cooper* (2011) 197 Cal.App.4th 357, 386 [only in "rare cases [is there] uncontroverted and uncontested evidence that establishes the crime as a matter of law"].) In *Flatley,* the evidence of extortion was "uncontroverted" because the defendant attorney "did not deny that he sent the [extortionate demand] letter nor did he contest the version of the telephone calls set forth in . . . declarations in opposition to the motion to strike." (*Flatley*, at pp. 328-329.)

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11 "Extortion is the obtaining of property from another, with his consent . . . induced by a wrongful use of force or fear . . . . " (Pen. Code, § 518; see *Flatley*, *supra*, 39 Cal.4th at p. 326.)

If there is a factual dispute about the legality of the defendant's conduct, "it cannot be resolved within the first step but must be raised by the plaintiff in connection with the plaintiff's burden to show a probability of prevailing on the merits." (*Flatley*, *supra*, 39 Cal.4th at p. 316; see *Seltzer*, *supra*, 182 Cal.App.4th at p. 965.) "The burden is on the party opposing a section 425.16 motion to strike to show that no factual dispute exists." (*Seltzer*, at p. 965.) Thus, "if a plaintiff contesting the validity of a defendant's exercise of protected rights 'cannot demonstrate as a matter of law that the defendant's acts do not fall under section 425.16's protection, then the claimed illegitimacy of the defendant's acts is an issue which the plaintiff must raise *and* support in the context of the discharge of the plaintiff's burden to provide a prima facie showing of the merits of the plaintiff's case.'" (*Seltzer*, at p. 965; see *Flatley*, at p. 315.)

Far from conceding Larson's allegations of extortion, the defendants categorically denied them. In response, Larson offered no conclusive evidence that the defendants ever threatened Larson as he claimed. Instead, Larson merely stated in his declaration that Philipson threatened him and argued the Knox Ricksen defendants were liable for Philipson's threats as co-conspirators. Larson's declaration was not sufficient to show extortion as a matter of law. (See *Contreras*, *supra*, 5 Cal.App.5th at p. 413 ["[c]onclusory allegations of conspiracy or aiding and abetting do not deprive [the defendant's] actions of their protected status"]; *Kashian*, *supra*, 98 Cal.App.4th at pp. 910-911 [conduct that comes within the scope of section 425.16 "does not lose its coverage . . . simply because it is *alleged* to have been unlawful or unethical"].) Therefore, Larson did not satisfy his burden of showing the defendants engaged in extortion as a

matter of law. (See *Seltzer*, *supra*, 182 Cal.App.4th at p. 965 [evidence of illegal conduct was inconclusive where the defendant submitted a declaration stating "he never misrepresented facts to [the plaintiff], concealed any evidence from her, or intended to cause her any emotional distress," and the plaintiff failed to present any evidence of defendant's intent].)

3. *Section 425.16 Applies to Statements by Philipson at the First Meeting*

Larson devotes many pages of his briefs to arguing the statements by Philipson at the first meeting are entitled to less protection under section 425.16 than his statements at later meetings. Among other things, Larson argues Philipson could not have been attempting to settle a dispute with Larson at the first meeting because the defendants deny Philipson was an employee or agent of Knox Ricksen. Thus, Larson argues, section 425.16 does not apply to anything Philipson said at the first meeting.

Larson's argument is inconsistent with both his complaint and the law. Most glaringly, Larson's argument appears to abandon his allegation that Philipson *was* an agent or employee of Knox Ricksen, which is the basis for his claim that Knox Ricksen is liable for Philipson's statements. Larson cannot defeat a special motion to strike by amending his complaint or alleging new facts after the court has ruled on the motion. "Under the anti-SLAPP analysis, we, like the trial court, must take the challenged pleading as we find it." (*Okorie v. Los Angeles Unified School Dist.* (2017) 14 Cal.App.5th 574, 598.) "Indeed, a trial court cannot even allow an amendment after a defendant has met its burden with respect to the first prong [citation] or before the

hearing on the motion [citation], because such action would undermine the purpose of the statute—that is, providing a 'quick and inexpensive method of unmasking and dismissing [meritless] suits.'" (*Id.* at p. 599.)

Moreover, even if Philipson represented Larson's interests at the first meeting as Philipson stated, section 425.16 applies to his communications with Larson. (See *Taheri Law Group v. Evans* (2008) 160 Cal.App.4th 482, 489 [an attorney's communications with his client about pending litigation are protected activity under section 425.16].) The authorities cited by Larson acknowledge only that section 425.16 may not apply to certain malpractice claims not at issue here. (See *Thayer v. Kabateck Brown Kellner LLP* (2012) 207 Cal.App.4th 141, 158; *Siegal v. Gamble* (N.D.Cal. Mar. 21, 2016, No. 13-CV-03570-RS) 2016 WL 1085787, pp. 10-11.)

To the extent Larson argues the first meeting was not sufficiently connected to anticipated litigation, the allegations in Larson's complaint provided that connection. Larson alleged with regard to all of his causes of action that Philipson, like Fraysse and Danowitz, acted as an employee or agent of Knox Ricksen, whose clients had denied insurance claims submitted by patients of Larson's clinics. Evidence of the connection between the first meeting and anticipated litigation also appeared in the declarations of Philipson and Francisco, who stated the meetings Philipson helped to arrange, including the first meeting, were intended to facilitate a resolution of potential causes of action against Larson.

C. *Larson Did Not Make a Prima Facie Showing of Merit Because the Litigation Privilege Bars His Causes of Action*

The trial court ruled Larson could not establish a prima facie case because the litigation privilege precluded liability for Larson's causes of action, all of which were based on prelitigation communications relating to litigation contemplated in good faith. Because we agree with this ruling, we do not consider the defendants' additional arguments that "mediation confidentiality" and the parties' confidentiality agreements shield them from liability.

1. *The Litigation Privilege*

Civil Code section 47, subdivision (b), provides: "A privileged publication or broadcast is one made: [¶¶] (b) In any . . . (2) judicial proceeding." The litigation privilege is relevant to the second step of the analysis under section 425.16 because "it may present a substantive defense a plaintiff must overcome to demonstrate a probability of prevailing." (*Flatley, supra,* 39 Cal.4th at p. 323; accord, *Bergstein, supra,* 236 Cal.App.4th at p. 814.) "'A plaintiff cannot establish a probability of prevailing if the litigation privilege precludes the defendant's liability on the claim.'" (*Ibid.*)

The litigation privilege applies "'to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action.'" (*Contreras*, *supra*, 5 Cal.App.5th at p. 415; see *Finton Construction, supra,* 238 Cal.App.4th at p. 212; *Bergstein*, *supra*, 236 Cal.App.4th at p. 814.) The litigation

privilege is absolute and applies regardless of malice. (*Malin*, *supra*, 217 Cal.App.4th at p. 1300; see *Action Apartment Assn., Inc. v. City of Santa Monica* (2007) 41 Cal.4th 1232, 1241.) Courts interpret the privilege broadly "to further its principal purpose of affording litigants and witnesses the utmost freedom of access to the courts without fear of harassment in derivative tort actions." (*Malin*, at p. 1300; see *Action Apartment Assn.*, at p. 1241.) Therefore, we resolve doubts about whether the litigation privilege applies in favor of applying it. (*Contreras*, at p. 415; *Finton Construction,* at p. 212.)

Civil Code section 47, subdivision (b), "'encompasses not only testimony in court and statements made in pleadings, but also statements made prior to the filing of a lawsuit, whether in preparation for anticipated litigation or to investigate the feasibility of filing a lawsuit.'" (*Bergstein*, *supra*, 236 Cal.App.4th at p. 814; see *Flatley*, *supra*, 39 Cal.4th at p. 322 [the litigation privilege may apply to statements made prior to the filing of a lawsuit].) Such statements may include "a lawyer's discussions with clients about potential litigation, the filing of pleadings, and letters to opposing counsel," including demand letters. (*Contreras*, *supra*, 5 Cal.App.5th at p. 415; see *Rubin v. Green* (1993) 4 Cal.4th 1187, 1195 [the litigation privilege protected a lawyer's communications with potential clients to discuss the merits of a proposed lawsuit]; *GeneThera, Inc. v. Troy & Gould Professional Corp.* (2009) 171 Cal.App.4th 901, 910 [the litigation privilege protected a letter to counsel proposing settlement, even if the letter was "substantively at variance with the Rules of Professional Conduct"]; see generally *Hagberg v. California Federal Bank FSB* (2004) 32 Cal.4th 350, 361 "[m]any cases have explained that section 47(b) encompasses not only testimony in

court and statements made in pleadings, but also statements made prior to the filing of a lawsuit, whether in preparation for anticipated litigation or to investigate the feasibility of filing a lawsuit"]; *Bergstein*, at pp. 815-816 [same].)

A prelitigation communication is privileged, however, only if it """relates to litigation that is contemplated in good faith and under serious consideration."""" (*Malin*, *supra*, 217 Cal.App.4th at pp. 1300-1301.) These requirements provide some assurance that the communication has some connection or logical relation to a contemplated action and is made to achieve the objects of the litigation. (*Action Apartment Assn.*, *supra*, 41 Cal.4th at p. 1251; *Malin*, at p. 1301.)

2. *The Defendants' Communications with Larson Related to Litigation Contemplated in Good Faith and Under Serious Consideration*

Larson argues the allegedly extortionate statements by Philipson and Fraysse are not protected by the litigation privilege. In making this argument, Larson again addresses the statements Philipson allegedly made in the first meeting separately from those Philipson and Fraysse allegedly made in the other meetings.

a. *The First Meeting*

Larson argues the litigation privilege does not protect statements made during the first meeting with Philipson because that meeting "did not involve communications with participants to any action, and did not attempt to achieve the objects of any

litigation." He argues that, because Philipson had no interest in the outcome of any pending litigation at the time of the first meeting, his communications at that meeting cannot benefit from the litigation privilege.

The statements Larson alleges Philipson made at the first meeting related to litigation contemplated against Larson. As discussed, even the allegations in Larson's complaint placed the alleged statements within the context of an adversarial relationship between Larson and his clinics, on the one hand, and the Knox Ricksen defendants (and their clients) and Philipson on the other. The only reasonable interpretation of Larson's complaint is that the purpose of the first meeting between Larson and Philipson—an allegedly adverse attorney representing insurance carriers who denied claims submitted by Larson's clinics—was to try to resolve that dispute. Thus, according to Larson's allegations, Philipson's objective at the first meeting was to achieve the objects of potential litigation: resolution of a dispute in favor of his alleged clients, the insurance carriers.

Moreover, although Philipson and the Knox Ricksen defendants deny Philipson's association with Knox Ricksen, the declarations of Philipson and Francisco confirm that the purpose of the first meeting was to resolve potential claims against Larson. Philipson stated he attended several meetings with Larson prior to the meetings with Fraysse and Danowitz, and the purpose of those meetings was to resolve claims against Larson. Philipson explained that Francisco arranged those meetings, and Francisco stated he did so "for the purpose of [determining] whether or not [Larson] needed the legal services and advice of [Philipson] to facilitate a resolution in the collection of liens."

Francisco also stated that at the meetings he, Philipson, and Larson discussed certain depositions Knox Ricksen attorneys had taken of doctors who worked in Larson's clinics. At one of the meetings prior to those with Fraysse and Danowitz, Francisco said Philipson "helped [Larson] by calling [Danowitz] and asking that the deposition of a provider be re-scheduled, or taken off-calendar." At that meeting, Francisco, Philipson, and Larson also discussed whether the insurance carriers might seek to consolidate existing cases with others pending against Larson before the Workers' Compensation Appeals Board. Knox Ricksen represented the insurance carriers in connection with that action. At all of the meetings Francisco attended with Larson and Philipson, Francisco stated that Larson said "he was going to retain [Philipson] to facilitate resolution of any and all problems between [Larson's] clinics, his doctors, and providers, and" one of the insurance companies.

Larson's declaration provides no evidence to counter the descriptions by Philipson and Francisco of the purpose of the first meeting. Indeed, Larson stated that, at that meeting, "Philipson referred to pending criminal indictments in Orange County and told me that 'one of your doctors will be on this round.'" Larson also said, "Philipson threatened to have me added to a criminal proceeding by telling me 'you are going to be on the next round of the indictments' unless I paid money to Knox-Ricksen, and unless I also withdraw liens held by Allied Medical Management then opposed by some of Knox-Ricksen's clients." Although Larson's declaration accuses Philipson of extortion, it does not contradict the statements by Philipson and Francisco that the purpose of the first meeting was to discuss potential claims against Larson arising from the alleged fraud against the qui tam plaintiffs.

Thus, notwithstanding Larson's (unsubstantiated) allegations of extortion, Philipson's alleged statements "'have some connection or logical relation to the [contemplated] action.'" (See *Blanchard v. DIRECTV, Inc.* (2004) 123 Cal.App.4th 903, 919.) Larson's argument that the litigation privilege did not apply to Philipson's communications because Philipson had no interest in the outcome of any pending litigation at the time of the first meeting is belied by Larson's complaint, which alleges Philipson, as an employee or agent of Knox Ricksen, represented the insurance companies adverse to Larson.

b. *The Other Meetings*

With regard to the later meetings with Fraysse and Danowitz, Larson argues the defendants could not have had a serious intent to pursue litigation against him until after September 2014 when they obtained transcripts of the grand jury proceedings. Thus, according to Larson, at a minimum the defendants are liable for statements made at the meetings prior to September 2014.

The evidence was to the contrary. Larson and his attorney's involvement in the June and July meetings would make no sense if Larson had no potential for liability arising from his business dealings with Anguizola. The confidentiality agreements Larson or his attorney and the Knox Ricksen attorneys signed in connection with those meetings contemplated claims against Larson. Indeed, at some point prior to the June 23, 2014 meeting, Knox Ricksen drafted the confidentiality agreement to include Larson among the "Anguizola Entities," and that agreement stated the purpose of the meeting was to resolve a dispute between the Anguizola Entities and Knox Ricksen's

clients. Larson's inclusion in, and his attorney's signature on, this agreement acknowledged that the Knox Ricksen defendants contemplated Larson's involvement in the alleged fraud scheme well before the proceedings of the grand jury were unsealed in September 2014.

Larson also argues the Knox Ricksen defendants could not have contemplated litigation against him in good faith because they did not name him as a defendant in the qui tam action (and apparently still have not done so). The litigation privilege, however, applies even if the defendants did not and never do add Larson as a defendant in the qui tam action or bring a separate lawsuit against him or his related entities. (See *Blanchard*, *supra*, 123 Cal.App.4th at p. 920 [a party "need not have filed lawsuits against every single [recipient of a prelitigation demand letter] to be entitled to the [litigation] privilege"].) "'[A]ccess to the courts is not an end in itself but only one means to achieve satisfaction. . . . If this can be obtained without resort to the courts—even without the filing of a lawsuit—it is incumbent upon the attorney to pursue such a course of action first [typically by a demand letter].' [Citation.] . . . To hold that [a party] must sue every recipient to invoke the [litigation] privilege would defeat a purpose of the demand letter, namely to avoid litigation." (*Ibid.*) Thus, regardless of the defendants' reasons for not (yet) suing Larson, Larson failed to show they were not contemplating litigation against him in good faith prior to the alleged meetings. In contrast, the defendants showed they had already initiated litigation against individuals and entities involved in the alleged fraud, they suspected and had investigated Larson's involvement in the scheme, and they entered into agreements evidencing that

their meetings were intended to address and perhaps resolve Larson's potential liability.

3. *Larson Did Not Allege a Mixed Cause of Action*

Larson argues he satisfied his burden to make a prima facie showing because he alleged mixed causes of action based on both protected and unprotected activity. He argues his causes of action survive because the litigation privilege applies only to protected activity. (See *Baral*, *supra*, 1 Cal.5th at p. 385 ["'[w]here a cause of action refers to both protected and unprotected activity and a plaintiff can show a probability of prevailing on *any part of its claim*, the cause of action is not meritless and will not be subject to the anti-SLAPP procedure'"].)

Larson, however, did not allege any mixed causes of action arising from both protected and unprotected conduct. As discussed, all of his causes of action arise from alleged prelitigation communications by the defendants within the scope of their representation. To the extent Larson alleged the statements Philipson made at the first meeting were unprotected extortion, Larson failed to meet his burden to demonstrate that his allegations were "'"supported by a sufficient prima facie showing of facts to sustain a favorable judgment."'" (*Oasis West*, *supra*, 51 Cal.4th at p. 820; see *Contreras*, *supra*, 5 Cal.App.5th at p. 405.) As the trial court concluded, Larson's "wildly inconsistent and conflicting" statements failed to demonstrate any meeting occurred on June 18, 2014, much less what was said at that meeting.

Larson also appears to suggest that the defendants' alleged statements arise from activity unprotected by the litigation privilege because his complaint, other pleadings, and supporting

declarations do not refer to any "threat of civil litigation." In deciding whether Larson's causes of action arise from protected activity, however, we focus not on Larson's characterization of the defendants' conduct, but on the defendants' actual activities. (See *Contreras*, *supra*, 5 Cal.App.5th at p. 411 [the court must look at the allegedly wrongful conduct and disregard "'the form of action within which it has been framed"']; *Cabral*, *supra*, 177 Cal.App.4th at pp. 479-483 [concluding the plaintiff's cause of action arose from the attorneys' conduct as counsel, not from aiding and abetting evasion of child support].) Here, the defendants allegedly made certain statements in the context of settlement discussions with a potential defendant in a qui tam action filed shortly after or before the communications occurred. Such statements are protected by the litigation privilege. (See *Blanchard*, *supra*, 123 Cal.App.4th at p. 920 [allegedly extortionate demand letter was protected by the litigation privilege where the letter was sent in connection with proposed litigation contemplated in good faith and under serious consideration].)[12]

DISPOSITION

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[12] After granting the special motions to strike, the trial court granted the defendants' requests for attorneys' fees and costs. Larson does not contest the amounts the trial court awarded. He argues only that we should reverse the awards to the extent we reverse the trial court's ruling on the special motions to strike. Because we affirm that ruling, we affirm the ruling granting attorneys' fees and costs to the defendants.

The order is affirmed. Larson's request for judicial notice is denied. Respondents are to recover their attorneys' fees and costs on appeal in an amount to be determined by the trial court.

SEGAL, J.

We concur:

PERLUSS, P. J.

BENSINGER, J.*

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.