

**RE: Special Motion to Strike/ Demurrer**  
**CV080510/ Murphy v State of California**

**Hearing Date: April 15, 2009, Dept. 2 at 9:00 AM**

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**Plaintiff**

**Dee Thomas Murphy**

**Counsel**

**Self Represented 775 848 8800**

**Defendant**

**State of California**

**Counsel**

**Joel A Davis 213 897 2130**

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**TENTATIVE RULING**

Plaintiffs allege that defendants disparaged a product developed by plaintiffs called a RECLAMATOR. The RECLAMATOR purports to re-purify wastewater flows from septic tanks and is presented as an alternative to a homeowner hooking up to sewer service.

The complaint alleges that on September 14, 2007, Defendant Harvey Packard, the Enforcement Coordinator for the Regional Water Quality Control Board, appeared on a radio broadcast and refuted plaintiffs' claims with respect to the RECLAMATOR technology.

The complaint further alleges that on September 7, 2007, Defendant Roger Briggs, the Executive Officer of the Regional Water Quality Control Board sent a letter to plaintiff Murphy and Mark Low stating that the RECLAMATOR discharges waste and is subject to Water Board regulation. The plaintiff alleges that the letter was published to Cinthea Coleman by a blind carbon copy of the letter.

The complaint finally alleges that on March 6, 2008, Roger Briggs sent a letter to one Piper Reilly stating, *inter alia*, that the RECLAMATOR does not comply with the Basin Plan and that the RECLAMATOR will still discharge waste.

Based upon these three communications, plaintiffs allege causes of action for Defamation, Trade Libel, Tortious Interference and Declaratory Relief.

Dee Thomas Murphy is the only individual plaintiff. The corporate plaintiffs have no attorney.<sup>1</sup>

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<sup>1</sup> The corporate defendants are not represented by counsel. Plaintiff Murphy cannot represent the interests of the corporations because he is not an attorney. Moving party does not request any sort of remedy with respect to the failure of the corporations to have counsel.

In California a corporation may not represent itself, except in a small claims proceeding. This prohibition stems from the notion a corporate representative who would likely appear on behalf of the corporation would be engaged in the unlicensed practice of law. (*Merco Construction Engineers, Inc. v. Municipal Court* (1978) 21 Cal.3d 724, 147 Cal.Rptr. 631, 581 P.2d 636.) The

The defendants have filed a demurrer and special motion to strike pursuant to CCP §425.16.

**Special Motion to Strike:**

Defendants bring a special motion to strike pursuant to CCP §425.16 based upon the contention that their communications were constitutionally protected.

Section 425.16 posits instead a two-step process for determining whether an action is a SLAPP. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. (§ 425.16, subd. (b)(1).) “A defendant meets this burden by demonstrating that the act underlying the plaintiff’s cause fits one of the categories spelled out in section 425.16, subdivision (e)” . If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim. (§ 425.16, subd. (b)(1);

As we previously have observed, in order to establish the requisite probability of prevailing (§ 425.16, subd. (b)(1)), the plaintiff need only have “ ‘stated and substantiated a legally sufficient claim.’ ” “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.’ ” *Navellier v. Sletten* (2002) 29 Cal.4th 82, 88-89 (Internal citations deleted)

The protections of the Special Motion to Strike are available to governmental entities and governmental speakers.

...[G]overnmental entities and their representatives do enjoy First Amendment protections in regard to statements they make on matters of public concern. Noting that governmental entities and their employees constitute a "person" within the meaning of the anti-SLAPP statute, the court opined: "The anti-SLAPP suit statute is designed to protect the speech interests of private citizens, the public, and governmental speakers." The court ruled: "Petitioners had a First Amendment right to keep the public informed, issue the report, respond to media questions, and ask other law enforcement agencies to conduct their own

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ban on corporate self-representation does not prevent a court from granting a motion to withdraw as attorney of record, even if it leaves the corporation without representation. Such an order puts pressure on the corporation to obtain new counsel, or risk forfeiting important rights through nonrepresentation. ( *Ferruzzo v. Superior Court* (1980) 104 Cal.App.3d 501, 504, 163 Cal.Rptr. 573.) It is the duty of the trial judge to advise the representative of the corporation of the necessity to be represented by an attorney. ( *Van Gundy v. Camelot Resorts, Inc.* (1983) 152 Cal.App.3d Supp. 29, 31, 199 Cal.Rptr. 771.) *Gamet v. Blanchard* (2001) 91 Cal.App.4th 1276 1284 at FN5

In any event, the corporate defendants have not properly opposed the motion to strike and it is granted as to them.

investigation. A contrary holding would impermissibly chill the exercise of First Amendment rights." In fact, "section 425.16 extends to public employees who issue reports and comment on issues of public interest relating to their official duties." Thus, "[p]etitioners made a prima facie showing that the report and media statements related to an official investigation, were made in a public forum, and involved an issue of public interest." *Schaffer v. City and County of San Francisco* (2008) 168 Cal.App.4th 992, 1002-1003 citing to *Bradbury v. Superior Court* (1996) 49 Cal.App.4th 1108 (Internal citations omitted)

Defendants contend that their statements were constitutionally protected activities because the statements were "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". This includes: "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." See CCP §425.16(e)(2),

In 1999, the Supreme Court resolved conflicts among the courts of appeal by holding that any statement or writing "made in, or in connection with an issue under consideration or review by, an official proceeding or body" is protected by section 425.16, whether or not it involves a public issue. *Paul v. Friedman* (2002) 95 Cal.App.4th 853, 863-864 (Citing *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1113,.)

The declaration of Roger W. Briggs establishes that he is an Executive Officer of the California Regional Water Quality Control Board. He declares that his responsibilities include overseeing the implementation of the Basin Plan. The letter dated September 6, 2007 informed plaintiffs that their claims that the purchase of a RECLAMATOR would relieve purchasers of the obligation to pay property assessments and would exempt them from regulation were incorrect. In addition the letter informed plaintiffs of the Board's belief that the RECLAMATOR discharges waste and is therefore subject to regulation by the Board.

On March 6, 2008, Briggs' letter to Reilly was sent in Briggs' official capacity. Briggs advised Reilly that installation of the RECLAMATOR would not alter her obligation to connect to the sewer when completed. Finally, Briggs states that all of his communications were conducted in his official capacity.

The declaration of Harvey Packard establishes that he is the Enforcement Coordinator for the Regional Board and that his duties include responding to public inquiry and initiating enforcement actions.

A week after plaintiff Murphy was interviewed on a local radio program, Packard spoke on the same program in his official capacity. According to his declaration, he informed the public that until plaintiffs submit data necessary for the Board to test and evaluate the RECLAMATOR, the Board considers it an on site wastewater disposal system. As a result, the owners are still subject to Board regulation and property assessments.

The three statements that are the subject of the complaint constitute constitutionally protected activity pursuant to CCP §425.16(e)(2). The statements enjoy protected status if they are connected either to an issue under review by one of the three branches of government or to an official proceeding authorized by law. *Maranatha Corrections, LLC v. Department of Corrections and Rehabilitation* (2008) 158 Cal.App.4th 1075, 1085

In fact, the Harvey Packard statements on the radio also implicate protections for an oral statement made in a public forum in connection with an issue of public interest pursuant to CCP §425.16(e)(3). Both Packard's and Briggs' statements implicate an exercise of free speech in connection with a public issue or an issue of public interest pursuant to subdivision CCP §425.16 (e)(4).

The opposition by plaintiff does not seriously contest defendants' contention that the activity is constitutionally protected. As a result, the burden shifts to the plaintiff to establish that there is a probability of prevailing on the claim.

To establish a "probability" of prevailing on the merits, plaintiff must demonstrate that the complaint is both:

—legally sufficient; and

—supported by a prima facie showing of facts sufficient to support a favorable judgment if the evidence submitted by plaintiff is credited. *Weil & Brown, Civil Procedure Before Trial* (Rutter Group 2008) §7:1006

Plaintiff Murphy has lodged a 6 boxes of CDs, documents and transcripts of hearings by the Regional Board without any declaration that describes or authenticates the documents or explains their relevance. Although the opposition to the motion to strike is verified by the plaintiff, there is no effort to present any evidence that would establish any probability of prevailing on a claim as required by CCP §425.16. The opposition consists essentially of plaintiff's contentions (not evidence) that that the RECLAMATOR does not produce waste and that defendants know that fact.

Moreover, there is no effort to address the privilege under Civil Code §47 asserted by the defendant.

In *Maranatha Corrections, LLC v. Department of Corrections and Rehabilitation* (2008) 158 Cal.App.4th 1075, the CDCR, through its representatives, terminated a private contract with plaintiff. A letter sent to plaintiff enumerated the reasons for the termination including an allegation that "Maranatha has misappropriated ... Inmate Telephone Revenue Funds (ITRF) in an amount estimated to be well in excess of \$1 million." The CDCR provided the letter to the media and it was published. The Information Officer, Margot Bach, later made statements to the press that repeated the assertions contained in the letter. Defendants' special motion to strike the defamation-based causes of action on grounds that the publication of the letter was protected by the absolute privilege for official acts within the meaning of Civil Code section 47, subdivision (a) was granted. The Court of Appeal affirmed.

Enacted in 1872, Civil Code section 47, subdivision (a) “confers privileged status upon any statement made by a public official in the course of discharging his [or her] official duties.” ( *Royer v. Steinberg* (1979) 90 Cal.App.3d 490, 500, 153 Cal.Rptr. 499 ( *Royer* ).) As the court summarized in *Royer*: “[T]he policy of protecting the free exercise of governmental decision-making mandates that the privilege of [Civil Code] section 47, subdivision 1 [(now subd. (a))] must be granted not only to ‘high-level’ state executive officers, but also to all state and local officials who engage in the policy-making process. We therefore hold that the privilege ... protects any statement by a public official, so long as it is made (a) while exercising policy-making functions, and (b) within the scope of his [or her] official duties.” ( *Royer*, at p. 501, 153 Cal.Rptr. 499.) *Maranatha Corrections, LLC v. Department of Corrections and Rehabilitation* (2008) 158 Cal.App.4th 1075, 1087

In finding that Civil Code §47(a) was applicable, the court reasoned as follows:

Like the government officials in *Barr, Saroyan and Kilgore*, Woodford released the termination letter to the press in defense of a policy decision she made. As Director of Corrections, Woodford had a “duty to communicate with the press about matters of public concern.” “Because a public official's duty includes the duty to keep the public informed of his or her management of the public business, press releases, press conferences and other public statements by such officials are covered by the ‘official duty’ privilege, although similar statements by private litigants are not covered by the litigation privilege.” *Maranatha Corrections, LLC v. Department of Corrections and Rehabilitation* (2008) 158 Cal.App.4th 1075, 1088-1089

The declarations of Briggs and Packard both state that the communications were made in their official capacities. No evidence is presented to refute that fact.

The motion to strike is clearly applicable to the first three causes of action. Plaintiff has failed to show a probability of prevailing on the merits. Accordingly, the motion to strike the first three causes of action is granted without leave to amend. The request for attorney’s fees in the amount of \$5,000.00 is granted.

**Demurrer:**

The defendant’s demurrer to the first three causes of action is moot as a result of the ruling on the special motion to strike. The declaratory relief cause of action, standing alone, does not implicate constitutionally protected activity that would support the motion to strike.

Although a general demurrer to a cause of action for declaratory relief must be overruled as long as an actual controversy is alleged; the pleader need not establish it is also entitled to a favorable judgment. [Weil & Brown, *Civil Procedure Before Trial* (Rutter Group 2008) §7:42.11] However, an actual controversy is required and the court may refuse to

exercise the power granted by this chapter in any case where its declaration or determination is not necessary or proper at the time under all the circumstances. [CCP §1061]

In this instance, the allegations incorporated by reference into the declaratory relief cause of action have been stricken. Standing alone, declaratory relief cause of action is simply plaintiff's effort to procure a legal judgment that his commercial product performs in a certain way. It is unlikely that this is true controversy that requires a declaration of the rights and obligations of the parties.

Accordingly, the demurrer to the declaratory relief cause of action is sustained with leave to amend.