PLAINTIFF, MICHAEL GLENN

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Newport Beach, Ca 92661

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE, HARBOR JUSTICE CENTER

SMALL CLAIMS DIVISIION

MICHAEL GLENN, an individual, Case No. 30-2017-00936029-SC-SC-HNB

Plaintiff, **PLAINTIFF’S NOTICE OF OPPOSITION OF SPECIAL MOTION TO STRIKE PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 425.16; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREON; DECLARATION OF LEILANI BROWN; VARIOUS EXHIBITS IN SUPPORT THEROF**

CITY OF NEWPORT BEACH, a California [Submitted pursuant to 3.21079(a) of the

municipal corporation, DIANE DIXON, a City California Rules of Court]

official and JENNIFER NELSON, a City employee **Hearing on Claim:**

 Date: December 18th, 2017

 Defendants. Time: 8:30 a.m.

 Dept: H10

 Date Action Filed: November 6th, 2017

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD, IF ANY:

PLEASE TAKE NOTICE THAT on or before December 18th, 2017, at 8:30 am., or as soon as thereafter as the matter may be heard in Department H10 of the Orange County Superior Court, Harbor Justice Center, Newport Beach Facility, located at 4601 Jamboree Road, Newport Beach, California 92660, Plaintiff Michael Glenn (“Mr. Glenn”) will, and does hereby request the Court to enter an order denying the special motion to strike (the “Motion”) claim filed by Defendants City of Newport Beach (the “City”), Diane Dixon (“Councilmember Dixon”), and Jennifer Nelson (“Ms. Nelson”) collectively, the “City Defendants”.

The (“City Defendants”) special motion to strike should be denied pursuant to California Code of Civil Procedure section 425.16 as the filing timeline has passed and is grounds for denial of the motion “(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.”(Decker v. U.D. Registry, Inc. (2003) 105 Cal.App.4th 1382, 1387 (Decker) Further, I ask that the court find that (“City Defendants”) special motion to strike be found frivolous and solely intended to cause unnecessary delay pursuant to Ca. Civil Code 128.5 as this is now the second attempt to delay the matter before this court, and for the same reason (“Anti-SLAPP”).

Defendants City of Newport Beach (the “City”), Diane Dixon (“Councilmember Dixon”), and Jennifer Nelson (“Ms. Nelson”) were collectively served on August 8th, 2017 which would mandate a special motion filing no later than 60 days later or October 8th, 2017. The (“City”) filed their special motion to strike on October 26th, 2017 a full eighteen days later. My request is made pursuant to the very well-known rule 3.2107(a) of the California Rules of Court.

The special motion to strike (the “Motion”) filed by the (“City Defendants”) must be denied by the Court on the grounds that (1) (“City Defendants”) were not engaged in commenting on matters of public concern (use of taxpayer dollars) but premeditatively and with actual malice (see Exhibit A Dixon VM - <https://apps.newportbeachca.gov/quest/attachments/269919_VoiceMessage.wav> ) made defamatory per se statements with no basis in fact as evidenced by (the “City”) itself (See Exhibit B, Eric Bryan email) and (2) Plaintiff can indeed demonstrate a probability of prevailing on his claims for the following reasons: the statements made by (“City Defendants”) are not substantially true as evidenced by City of Newport Beach, Records Specialist Eric Bryan (“Mr. Bryan”) in an email to Mr. Glenn dated May 10th, 2017 “Whenever possible, we deliver responsive records electronically.  The statement discussing fees for direct costs of duplication are simply to inform the requestor of what the charges *would be* for a physical copy of the records”.

Further, (“Mr. Bryan’s”) statement as to (“the City”) policy is in accordance with California Public Records Act law, and Proposition 42 Article 1 Section 3 (7). Plaintiff (“Mr. Glenn”) re-posting for fair use news value previously aired defamatory broadcasts by the City of Newport Beach via cable TV, internet and before a live public audience does not equate to consent of publication of slanderous statements.

Mr. Glenn operates a periodical which covers local news (savenewport.com), and his merely reposting a slanderous and newsworthy exchange with Councilmember Dixon doesn’t undermine his argument that he was damaged as the damage occurred at the very first instance of broadcast where third parties were present.

The motion opposing the special motion to strike is based upon this Notice of Opposition of Motion, the accompanying Memorandum of Points and Authorities in support thereof, and the Plaintiff’s Compendium of Evidence in Support of the Motion to Oppose (including the Declaration of City Clerk, Leilani Brown and various Exhibits)

**MEMORANDUM OF POINTS AND AUTHORITIES**

1. **INTRODUCTION**

Defendants City of Newport Beach, (“City”), Councilmember Diane Dixon (“Councilmember Dixon”) and Assistant City Clerk Jennifer Nelson (“Ms. Nelson”) (collectively, the “City Defendants” special motion to strike must be denied pursuant to Code of Civil Procedure 425.16 (The “Anti-SLAPP Statute”) because statements made by Councilmember Dixon were not on a matter of public concern. Rather, they were a premeditated, orchestrated conspiracy to retaliate against a citizen, (“Mr. Glenn”) and his public comments, as guaranteed by the California Constitution. Councilmember Dixon’s comments were provably not true as evidenced by Exhibit A and exceeded the protections of Civil Code Section 47(a) and (b).

Moreover, the City fails to cite Civil Code Section 47(c) which speaks to the limitations of qualified privilege “The malice necessary to defeat a qualiﬁed privilege is ‘actual malice’ which is established by a showing that the publication was motivated by hatred or ill will towards the plaintiff or by a showing that the defendant lacked reasonable grounds for belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff’s rights.” (Taus v. Loftus (2007) 40 Cal.4th 683, 721 [54 Cal.Rptr.3d 775, 151 P.3d 1185], original italics.)

• “[M]alice [as used in Civil Code section 47(c)] has been deﬁned as ‘a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy or injure another person.’ ” (Brown v. Kelly Broadcasting Co. (1989) 48 Cal.3d 711, 723 [257 Cal.Rptr. 708, 771 P.2d 406], internal citation omitted.)

Councilmember Dixon’s voicemail to City of Newport Beach City Clerk Leilani Brown (“Ms. Brown”) demanding specific public records “as soon as possible because I expect he (Mr. Glenn) will be speaking publically on Tuesday regarding the trolley measure” satisfies the first step of ‘actual malice’ in Civil Code Section 47(c). At a minimum a reasonable person would conclude that Councilmember Dixon’s entire purpose for her public records request was one of retribution and to vex, annoy, injure Mr. Glenn in case he dared speak out against Councilmember’s trolley initiative, which Mr. Glenn indeed did. Further, Mr. Glenn has the absolute right and the city the obligation per the California Constitution to allow inspection and electronic copies of public records requests at no charge and with no “hourly accounting’ of staff time required to fulfill the same.

1. **BRIEF FACTUAL BACKROUND**

At the April 11th City Council meeting, Mr. Glenn, during his constitutionally protected public comment period spoke to the costs involved (well into the hundreds of thousands of dollars) for Councilmember Dixon’s personal “trolley initiative” versus the existing private sector operating businesses. Councilmember Dixon at the conclusion of Mr. Glenn’s comments, in a highly unusual move, called him back up to the podium for speaking out against Councilmember Dixon’s “trolley proposal”. In an attempt to publicly shame him and negate his testimony, Councilmember Dixon stated that the city incurred a purported $25,000 “estimate” of staff time (which Mr. Glenn is entitled to use by the California State Constitution) and further proclaimed Mr. Glenn owed the city more than $600 in copying costs (Brown Decl. ¶¶ 3-4.).

Further, Councilmember Dixon stated as fact “are you aware you owe the city about $600 for your Public Records Act requests, and on top of that, over 500 hours of staff time has been devoted to procure those public records that you have never picked up?” (Brown Decl., Ex. 3 [pp. 2].) “you’ve paid to have them copied, which you owe $600 for.” (*Id*., at pp. 2.) and “please pay your bills to the City of Newport Beach. Thank you.” (*Id*., at pp. 3.) One cannot pay for something until you actually pay for it and the city readily admits that Mr. Glenn never wished to have any physical copies printed out (Brown Decl., ¶¶, Ex. 3 [p. 3, lines 12-14].)

Councilmember Dixon’s statements were not opinions but rather stated as facts and are wholly untrue for several reasons a) Mr. Glenn never made any requests to the city for documents to be physically produced b) The city has no record of Mr. Glenn ever requesting documents to be physically produced c) The city changed its illegal policy (Brown Decl., ¶¶ 4), as a result of not having policy which conforms to California Public Records Act Ca. Govt. Code Section 6250 and The Ralph M. Brown Act Ca. Govt. Code Section 54950 and only after Mr. Glenn initially filed suit with this court.

This is an egregious violation by an elected official of the constitutional rights of Mr. Glenn, a violation of the California Public Records Act as well as the of The Ralph M. Brown Act.

###### Mr. Glenn exercising his constitutional right of unfettered access to public information does nothing to undermine his concerns regarding “efficiency and taxpayer money” (Brown Decl., Ex. 3 [ p. 3, lines 7-9.)

###### Indeed, the very heart of the California Public Records Act resides in Ca. Govt. Code Section 6250.

(a) Public records are open to inspection at all times during the office hours of the state or local agency and every person has a right to inspect any public record, except as hereafter provided. Any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law.

(b) Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records promptly available to any person upon payment of fees covering direct costs of duplication, or a statutory fee ***if applicable.*** Upon request, an exact copy shall be provided unless impracticable to do so.

Additionally, the Ralph M. Brown Act states-

“The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.”

Finally, California Proposition 42 which passed in 2014 and resulted in changes to the California Constitution states –

## Article 1

### Section 3.

(a) The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good.
(b)

(1) The people have the right of access to information concerning the conduct of the people’s business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.

(2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people’s right of access, and narrowly construed if it limits the right of access. A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

The facts of the California Public Records Act are that the public records can be requested in one of four ways, at the discretion of the requestor alone:

1. Electronic records—the default way that the City of Newport produces records. (no charge)
2. Inspect in person – printed or otherwise (no charge)
3. Print and remove from premises (charge)
4. Print and mail (charge)

Mr. Glenn had only ever received Electronic Records (#1) and never requested any printed copies at all, and had repeatedly refused offers to print copies. Nonetheless, upon their own will and unrequested by Mr. Glenn, the City printed copies of Public Records (which were later inspected in-person by Mr. Glenn, pursuant to #2)

**III. LEGAL ARGUMENT**

City Defendant’s argue that the Anti-SLAPP statute ensures the unfettered exercise of the constitutional right to be free speech by providing a mechanism to strike lawsuits targeting the exercise of that right as a basis for liability. Further, the Statute must be “construed broadly” to protect its covered rights. “However, the Statute is not unlimited and protected activity is conditional and it must be exercised (1) in a reasonable manner and (2) for a proper purpose. The immunity is forfeited if the defendant steps outside the scope of or abuses the privilege.” W. Prosser, Handbook of the Law of Torts § 115 (4th ed. 1971).

1. **Step 1 of the Anti-SLAPP Analysis: Defendants Slander and Libel Actions are not Protected Activity**

There is no reasonable nexus between the issue under consideration, Councilmember Dixon’s personal “trolley proposal” and the California Public Records Act (CPRA). No reasonable person could conclude that City Councilmember Dixon’s proposal for a bus masquerading as a trolley would equate to the universal protections of access to public records afforded to each and every Californian. These rights being so important that we the people decided they should be enshrouded in the California Constitution. Councilmember Dixon’s statements made during the April 11th, 2017 City Council meeting were not statements of opinion, nor were they about efficiency and taxpayer money, rather they were stated as statements of [incorrect] fact that Mr. Glenn owes the city money and does not pay his bills.

1. **Step 2 of the ANTI-SLAPP Analysis: Plaintiff Can Indeed Establish a Probability of Prevailing**

Mr. Glenn as evidenced by (Exhibit A) has prima facie evidence directly from the City of Newport Beach Records Specialist, Eric Bryan, that indeed he does not owe the city any money and at no time ever did. Further, as a result of Mr. Glenn’s lawsuit the city changed its illegal and legally flawed policy (Brown Decl., ¶¶ 4), as the city was requested to do by a judge during the Kent Moore lawsuit about public records, but never did. This is prima facie evidence that the city’s policy was not compliant with the California Public Records Act (CPRA) otherwise why would the city change an existing legally sound policy?

1. **The statements are not true**

First, the defendant cannot establish that Mr. Glenn requested documents to be physically produced, even if the city could, the California Public Records Act prohibits charging for physical copies not requested and never received. Further, the city’s former policy of printing physical documents for “some” Public Records Act requestors and sending “Notices of Determination” aka “Invoice’s” (Exhibit C) per the city is a violation of the California Public Records Act. Plaintiff Glenn establishes via the City’s own records specialist Eric Bryan (Exhibit B) that indeed Mr. Glenn owes not money “Whenever possible, we deliver responsive records electronically.  The statement discussing fees for direct costs of duplication are simply to inform the requestor of what the charges *would be* for a physical copy of the records”.

If there is no substantial truth to the statements, which Mr. Glenn has clearly established, then the Anti-SLAPP test fails.

Councilmember Dixon is not the arbiter of whether or not Mr. Glenn’s PRA requests are or are not wasting city resources. There is no limit to reasonable PRA request’s encoded in Ca Govt Code 6250. Finally, there is no debate regarding Mr. Glenn’s copying costs. City Clerk Leilani Brown is quoted in an Los Angeles Times article dated August 16th , 2017 <http://www.latimes.com/socal/daily-pilot/opinion/tn-dpt-me-venezia-20170817-story.html> (Exhibit D) Brown told me, “Our current records request policy is that nothing is produced until payment is received.” “That is correct, per our current policy,” Brown told me. Brown said the city changed its policy because of the situation with Glenn and now requires prepayment.

The city has admitted its illegal California Public Records Act policy errors and is only now and a result of Mr. Glenn filing suit compliant with the California Public Records Act law by requiring payment upfront when one requests *physical copies* of public records act requests.

1. **The Statements Are Not Absolutely Privileged**

Second, the statements are not absolutely privileged. While Councilmembers statements were made at an “official proceeding authorized by law” her statements were not made (1) in a reasonable manner and (2) for a proper purpose. Mr. Glenn has established that Councilmember Dixon abused her qualified privilege by requesting public records from City Clerk Leilani Brown “and do this search as soon as possible as I expect he will be speaking publically on Tuesday regarding the trolley measure” specifically to target Mr. Glenn and his free speech activities at the next city council meeting should he speak. (Exhibit A Dixon VM)

Councilmember Dixon by maliciously repeating incorrect information provided to her from the City is demonstrating her level of skills in keeping the “public informed of her management of the public business”

1. **Plaintiff Did Not Consent to the Publication of Statements**

Third, Mr. Glenn never consented to publication of Councilmember Dixon’s statements. Defendant City of Newport Beach operates a public access cable broadcast of all city council meetings, further it broadcasts all city council meetings to a worldwide audience via the city website [www.cityofnewportbeachca.gov](http://www.cityofnewportbeachca.gov) and an audience of the community is present to watch the city council proceedings live. Here the doctrine of consent fails as the statements were made publically and broadcast to the community at large as well as to a worldwide audience previous to Mr. Glenn’s re-posting of the city’s broadcast. Further, Mr. Glenn’s claim for slander and libel does not rest with his posting but the original slanderous public statements and broadcast.

"'Where a defendant, not in the presence or hearing of third persons, makes a slanderous statement about a plaintiff, and thereafter at the request of the plaintiff repeats the statement in the presence and hearing of third persons, such repetition cannot be made the basis of an action for slander.'" (See also 4 Witkin, op. cit. supra, § 300, p. 2572; O'Donnell v. Nee, 86 Fed. 96; Heller v. Howard, 11 Ill.App. 554.)

Defendant speculates that Plaintiff Glenn undermines his argument that he re-posted a previously broadcast publication already seen by thousands of people directly contradicting the third party basis of the law of consent.

Additionally, assistant City Clerk Nelson’s direct response email to Mr. Glenn, instantly a matter of discoverable public record, was indeed published to a third person, making it a publication and actionable as libel (Live Oak Publishing Co. v. Cohagan (1991) 234 Cal.App.3d 1277, 1284 ["libelous statement is not actionable until it has been published to a third person"].).

Reporter Barbara Venezia from the Los Angeles Times printed the following on August 16th, 2017 –

<http://www.latimes.com/socal/daily-pilot/opinion/tn-dpt-me-venezia-20170817-story.html>

On April 17, Nelson, the assistant city clerk, wrote to him: “This is not the first time the notices of determination (a.k.a. invoices) have been sent to you. Each notice is individually dated on the day it was sent to you. As you will see in the attached documents, you have received 17 individual notice of determination or ‘invoices’ since 2015, which show $619.93 due to the city for records requested by you. To date, you have not picked up the documents you requested, nor have you paid the outstanding balance of $619.93 owed to the city.”

Nelson also wrote, “We are not interested in continuing to debate this with you, as it is a waste of staff time and city resources.”

1. Conclusion

Defendant’s special motion to strike filing is past the 60 day deadline. Defendant Councilmember forfeited her immunity by abusing her qualified privilege. Plaintiff Mr. Glenn has met the burden of demonstrating that indeed he owes the city of Newport Beach no money and further demonstrating a probability of prevailing. Accordingly, Plaintiff Glenn requests the Court to deny the City Defendants Special Motion to Strike.

Dated: November 6, 2017 Michael Glenn

 By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_