S219052

In The

SUPREME COURT

Of The State Of California

CITY OF MONTEBELLO
Plaintiff and Respondent

vs.

ROSEMARIE VASQUEZ, et al.
Defendants and Appellants,

ARAKELIAN ENTERPRISES INC.,
Intervener

ANSWERING BRIEF ON THE MERITS

After a Decision by the Court of Appeal
Second Appellate District, Division One
[B245959]

ALVARADOSMITH, APC
Raul F. Salinas, SBN: 126922
rsalinas@AlvaradoSmith.com
Mary M. Monroe, SBN: 143734
mmonroe@AlvaradoSmith.com
633 West Fifth Street, Suite 1100
Los Angeles, California 90071
213-229-2400
213-229-2499 (fax)

LEIBOLD McCLENDON
John G. McClendon, SBN: 145077
john@ceqa.com
23442 Mill Creek Drive, Suite 105
Laguna Hills, California 92653
949-457-6300
949-457-6305 (fax)

Attorneys for Plaintiff and Respondent
CITY OF MONTEBELLO

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I. INTRODUCTION

On April 30, 2014, the Second District Court of Appeal affirmed the trial court's denial of a joint Anti-SLAPP Motion to Strike ("Motion") Defendants-Appellants Rosemary Vazquez, Robert Urteaga, Kathy Salazar and Richard Torres ("Appellants") filed in response to the conflict of interest suit by Plaintiff-Respondent the City of Montebello (the "City" or "Respondent"). Appellants now ask this Court to reverse the Court of Appeal, erroneously contending the Court of Appeal misapplied and misinterpreted case law in finding Appellants did not have the right to bring the Motion.

In Appellants' Opening Brief ("AOB"), Appellants set forth three arguments as to why the Court of Appeal's decision affirming the denial of the Motion was erroneous. First, Appellants argue the Court of Appeal improperly applied the United States Supreme Court case of *Nevada Commission on Ethics v. Carrigan* (2011) 564 U.S. ____, 131 S.Ct. 2343 in finding their votes were not protected activity within the meaning of Code of Civil Procedure Section 425.16 ("Section 425.16"). Appellants argue their votes approving a trash hauler service contract for the City, which they claim is the basis for the City's "frivolous" lawsuit, are in fact protected within the context of Section 425.16.

Next, Appellants argue the Second District misinterpreted California case law, namely *San Ramon Valley Fire Protection District v. Contra Costa County Employees' Retirement Association* (2004) 125 Cal.App.4th 343, in holding individual members of a legislative body could not bring an Anti-SLAPP motion.

Finally, Appellants contend the Court of Appeal erred in waiving the requirement that the City make a prima facie showing that its claim against Appellants is meritorious. Appellants tie this third argument to their contention that the public enforcement exemption provided for in Section 425.16 does not apply in this instance because the action was brought not by a city attorney but rather by private counsel retained by the City.

As set forth below, Appellants are wrong on all accounts. First and foremost, the Anti-SLAPP statute, which was enacted to protect against efforts to chill public civic participation, was never intended to prevent public scrutiny of alleged wrongdoing by elected officials or senior management. In other words, Section 425.16 was never intended to serve as an immunity statute for corrupt public officials.

Despite what Appellants claim, this is not a "frivolous" case where the City is seeking to punish them for legitimately carrying out City business or for exercising their rights to participate in civic matters. Rather, this is a case where Appellants are alleged to have violated Government Code Section 1090 ("Section 1090") by engaging in self-dealing in connection with the approval of an exclusive trash hauling contract between the City and intervener Arakelian Enterprises, Inc. ("AEI"). To that end, in its Complaint, the City is seeking a declaration that at least one official or employee of the City (i.e., one of the Appellants) was financially interested in the City's contract with AEI in violation of Section 1090,

such that the AEI contract is to be deemed void *ab initio*, resulting in a disgorgement of all monies received from AEI.

Section 1090 has proven a much needed and effective means of combating corrupt public officials. Appellants' misuse of the Anti-SLAPP scheme to thwart the City's Section 1090 claim should be summarily rejected by this Court. This is a case whose outcome will no doubt have a wide ranging impact on California cities as they increasingly find themselves combating corrupt public officials.

Further, while the Court of Appeal briefly addressed the applicability of Section 425.16's public enforcement exemption to this case, finding that because the City's lawsuit was not brought in the name of the People of the State of California nor the City suing on an issue of state-wide concern, both the Court of Appeal and Appellants are wrong, as was the trial court, in their assertion that the public enforcement exemption does not apply in this instance. This action is being prosecuted by private counsel retained by the City rather than the City's city attorney for one reason and one reason only – a conflict of interest on the part of the City's city attorney. Unequivocally, this action is being prosecuted for the benefit of the City and its citizens as the City seeks a declaration that the Appellants violated Section 1090.

Finally, because the Appellate Court was correct in finding Appellants failed to make a threshold showing that their challenged actions arose from protected activity within the meaning of Section 425.16, the Appellate Court did not err in not reaching the second prong of the Anti-SLAPP analysis – namely

whether the City has demonstrated a probability it will prevail on its claim. However, even if this Court determines Appellants have made a threshold showing that their challenged actions arose from protected activity, this Court should affirm the trial court's finding that the City has met its burden of proof at this stage of the litigation in establishing there is a probability it will prevail on its claim.

II. STATEMENT OF THE CASE

Appellants appeal from the Court of Appeal's April 30, 2014 ruling which affirmed the November 1, 2012 Order by the trial court denying Appellants' Motion.

A. Statement of Facts

The City alleges that:

- From November 1, 1984 through July of 2008, the City's residential waste was collected pursuant to a 1984 agreement between the City and Athens Disposal Company, Inc., California corporation incorporated in 1959 ("ADC"). (Clerk's Transcript ("CT"): 1:192-203.)
- In 1998, Robert Urteaga ("Urteaga") was charged with six felonies involving grand theft and forgery; on or about September 2, 1999, under a plea negotiation, the court convicted him of felony theft, dismissed the five remaining felony counts, and placed him on formal probation for three years conditioned

upon him performing 60 days of CalTrans service and paying restitution. (CT: 3:571-581.)

- In 2007, Urteaga ran for a seat on the City Council on a platform of "Honest Government." He did not, however, disclose his prior felony conviction. On November 6, 2007, Urteaga was elected to the City Council. (CT: 1:6; 2:446; 2:554.)
- Either shortly before or after his election to the City Council, Urteaga contacted the executive vice president of intervener AEI, a California corporation incorporated in 1991, and suggested that AEI submit a proposal to become the exclusive *commercial and industrial* waste hauling franchise in the City in addition to becoming the exclusive *residential* waste hauling franchise in the City. However, during this time Urteaga was publicly claiming that he strongly opposed granting any waste hauler an exclusive franchise to collect the City's commercial and industrial waste. (CT: 1:6-7; 3:600-603.)
- Section 8.12.020 of the City's Municipal Code only provides for **non-exclusive** commercial waste hauling franchises; it does not provide for such franchises to be exclusive. (CT: 1:261-262.)
- Urteaga told AEI's executive Vice President that he would be favorably disposed to approving a contract granting AEI an exclusive franchise to haul **all** of the City's waste if AEI would

financially support his election campaign. (CT: 3:600; 603; 3:715.)

- Following Urteaga's election to the City Council, Richard Torres ("Torres") asked AEI to submit a proposal for AEI to become the exclusive waste hauling franchisee for all of the City's waste and thereafter negotiated the terms for such an exclusive franchise with AEI's executive vice president. Urteaga, and possibly one or more of the other Defendants, directed Torres to take these actions. (CT: 3:600, 605.)
- On the agenda for the City Council's July 9, 2008, public meeting was a public hearing regarding an amendment of ADC's prior contract for exclusive residential waste hauling in the City. The report prepared for the City Council by the City's Department of Municipal Services stated the objective of the public hearing was: "To obtain City Council approval to update the residential solid waste collection and recycling rate for Fiscal Year 2008/2009." However, buried in the staff report was something else: AEI's proposal to obtain an exclusive franchise to collect all of the City's waste and not just its residential waste. (CT: 1:77; 3:548-549.)
- By a vote of 4-1, the City Council approved a rate increase under ADC's prior contract and by the same vote directed staff to bring

back to the next City Council meeting documents relating to ADC's other requested changes to its prior contract. The Mayor later signed Resolution No. 08-69, setting charges for residential waste collection in the City. (CT: 2:322; 3:548-549.)

- Listed as "Unfinished Business" on the agenda for the City Council's July 23, 2008, regular meeting was an Amended and Restated Athens Services Agreement for Waste Collection (the "AEI Contract") with AEI (not ADC) which would (among other things) give AEI the exclusive franchise to haul all of the City's waste. For over four hours more than 20 people spoke in opposition to giving AEI an exclusive franchise to haul the City's commercial waste. During the discussion, AEI's executive vice president spoke in support of the proposed AEI Contract and offered a number of incentives to the City, including a $500,000 payment. (CT: 1:145-149; 2:233; 3:548-550.)
- At the end of the discussion on the AEI Contract, then-Councilwoman Mary Anne Saucedo-Rodriquez moved to reject the AEI Contract, and the Mayor seconded the motion, but the motion failed by a vote of 2-3. (CT: 3:548, 550.)
- Vasquez next moved to approve the AEI Contract, and Urteaga seconded her motion. The motion carried by a vote of 3-2, with

the deciding third vote cast by Salazar. (CT: 1:145-149; 3:548-550.)

- At no time during the City Council's July 9 and July 23, 2008, discussions on the AEI Contract did any of the Defendants disclose they had either a direct or a remote financial interest in the AEI Contract. (CT: 1:145-149; 3:548-550.)
- The provisions of Government Code sections 40601 and 40602, and City Municipal Code section 3.21.060B, require the City's Mayor to sign off on contracts. (CT: 2:288; 3:548; 3:550.)
- After the Mayor balked at signing the AEI Contract until he received answers to a number of questions he had regarding it, on or about September 12, 2008, Vasquez issued a press release claiming she herself had signed the AEI Contract instead of the Mayor. (CT: 1:145-149; 3:548-550.)
- On Monday September 15, 2008, the AEI Contract appeared in City Hall with the signature page altered to substitute Vasquez's signature for the Mayor's signature and with a notation added to it stating that the Mayor was "deemed absent" for purposes of signing the AEI Contract. The altered signature page had signatures at the spaces for Vasquez's signature, the City Attorney's signature, the City Clerk's signature, and AEI's chairman's and secretary's signatures. However, none of the

signatures were dated, and the Assistant City Clerk declined to place the City's seal on the AEI Contract since she had not witnessed any of the signatures. (CT: 1:145-149; 3:548-550.)

- Since Vasquez, the City Attorney, and the City Clerk all denied altering the signature page of the AEI Contract, the City believes that the signature page was altered by AEI officers and/or employees. (CT: 3:717.)
- Concerned about the relationship between AEI and the three City Council members who voted for the AEI Contract, on December 18, 2008, the Mayor wrote a letter to the Public Integrity Division of the Los Angeles County District Attorney's office requesting an investigation. By letter dated January 21, 2009, the Mayor received confirmation that the matter had been assigned to Deputy District Attorney Juliet Schmidt. (CT: 3:548, 553.)
- By letter dated April 8, 2009, Deputy District Attorney Schmidt informed the Mayor that, while the District Attorney "could possibly establish a technical violation of Government Code section 1090 against Salazar," it was declining to criminally prosecute her. In a follow-up letter to Salazar's attorney, the Head Deputy of the District Attorney's Public Integrity Division elaborated on this "technical violation," explaining that it was based on Government Code section 1091.5, and the fact that

"Salazar did not recuse herself from the vote on the [AEI] Contract nor disclose the fact that she indirectly received income from [AEI] through her non-profit organization." (CT: 3:548, 553.)

- Vasquez was up for reelection on November 3, 2009. (CT: 3:548, 554.)
- The City believes Vasquez voted for, and possibly signed, the AEI Contract with the expectation that AEI would financially support her reelection, and circumstantial evidence supporting this allegation includes forms AEI filed with the California Fair Political Practices Commission wherein AEI admits contributing at least $45,000 to the "Rosemarie Vasquez for City Council 2009" campaign. Additional evidence supporting this allegation includes the fact that, in 2012, Vasquez was a third-party deponent in an action brought by a City resident against the City, and in her deposition she asserted her Fifth Amendment right against self-incrimination and refused to answer any questions relating to AEI and the AEI Contract. When the plaintiff in that action wrote the District Attorney's Office asking it to grant Vasquez immunity so that she could be compelled to testify, the District Attorney rejected the request and disclosed that it had an open investigation on Vasquez. (CT: 3:548, 554.)

- Despite being heavily financed by AEI, the City's voters rejected Vasquez and did not return her to the City Council for another term. (CT: 3:548, 554-555.)
- A few weeks after the November 2009 election, and after the City voters had qualified a special election set for February 23, 2010 to recall Urteaga and Salazar, Torres announced he was retiring as City Administrator. (CT: 3:548, 554-555.)
- The City believes Urteaga and Salazar voted to approve the AEI Contract with the expectation that AEI would financially support their future campaigns to stay on the City Council, and circumstantial evidence supporting the City's allegation includes forms AEI filed with the California Fair Political Practices Commission wherein AEI admits it sponsored the "Say No on Recall" campaign for Urteaga and Salazar to which AEI contributed at least $352,912.73, in an effort to thwart the recall of Urteaga and Salazar. However, despite AEI sponsoring the anti-recall campaign and spending massive amounts of money on it notwithstanding the fact that the City's voters were now aware of Urteaga's criminal record, the voters recalled Urteaga and Salazar. (CT: 1:9.)
- Additional circumstantial evidence supporting the City's allegation that AEI provided its massive campaign contributions

to Vasquez, Urteaga and Salazar on account of the favor they earlier bestowed on AEI by approving the AEI Contract is the fact that, following the City Council's 3-2 vote to approve the AEI Contract on July 23, 2008, AEI did not thereafter make any campaign contributions to the two Council members that had voted "no" on it. In fact, just the opposite occurred. In forms AEI filed with the California Fair Political Practices Commission, AEI admitted that it contributed at least $37,300.00 to the campaign to prevent the Mayor from being reelected. Despite this, the Mayor was reelected as the top vote getter. (CT: 1:9.)

- In 2009, Athens contributed $45,000 to Vasquez's campaign for reelection. Athens also contributed $37,300 to efforts to defeat the mayor's reelection campaign. Athens contributed $353,912.73 to a "Say No to Recall" campaign. Athens contributed no more than $9,000 to any city council campaign in any other city. (CT: 3:585-597.)

B. Procedural History

- On July 23, 2012, the City filed a Complaint against Appellants. (CT: 1:4-9C.)
- On September 19, 2012, AEI filed a Complaint in Intervention and Motion to Intervene. (CT: 1:21-45.)

- On September 28, 2012, Appellants filed a Special Motion to Strike the Complaint pursuant to Code of Civil Procedure section 425.16. (CT: 2:416-436.)
- On October 19, 2012, the City filed an Opposition to the Motion to Strike the Complaint. (CT: 3:712-724.)
- On October 25, 2012, Appellants filed a Reply to the Opposition to the Motion to Strike. (CT: 3:753-762.)
- On November 1, 2012, the Court denied the Special Motion to Strike and granted AEI's Motion to Intervene. (CT: 3:766-769.)
- In its Order on the Special Motion to Strike, the Court rejected the City's argument as to the applicability of the Anti-SLAPP Statute, finding the public enforcement section exemption does not apply to the City's Action and found the City's Action arises from protected activity. (CT: 3:766-769.) However, the Court ultimately denied the Special Motion to Strike, finding the City had met its burden of proof as to the probability of prevailing on the Action. *Id.*
- On December 20, 2012, Appellants filed the instant appeal. (CT: 3:774-776.)
- On December 27, 2012, Appellants filed a Motion for Leave to Use a Settled Statement Instead of Reporter's Transcript. (CT: 3:793-800.)

- On February 14, 2013, Appellants filed a Condensed Narrative. (CT: 1-1.)
- On March 29, 2013, the Court Granted Appellants' Motion for Leave to Use a Settled Statement Instead of Reporter's Transcript. (CT: 1-1.)
- On April 3, 2014, the Second District Court of Appeals affirmed the judgment of the trial court in favor of the City.

III. STANDARD OF REVIEW ON APPEAL FROM AN ORDER DENYING A SPECIAL MOTION TO STRIKE

An Order granting or denying an Anti-SLAPP Motion is reviewed under a de novo standard. *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3). Accordingly, in reviewing the lower court's Order, the reviewing court applies the same two-step analysis utilized by the lower court on an Anti-SLAPP Motion. A*lpha and Omedga Development, LP v. Whillock Contracting, Inc.* (2011) 200 Cal.App.4th 656.

IV. THE TWO-PRONG ANALYSIS ON AN ANTI-SLAPP MOTION

The purpose of the Anti-SLAPP Statute is found in Code of Civil Procedure section 425.16(a) which states as follows:

> "The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage

continued participation in matters of public significance, and that this participation should not be chilled through the abuse of the judicial process. To this end, this section shall be construed broadly."

Moreover, "SLAPP plaintiffs do not intend to win their suits; rather they are filed solely for delay and distraction [citation], and to punish activists by imposing litigation costs on them for exercising their constitutional right to speak and petition the government for redress of grievances." *Dixon v. Superior Court* (1994) 30 Cal.App.4th 733, 741. SLAPP suits are filed to prevent citizens from exercising their political rights, and to harm those who have exercised those rights. *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 815.

Only "[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" is subject to the Anti-SLAPP statute." (Code Civ. Proc. § 425.16(b)(1).) Consequently, it requires the trial court to engage in a two-step process when determining whether a defendant's special motion to strike should be granted. *Id.*

First, the court decides whether the defendant has made a threshold prima facie showing that the defendant's acts, of which the plaintiff complains, were ones taken in furtherance of the defendant's constitutional rights of petition or free speech in connection with a public issue. *Wilcox v. Superior Court, supra,* 27 Cal.App.4th at 820. If the Court finds such a showing has been made, then the

plaintiff will be required to demonstrate that "there is a probability that the plaintiff will prevail on the claim." Code Civ. Proc. § 425.16(b)(1); *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 567-568.

The burden on the first issue belongs to the defendant, with the burden on the second issue falling on the plaintiff. *Wilcox, supra,* 27 Cal.App.4th at 819 *ff.*

A. The Appellate Court Erroneously Found that the Public Enforcement Exemption of Anti-SLAPP Statute Does Not Apply to this Action

Before applying the two-step process in ruling on the Appellants' Anti-SLAPP Motion to Strike, both the trial and appellate courts first addressed the parties' dispute as to the applicability of the public enforcement exemption of Code of Civil Procedure section 425.16(d) which states:

> "This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor."

Appellants argued this exemption does not apply because this action was not brought in the name of the People of the State of California. The City argued that the exemption does apply pursuant to the decision in *City of Long Beach v. California Citizens for Neighborhood Empowerment* (App. 2 Dist. 2003) 111 Cal.App.4th 302, although both parties noted there is a split of authority with the recent Fourth District decision *City of Colton v. Singletary* (2012) 206 Cal.App.4th 751.

The trial court noted that the City had failed to establish that this action was brought by a city attorney acting as a public prosecutor, found *Singletary* to be controlling, and rejected the City's argument. (CT:766-769.) Similarly, the Court of Appeal rejected the City's argument, finding that because the City's lawsuit was not brought in the name of the People of California, nor is the City suing on an issue of state-wide concern, the public enforcement exemption does not apply. In so doing, both courts completely discounted the City's argument that it had retained outside counsel so as avoid a legitimate conflict of interest based on the fact the City Attorney's law firm employed the daughter of AEI's executive vice president (CT: 766-769); a conflict of interest made salient by the trial court's granting of a motion to intervene by AEI in this action. (CT: 766-769.)

This action was brought in the name of the City of Montebello to enforce a law aimed at protecting the public. (CT: 4-9C). The City continues to maintain that *City of Long Beach* should control in this case given its sound reasoning in finding there was "no question" the City of Long Beach's civil action (brought in the name of the City of Long Beach) was exempt from the Anti-SLAPP statute and the defendant's exemption argument was "a shield from which to hide behind." *City of Long Beach, supra,* at 309; see also, *City of Los Angeles v. Animal Defense League* (2006) 135 Cal.App.4th 606, 618-619 [actions brought in the name of a city or county are "not necessarily outside the ambit" of the prosecutorial exemption, but only those actions brought "to enforce laws aimed generally at public protection qualify" for exemption].

This is precisely the type of case where this Court's reasoning in *City of Long Beach* should apply, as Appellants are attempting to use the Anti-SLAPP statute as a shield against their corrupt behavior to the detriment of the City's citizens. Finding that the public enforcement exemption of the Anti-SLAPP Statute does not apply would clearly circumvent the very purpose of the legislative scheme and reward Appellants for their wrongful acts.

In refusing to allow the public enforcement exception to be used in this Action, the trial court also noted that, because the Action seeks only a declaration that AEI's exclusive contract is void and disgorgement, it is not brought to enforce laws aimed generally at public protection. (CT: 766-769.) The Court of Appeal also concluded that since the waste hauling contract concerns only the City and its citizens, this is not an action concerning an issue of statewide concern.

If ever there was a case brought to enforce laws aimed at public protection, this is such a case. Appellants are accused of violating Section 1090 at the expense of the citizens of the City, citizens who are a subset of the People of California. Respondent seeks a declaration that the AEI contract is void and all monies received by Appellants from AEI be disgorged. How is this not seeking to enforce laws aimed at public protection? Government Code Section 1090, under which this action is brought, is directly aimed at protecting the public from precisely the type of wrongdoing the Appellants are accused of:

"Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract

made by them in their official capacity, or by anybody or board of which they are members. Nor shall state, county, district, judicial district, and city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity." Section 1090.

It is important to note that in enacting Section 1090, the California State Legislature codified the common-law prohibition against public officers and employees obtaining financial interests in contracts made in their official capacity. The public purpose behind Section 1090 is to "to remove all indirect influence of an interested officer, as well as to discourage deliberate dishonesty...." *Stangman v. Duke* (1956) 140 Cal.App.2d 185. The courts have interpreted Section 1090 to disqualify persons from discharging the services of their positions in public service when they have a personal interest, which might interfere with the unbiased discharge of their duties to the public or prevent their exercise of absolute loyalty to the best interests of the city. *See Raymond v. Bartlett* (1947) 77 Cal.App.2d 283. As a matter of public policy, the contract is deemed void regardless of its inherent benefits to the agency. *Brandenburg v. Miley Petroleum Exploration Co.* (1926) 16 F.2d 933; *Stragnman v. Duke* (1956) 140 Cal.App.2d 185 [holding it is not the character of the contract itself but the manner in which it is created that renders it violative of public policy].

Appellants took advantage of their positions of power in connection with their dealings with AEI and the resulting AEI contract. They did so for their own personal gain and political influence. The only reason for the City to file a conflict

of interest action under Section 1090 is to protect the public. The City, via its private counsel, is acting as a public prosecutor. If not for the conflict of interest resulting from the City Attorney's employment of a close relative of an AEI executive, the City Attorney would have brought this action on behalf of the City. Indeed, this is a classic case of form over substance. If one looks to the substance of the City's action, it is clear the City is acting as a public prosecutor and the public enforcement exception should apply.

B. The Court of Appeal Correctly Found Appellants Failed To Demonstrate Their Actions Arose From Protected Activity

With respect to the first prong of the two-step process employed in Anti-SLAPP motions, the Court of Appeal correctly found that Appellants' action relating to the AEI contract did not constitute protected activity within the meaning of Section 425.16, finding the outcome of this prong in the two step process is controlled by the unanimous Supreme Court decision in *Nevada Commission on Ethics v. Carrigan* (2011) 564 U.S. ____ , 131 S.Ct. 2343, 180 L.Ed.2d 150.

Appellants argue that because *Carrigan* did not mention or construe Section 425.16 or California's constitutional free speech clause, the Court of Appeal's reliance on *Carrigan* to deny Appellants' right to bring their Anti-SLAPP motion is contrary to several of this Court's rulings. However, the cases cited by Appellants are distinguishable on the facts and none warrant a finding that a legislator's vote is **always** protected speech within the meaning of Section 425.16.

For example, in *Navellier v. Sletten* (2002) 29 Cal.4th 82, 94-95, the Court held that a defendant need not establish that his actions were constitutionally protected under the First Amendment to invoke the Anti-SLAPP statute. However, *Navellier* did not concern public officials accused of violating Section 1090 but rather dealt with claims of fraud and breach of contract related to a federal lawsuit. The defendant brought an Anti-SLAPP motion on the basis that the plaintiffs' state court claims arose out of the counterclaims the defendant filed in the federal court action. *Navellier* is distinguishable in that the conduct called into question - claims related to the filing of a counterclaim - concerned acts the defendant took "in furtherance of his right of petition or free speech in connection with a public issue" and "the constitutional right of petition encompasses . . . the basic act of filing litigation." *Id.* at 90. The City would not dispute that the act of filing litigation falls within the rubric of protected activity. That however is not what is at issue here. Rather, what is at issue here is corruption by public officials who violated the public's trust.

While the Court of Appeal did not specifically address this issue, it is important to note that the actions of Appellants which are challenged by the City's lawsuit encompass far more than just votes. A reading of the AOB would lead this Court to believe that the only alleged wrongs committed by Appellants were their acts of voting in favor of the AEI Contract. While the City agrees with the Court of Appeal's analysis that, under *Carrigan,* those votes are not protected free speech, it is important to note that the City's action goes far beyond mere votes.

The heart of the City's action takes aim at corrupt public officials whose votes and actions with respect to the AEI Contract were driven by self-dealing – self dealing which is specifically prohibited by Section 1090. The City concedes that had there been no self-dealing by the Appellants which led to their actions and votes in favor of the AEI Contract, the result might be different.

Perhaps of most interest to this Court is the decision by the First District Court of Appeal in *Schwarzburd et al v. Kensington Police Protection & Community Services District Board* (2014) 225 Cal.App.4th 1345, decided the very same day as this case. Appellants argue that unlike this case, *Schwarzburd*, which found the challenged votes of district board members arose out of protected activity, was correctly decided. However, no conflict exists between the First District in *Schwarzburd* and the decision of the Second District in this case as the decisions are easily reconciled.

The petitioners in *Schwarzburd* filed a petition for writ of mandate against a district board and three individual board members alleging the board failed to give proper advance notice of the business items that were to be discussed at a board meeting and that the board impermissibly extended the meeting past 10:00 p.m. after failing to secure sufficient votes to continue the meeting. The district board and individual board members filed a special motion to strike under Section 425.16.

Finding that the individual defendants' actions arose out of protected First Amendment voting and legislative deliberative activities concerning a public

issue, the First District concluded the petitioners had unnecessarily sued the individual legislators based solely on how those legislators voted and expressed themselves at a public hearing and that the circumstances suggested a retaliatory motive. The petitioners' action was designed at least in part to restrict legislators' free speech rights in *how* they voted and expressed themselves at the meeting.

Contrast *Schwarzburd* with this case which arose from the council members' acts and voting to approve a contract in which they had a financial interest, which does not implicate the exercise of the council members' own freedom of speech or petition. The City's case against Appellants is necessary to prosecute the City's Section 1090 claim – a claim not directed at the act of voting itself but at the corruption which led to the votes. The key question to be asked is what is the targeted activity – in this case it was not the act of voting by the council members but rather the self-dealing behind their votes: "The fact that a cause of action may have been triggered by protected activity does not mean it arose from that activity. We look to the gravamen of the plaintiff's cause of action to determine whether the anti-SLAPP statute applies." *Schwarzburd* at 1353. In *Schwarzburd*, the court found that the "gravamen of petitioners' suit is that defendants violated Board policy by voting in a manner inconsistent with Board policy to extend the July 12, 2012 meeting and by discussion and voting on a matter (the retention bonus) that was not properly noticed." *Id.* at 1355.

In this instance, the gravamen of the City's suit is the self-dealing employed by Appellants – self dealing which is expressly prohibited by Section 1090. The

City sued individual council members not because of how they voted but because they violated Section 1090 by participating in the consideration of a contract they had a financial interest in. Surely such behavior does not fall within the rubric of protected activity under the Anti-SLAPP statute. When a government official votes on a matter of public interest, that official has a responsibility to do so without some hidden financial agenda. Allowing government officials to violate the public trust and then hide behind the protections afforded via the anti-SLAPP statute would entirely vitiate Section 1090.

Appellants insist their votes as elected officials and conduct as a city administrator with respect to submitting AEI's contract to the City Council qualifies as protected activity. However, under *Carrigan*, which held that public officials do not possess a personal First Amendment right to vote on any given matter because such officials' votes are not protected, this is clearly not the case.

In *Carrigan*, the Supreme Court upheld Nevada's Ethics in Government Law which provides that "a public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by" *inter alia* "[h]is commitment in a private capacity to the interest of others." (*Carrigan, supra*, 131 S.Ct. at 2344). The Nevada law defined such commitment to mean "a commitment to a person" who is a member of the officer's household; is related by blood, adoption, or marriage, employs the officer or a member of his household; has a substantial and

continuing business relationship with the officer; or any other "substantially similar" commitment. (*Id.* at 2346.)

In 2005, the Nevada Commission on Ethics investigated Michael Carrigan, an elected city council member, in response to complaints that Carrigan had violated the law by voting in favor of a hotel/casino development. (*Id.* at 2346-2347). The complaint asserted that Carrigan's long-term friend and campaign manager worked as a paid consultant for the developer, circumstances which obligated Carrigan to recuse himself from the vote. (*Id.*)

The Commission determined that Carrigan's relationship with the consultant was "substantially similar" to prohibited relationships described in the statute, creating a disqualifying conflict of interest for which Carrigan should have recused himself from the vote on the development project. (*Id.*) The Commission censured Carrigan but determined that his violation was not willful, because he had consulted the city attorney and was advised that he need only disclose his relationship before voting on the project. (*Id.*)

Carrigan filed a petition for review in the Nevada trial court, arguing that the provisions of the law that he was found to have violated were unconstitutional under the First Amendment. (*Id.*) The court denied the petition but a divided Nevada Supreme Court reversed, holding that voting by an elected official was protected by the Frist Amendment and the catchall "substantially similar" provision was unconstitutionally overbroad. (*Id.*)

In reversing the Nevada Supreme Court, the Supreme Court held that the Nevada law was not overbroad and observed that recusal rules have existed in both the House and Senate since 1791, creating "a strong presumption that the prohibition is constitutional." (*Id.* at 2348.) The Court also noted that "virtually every State has enacted some type of recusal law," creating an "overwhelming evidence of constitutional acceptability." (*Id.* at 2349.) The Court further determined that restrictions on legislators' voting do not violate legislators' right to free speech, because a legislator's voting power "is not personal to the legislator but belongs to the people; the legislator has no personal right to it." (*Id.* at 2350.) A legislator's vote is therefore a nonsymbolic act, distinguishable from a citizen's vote, and does not constitute an act of personal communication. (*Id.*)

In this instance, Respondent alleges that Appellants violated Section 1090 by participating in the making of a contract between the City and AEI in exchange for financial gain and/or political favor. Appellants were neither innocent nor financially disinterested citizens engaging in protected activity when they voted to approve the exclusive trash hauling contract. Appellants took advantage of their positions of power within the City and acted purposefully in their own self interests. The rule of *Carrigan* is clear: a legislator's vote is not protected activity.

This is an action aimed at Appellants' unlawful interest in the AEI contract. It is not an action aimed at thwarting a citizen's right to vote. "The gravamen of an action is the 'allegedly wrongful and injury-producing conduct." *Renewable*

Resources Coalition, Inc. v. Pebble Mines Corp. et al (2013) 218 Cal.App.4th 384. In this instance, the gravamen of the City's action is that Appellants acted unlawfully in approving a contract in which they had a financial interest. It is not the act of voting in and of itself that was wrong; rather it is the fact that Appellants violated Section 1090 by participating in the City Council's consideration of a contract which they were personally interested in. But for Appellants' illegal conduct, the City would not be here today.

Three other cases Appellants cite in support of their argument that the Court of Appeal misapplied *Carrigan* are worth mentioning if only to demonstrate that Appellants support their argument with cases which not only predate *Carrigan* but which are also distinguishable. First, Appellants cite *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal. 4th 1106, 1118, for the proposition that this Court has recognized a broad application of Section 425.16 in official government proceedings. While that may be true, *Briggs* is distinguishable based the fact that the plaintiffs, owners of residential rental properties, were challenging actions by housing counselors who were allegedly advising tenants to institute actions with HUD against the plaintiffs. It was clear in *Briggs* that the plaintiffs' action arose from the defendant's statements or writings made in connection with issues under consideration or review by official bodies or proceedings (HUD). Contrast *Briggs* with this case where the action by the City against Appellants arises specifically from their prohibited financial interest in a public contract – conduct specifically prohibited by Section 1090.

Even construed broadly, Section 425.16 should not be used to protect public officials who have violated the law.

Similarly, Appellants cite *Jarrow Formulas Inc. v. La Marche* (2002) 31 Cal.4th 728 in support of their position that Section 425.16's "arising from" has broad application and where unambiguous, statutory language must be treated as conclusive. In *Jarrow*, this Court found that malicious prosecution claims were not exempt from Anti-SLAPP motions. The defendants had filed an Anti-SLAPP motion against plaintiff's malicious prosecution action which arose from a cross-complaint filed by the defendants in earlier litigation. In affirming the Court of Appeal's reversal of the trial court's denial of defendant's Anti-SLAPP motion, this Court found that malicious prosecution falls within the "arising from" prong of Section 425.16 and that the cross-complaint in the earlier litigation, which was the basis for the plaintiffs' malicious prosecution action, was within Section 425.16's "cause of action against a person arising from any act . . .in furtherance of the person's right of petition." However, this is again an entirely different situation, one involving public officials engaged in self-dealing. Surely the Legislature did not intend to allow public officials accused of violating Section 1090 to use Section 425.16 as a shield.

Finally, Appellants cite *Schaffer v. City and County of San Francisco* (2008) 168 Cal.App.4th 992 for the argument that, in determining whether conduct is protected under 425.16, courts look not to First Amendment law but to the

statutory definition set forth in 425.16. *Schaffer,* however, includes language pertinent to the City's position:

> "The purpose is to curtail the chilling effect meritless lawsuits may have on the exercise of free speech and petition rights, and the statute is to be interpreted broadly to accomplish that goal."

Schaffer 168 Cal.App.4th at 998.

> "The anti-SLAPP statute is not an immunity statute; it provides a means by which defendants can protect themselves against certain meritless claims at an early stage of the litigation."

Id. at 1002.

This is not a "meritless" or "frivolous" case aimed at chilling the free speech rights of public officials. This is a case aimed directly at public corruption by former city officials who are now attempting to use the Anti-SLAPP statute as a means to achieve immunity for their misconduct which has nothing to do with their rights of petition or exercise of free speech. If Appellants had been private citizens who were financially interested in and advocating for the approval of the AEI Contract by the City, the protection of their free speech rights would certainly be of primary concern. However, Appellants were not acting as private citizens but rather acting as public officials. As such, they were duty bound to avoid the very self-dealing for which they are accused.

Accordingly, under the Anti-SLAPP analysis, Appellants' actions are not protected by the First Amendment and Appellants cannot meet their burden of proof on the first prong of the analysis.

C. The Court of Appeal Correctly Applied *San Ramon*

Appellants next claim the Court of Appeal misinterpreted California case law, namely *San Ramon Valley Fire Protection District v. Contra Costa County Employees' Retirement Association* (2004) 125 Cal.App.4th 343, in finding that individual members of a legislative body could not bring an Anti-SLAPP motion. Specifically, Appellants argue that the Court of Appeal ignored that portion of *San Ramon* which suggested support for an argument that Section 425.16 would apply to votes of individual members of a public board. Appellants then cite a number of cases supporting their argument; but as with their contention that *Carrigan* was misapplied, Appellants' argument that the Court of Appeal misinterpreted *San Ramon* falls flat for a number of reasons.

In *San Ramon*, the First District affirmed a trial court's denial of an Anti-SLAPP motion filed by a retirement board, finding that the collective action of the board in requiring a fire protection district's employees to make extra contributions to a retirement plan was not protected activity under Section 425.16. While the *San Ramon* Court noted in dicta that it "need not decide here whether an action against individual lawmakers, challenging their vote cast in the exercise of individual legislative prerogative, would probably be held to arise from conduct in furtherance of the exercise of speech rights, protected by section 425.16 ...that this

was not the conduct challenged by the district's petition", the facts are sufficiently distinguishable from this case to support the Court of Appeal's reliance on *San Ramon* for declining to extend "the purview of the anti-SLAPP statute in such a manner".

Even if *San Ramon* can be used for support that individual council members may bring an Anti-SLAPP motion, the Court of Appeal correctly applied *San Ramon* in this instance, as *San Ramon* is distinguishable from this case in significant ways. *San Ramon* involved allegations of abuse of discretion concerning a vote by a governing board of a county employees' retirement association adopting certain employer contribution amounts for retirement benefits. There were no allegations in *San Ramon* of corrupt or fraudulent behavior by the board let alone individual board members. Contrast that with this case in which council members and a city administrator are accused of acting and voting on a contract in which they had a financial interest – conduct specifically ***prohibited by law*** under Section 1090. Once again, as with their argument that *Carrigan* was misapplied, Appellants fail to acknowledge that this case involves far more than just the mere act of voting by public officials. This is not, as Appellants repeatedly characterize throughout their AOB, a "frivolous" lawsuit. The City has sued individual public officials based upon their fraudulent behavior in connection with a public contract.

In declining to extend *San Ramon* to the individual council members in this case, the Court of Appeal noted, "to hold otherwise would cause the Anti-SLAPP

statute to swallow all city council actions and require anyone seeking to challenge a legislative decision on any issue to first make a prima facie showing of the merits of their claim". Under Appellants' reasoning, any public official who has a financial interest in a public contract can act or vote to approve such contract; and then if sued for self-dealing, file an Anti-SLAPP motion to avoid any responsibility or consequences. Such a scenario does away with the protections afforded cities pursuant to Section 1090 and opens the doors to the very behavior Section 1090 prohibits. Public corruption is unfortunately a very real and increasing problem. Cities must be able to hold public officials accountable for their wrongful conduct. Adopting Appellants' arguments would strip away the protections afforded by Section 1090.

Appellants also cite *Holbrook v. City of Santa Monica* (2006) 144 Cal.App.4th 1242 in support of their argument that their actions in approving the AEI contract constitutes protected legislative activity under Section 425.16. However, as noted by the Court of Appeal, *Holbrook* is distinguishable. The lawsuit in *Holbrook* challenged the actions of a city council and individual council members concerning the timing of city council meetings, or in other words, the lawsuit arose from protected activity because it was designed to restrict the city council's ability to hold public meetings during which council members exercised their own freedoms of speech and petition in their interactions with other council members and with the public. However, in this instance the lawsuit arises from Appellants' alleged violations of Section 1090, which as noted by the Court of

Appeal, does not implicate the exercise of Appellants' own freedom of speech or petition.

D. The City Met Its Burden Of Proof as to Demonstrating the Probability the City Will Prevail on the Claim

Appellants claim that the trial court abused its discretion by denying their Motion on the grounds that the City had demonstrated a probability of prevailing in this action and that the Court of Appeal wrongly failed to consider the second prong of the anti-SLAPP analysis. Appellants go so far as to claim the Court of Appeal set a "dangerous precedent" by "waiving" the requirement that the plaintiff make a prima facie showing that its claims are meritorious and that the Court of Appeal has created a "new class of plaintiffs exempt from the Anti-SLAPP statute".

First and foremost, the Court of Appeal has not created a "new class of plaintiffs exempt from the Anti-SLAPP statute," but simply followed the accepted two-prong analysis employed in Anti-SLAPP cases. It determined there was no need to reach the second prong in this case only after determining the Appellants had not met the test of the first prong. Had the Court of Appeal determined that Appellants had met their burden on the first prong, the burden would have then shifted to the City on the second prong. The Court of Appeal in no way waived anything nor did it create a new class of plaintiffs.

Further, contrary to Appellants' arguments, this second prong of the two-step process was correctly decided by the trial court. The City met its burden to demonstrate a prima facie showing of the merits of its claim against Appellants.

"To establish such a probability [of prevailing], a plaintiff must demonstrate that the complaint is both legally sufficient and supported by a prima facie showing of facts to sustain a favorable judgment if the evidence submitted by plaintiff is credited. *Gallagher v. Connell* (2004) 123 Cal.App.4th 1260, 1265. In satisfying this burden, Respondent need only demonstrate "minimal merit." *Navellier v. Sletten* (2002) 29 Cal.4th 82, 94. A court does not "weigh the credibility or evaluate the weight of the evidence. Rather, [it] accept[s] as true the evidence favorable to the plaintiff and address[es] the defendant's evidence only to determine if it has defeated plaintiff's submission as a matter of law." *Ampex. Corp. v. Cargie* (2005) 128 Cal.App.4th 1569, 1576.

As noted in *Oasis West Realty LLC v. Goldman* (2011) 51 Cal.4th 811, 820, a case Appellants themselves cite:

> To satisfy the second prong, a plaintiff responding to an anti-SLAPP motion must state and substantiate 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 We consider the pleadings, and supporting and opposing affidavits upon which the liability or

> defense is based. However, we neither weigh credibility nor compare the weight of the evidence. Rather we accept as true the evidence favorable to the plaintiff and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law. If the plaintiff can show a probability of prevailing on any part of its claim, the cause of action is not meritless and will not be stricken." [Citations omitted.]

In this instance, the trial court found that City had provided sufficient circumstantial evidence that Appellants were financially interested in the exclusive AEI contract to meet its burden on the second prong of the two-step analysis: the City demonstrated, through the evidence, that it had a reasonable probability of establishing that Appellants violated Government Code Section 1090. (CT: 766-769.) In so doing, the trial court cited the following evidence presented by the City as sufficient circumstantial evidence to meet its burden on this second prong: Urteaga (then campaigning for election to the City Council), approached AEI's vice president and stated that he thought it would be a good idea for AEI to attempt to obtain an exclusive contract and that upon Urteaga's election, Torres encouraged AEI to consider obtaining exclusivity; the public expressed opposition to the approval of the AEI exclusive contract and that following approval of the AEI exclusive contract, AEI contributed substantial monies to defeat the mayor who voted against the exclusive contract. (CT: 766-769.)

Appellants would have this court delve into resolving the factual dispute and weigh the evidence which, as noted by the trial court, is not appropriate at this stage. (CT: 766-769.) See, *Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114, 1128.

In 2010, the Second District in *Hub City Solid Waste* concluded "that all admissible evidence – direct and circumstantial – may be considered ... to show that the council members ... had illegal interests in the contract within the meaning of Section 1090." *Hub City* at 1127. "Financial interests under Section 1090 are not limited to express agreements for benefit and need not be proved by direct evidence. Rather forbidden interests extend to expectations of benefit by express or implied agreement and may be inferred from the circumstances." *Hub City at 1128.*[1] The *Hub City* court concluded that "proof that a campaign contribution constitutes an illegal interest within the meaning of section 1090 may be shown by circumstantial evidence. The purpose of 1090 is to prohibit self-dealing, not legitimate political activity." *(Ibid.)*

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[1] Compare *Breakzone Billards v. City of Torrance* (2000) 81 Cal.App.4th 1205 where the Court found that council members who received campaign contributions ranging from $100 to $5,500 more than 17 months before a vote did not have a prohibited financial interest under Section 1090 because there was no evidence that the members had received a personal benefit that swayed their judgment. In dicta, the court noted:

"We contrast the facts of this case with one in which it is alleged the campaign contribution is made in return for an express promise to act in a particular way in exercising governmental authority with respect to a particular matter then pending or which may be presented for governmental review and action at a later date..... We do not foreclose a circumstance in which an earlier governmental action is "rewarded" in an illegal manner." *Breakzone Billards* 81 Cal.App.4th at 1233.

Indeed the facts in *Hub City* are similar to those in the instant case. There, the Court of Appeal found there was sufficient evidence for a reasonable jury to find that the votes in favor of the agreement were cast in anticipation of the contributions and that the payments were made on account of them. The council members approved the deal even though the city had only recently brought its waste management in-house, and a majority of the public who spoke at the city council hearing opposed the franchise. The donations, particularly those close to Mayor Bradley's comments, were made close in time to the council's approval of the franchise and constituted substantial portions of the council members' campaign funds.

Appellants' argument that campaign contributions do not equate to violations of Section 1090 is a non-starter. The basis for the City's Complaint is not just that the former City Council members accepted campaign contributions, it is that the contributions were quid pro quo in exchange for promises to approve and approval of the AEI Contract – a contract which by its terms alone was not in the best interests of the City. For example, the AEI Contract has a 15 year termination notice provision which provided that once the City gave AEI written notice of termination, the AEI would remain in effect for another 15 years.[2] This begs the question of what public official in their right mind would advocate and

[2] There are two cases pending on appeal which are related to the underlying acts that are the subject of this litigation. *Torres v. City of Montebello*, et al. (2nd Dist. Civ. Case No. B246515 – LASC Case No. BS120272) and *Arakelian Enterprises, Inc. v. City of Montebello, et al.* (2nd Dist. Case No. B246526 – LASC Case No. BS138950). Through this related litigation, the AEI Contract was voided.

vote for a contract that contained such an egregious term. Only one answer is possible – a public official who had received some personal benefit which swayed their judgment as to that contract.

Moreover, the City is not seeking to infringe upon the right of any person or entity to make campaign contributions. It is not the fact that contributions were made but rather that the contributions in this instance resulted in the former city council members and city administrator having financial interests in securing the AEI contract, something which is prohibited by Section 1090.

Appellants cite *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1074, which sets forth the elements of a cause of action for a violation of Section 1090, in support of their argument that the City has failed to establish a probability of proving its Section 1090 claim. Appellants argue that the City has no evidence, direct or circumstantial, that any of the Appellants had a cognizable interest in the AEI Contract. However, as set forth above, the City met its burden in establishing a prima facie case for violation of Section 1090. As noted by the court in *Lexin*:

> "The term financially interested in section 1090 cannot be interpreted in a restricted and technical manner. The defining characteristic of a prohibited financial interest is whether it has the potential to divide an official's loyalties and compromise the undivided representation of the pubic interests the official is charged with protecting. Thus, that interest might be small or indirect is immaterial so long as it is such as deprives the [people] of his overriding fidelity to [them] and places him in the compromising

situation where, in the exercise of his official judgment or discretion, he may be influenced by personal considerations rather than the public good." [citations omitted]. *Lexin* 47 Cal.4th at 1075.

Under this standard, at a minimum the City demonstrated that Appellants had a cognizable financial interest in the AEI contract and has met the threshold standard for demonstrating a probability it will prevail in its Section 1090 action. Accordingly, this ground alone is a sufficient basis to confirm the trial court's denial of Appellants' Motion.

E. Former City Attorney Richard Torres

The AOB concludes by claiming no evidence supported the City's allegation with regard to former city administrator Richard Torres. However, the Court of Appeal applied a longstanding rule of this Court and found Torres' actions negotiating the AEI Contract did not constitute protected activity under the first prong of Section 1090 and therefore did not need to address evidence under the second prong as the trial court had done.

The fact that the action of the court may have been based upon an erroneous theory of the case, or upon an improper or unsound course of reasoning, cannot determine the question of its propriety. No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right upon any

theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion

Davey v. Southern Pacific Co. (1897) 116 Cal. 325, 329; *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19; *Transamerica Insurance Co. v. Tab Transportation* (1995) 12 Cal.4th 389, 399, fn. 4; *Conservatorship of McQueen* (2014) 59 Cal.4th 602, 612.

It next protests the City's alternative pleading on Torres, claiming it demonstrates "that the City's case is based on pure speculation." Appellants' protest here is to the "modern rules of pleading" permitting plaintiffs to plead alternative factual or legal theories when they are "in doubt as to which theory most accurately reflects the events and can be established by the evidence." *Crowley v. Katleman* (1994) 8 Cal.4th 666, 690-691; see, e.g., *Grundt v. City of Los Angeles* (1970 2 Cal.3d 575, 586; *see also, Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 886 ["Tolerance for such pleading rests on the principle that uncertainty as to factual details or their legal significance should not force a pleader to gamble on a single formulation of his claim if the facts ultimately found by the court, though diverging from those the pleader might have considered most likely, still entitle him to relief."].

Finally, it cites *Santa Barbara County Coalition Against Automobile Subsidies v. Santa Barbara County Association of Governments* (2008) 167 Cal.App.4th 1229 and rhetorically asks whether Torres should be denied Section 425.16 extrication from this action on account of "razor-thin distinctions." As the

Court of Appeal noted in rejecting this argument, the distinction here is not razor-thin because "the City's claim against Torres is predicated on his negotiation of the Athens contract, not on any actions publicly advocating for its passage." Slip op. at 11. In municipal government, the elected officials set policy and the city administrator implements it. While the AOB discusses Torres changing his personal opinion regarding exclusive waste hauling contracts, it ignores the pertinent question here: why was a non-policymaker like Torres ignoring the City's municipal code's prohibition on exclusive commercial waste hauling contracts and negotiating such a contract with AEI when no evidence shows the City's policymakers ever authorized him to do so?

V. CONCLUSION

Government Code Section 1090 is an extremely important and effective tool the legislature has provided California cities as they combat the ever increasing problem of corrupt public officials. Allowing those public officials to use the Anti-SLAPP scheme as a means of avoiding the consequences of self dealing would in large part render Section 1090 meaningless.

In considering this appeal, the City respectfully requests the Court carefully consider the wide ranging implications which would flow from sanctioning the misuse of the Anti-SLAPP scheme.

Dated: December 4, 2014

Respectfully submitted,

ALVARADOSMITH, APC

By: RAUL F. SALINAS
Raul F. Salinas
Mary Michelena Monroe

LEIBOLD MCCLENDON
John McClendon

Attorneys for Plaintiff and
Respondent City of Montebello

CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 8.520(c)(1).

In accordance with California Rule of Court, Rule 8.520(c)(1), I certify that the foregoing *Answering Brief on the Merits* was produced on a computer and contains 11,058 words, based upon the word count generated by the word processing program used to prepare it.

Dated: December 4, 2014

Respectfully submitted,

AlvaradoSmith
A Professional Corporation

By: _____
Raul F. Salinas

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is **AlvaradoSmith, 633 W. Fifth Street, Suite 1100, Los Angeles, CA 90071**.

On December 4, 2014, I served the foregoing document described as **ANSWERING BRIEF ON THE MERITS** on the interested parties in this action.

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Executed on December 4, 2014, at Los Angeles, California.

Julia Evans

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Court Of Appeal Second Appellate District-Division One Ronald Reagan State Building 300 S. Spring Street, 2nd Floor, No. Tower Los Angeles, CA 90013	
Superior Court Of Los Angeles County Stanley Mosk Courthouse Hon. Rolf Treu – Department 58 111 No. Hill Street Los Angeles, CA 90012	
Frank Revere Revere & Wallace 355 South Grand Avenue, Suite 2450 Los Angeles, CA 90071	Attorneys for Appellants Rosemarie Vasquez, Robert Urteaga, Kathy Salazar and Richard Torres 213-839-1333 323-937-6516 (fax)
Lauren D. Friedman Courtney R. Dreibelbis Gibson Dunn & Crutcher LLP 3161 Michelson Drive Irvine, CA 92612	Attorneys for Respondent, Intervenor Arakelian Enterprises, Inc. dba Athens Services 949-451-3800 949-451-4220 (fax)
Paul T. Gough Bell McAndrews & Hiltachk LLP 13406 Valleyheart Drive North Sherman Oaks, CA 91423	Attorneys for Respondent, Intervenor Arakelian Enterprises, Inc. dba Athens Services 818-971-3660 818-619-3791 (fax)
John G. McClendon Leibold McClendon & Mann, APC 23422 Mill Creek Drive, Suite 105 Laguna Hills, CA 92653	Attorneys for Respondent and Plaintiff City of Montebello 949-457-6300 949-457-6305 (fax)