18. TIME: 9:00 CASE#: MSC16-00601

CASE NAME: CHRISTINE DEAN vs. FRIENDS OF PINE MEADOW

HEARING ON MOTION TO STRIKE

FILED BY FRIENDS OF PINE MEADOW, et al.

**** TENTATIVE RULING: ****

The special motion to strike filed by defendants Friends of Pine Meadow ("FPM"), Tim Platt, Mark Thompson, Julian Frazer, and Mike Benson is **granted**. The basis for this ruling is as follows.

A. Request for Judicial Notice filed 5/6/16.

The court grants this unopposed Request for Judicial Notice.

B. Standards for consideration of special motion to strike.

Consideration of a special motion to strike under CCP § 425.16 involves a two-step process. First, the defendant must make a prima facie showing that the plaintiff's cause of action arises from an act by the defendant in furtherance of the defendant's right of petition or free speech in connection with a public issue. Second, if the defendant makes this showing, the plaintiff must show he has a probability of prevailing on the claim. If plaintiff fails to make this showing, the cause of action shall be stricken. *Martin v. Inland Empire Utilities* Agency (2011) 198 Cal. App. 4th 611, 623, *rev. den*; CCP § 425.16 (b)(1). In making its determination, the court considers the pleadings, and supporting and opposing declarations stating the facts upon which the liability or defense is based. CCP § 425.16 (b)(2).

C. First Step – the Law.

A cause of action arises from an act by the defendant in furtherance of the defendant's right of petition or free speech in connection with a public issue if it falls within one of the following four categories: "(1) any written or oral statement or writing made *before* a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made *in connection with an issue under consideration* or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made *in a place open to the public or a public forum in connection with an issue of public interest*, or (4) *any other conduct* in furtherance of the exercise of the constitutional *right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest*." CCP § 425.16 (e) (emphasis added). If the matter falls within the first two categories listed above, it need not concern a matter of public interest or have public significance; but

if it falls within the third or fourth, it must. *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1116, 1123.

Whether CCP § 425.16 applies is determined by the "principal thrust or

gravamen" of plaintiff's claims. *Martinez v. Metabolife International, Inc*. (2003) 113 Cal.App.4th 181, 187. In making this determination, the court focuses on the "allegedly wrongful and injury-producing conduct that provides the foundation for the claims." *Castleman v. Sagaser* (2013) 216 Cal.App.4th 481, 490-491. "The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's activity that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning." *Navellier v. Sletten* (2002) 29 Cal.4th 82, 92; *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton* (2005) 133 Cal.App.4th 658, 671; *see also Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal4th 728, 734–735 (section 425.16 encompasses any cause of action arising from protected activity, and the statute does not categorically exempt any particular type of action). A plaintiff cannot "frustrate the purposes of the SLAPP statute through a pleading tactic of combining allegations of protected and nonprotected activity under the label of one 'cause of action'." *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal. App. 4th 294, 308.

D. First Step – conclusion: the causes of action arise from acts by defendants in furtherance of defendants' right of petition or free speech.

Plaintiffs allege five causes of action: (1) Declaratory Relief/Permanent Injunction; (2) Intentional Interference with Prospective Economic Advantage; (3) Negligent Interference with Prospective Economic Advantage; (4) Defamation; and (5) Conspiracy. Each of these causes of action may properly be the subject of a motion to strike under CCP § 425.16 *See Wilcox v. Sup. Ct*. (1994) 27 Cal.App.4th 809, 816, overruled on other grounds in *Equilon Enterprises, LLC v Consumer Cause, Inc*. (2002) 29 Cal.4th 53 ("The favored causes of action in SLAPP suits are defamation [and] various business torts such as interference with prospective economic advantage . . ."); *Equilon, supra* (suit for declaratory relief and permanent injunction); *South Sutter, LLC v. LJ Sutter Partners, L*.P. (2011) 193 Cal. App. 4th 634, 665-666 (declaratory relief). Further, defendants have met their burden of showing that all five of these causes of action arise from acts by the defendants in furtherance of the defendants' right of petition or free speech.

Plaintiffs argue that defendants' conduct is not entitled to the protection afforded by CCP § 425.16 for two reasons: (1) that the conduct went beyond "speaking out about the 'public issue'" or "exceeds the scope of the 'public issue'" (Opp. of FPM Def.s at 2:1, 4:11-12); and (2) that the conduct gives rise to a cause of action against persons who are primarily engaged in the business of selling goods or services (*Id*. at 2:4) and thus is exempt from a section 425.16 motion to strike because of the provisions of section 425.17 (c). Neither argument is valid.

Plaintiffs argue for a narrow definition of "public issue" without offering any supporting authority. (See Opp. at 4:15-5:11.) On that ground alone, the court could deem this argument to be without foundation. *Anastos v. Lee* (2004) 118 Cal.App.4th 1314, 1318.

However, analysis of the argument also leads to the same conclusion. Plaintiffs concede that defendants had the right to speak against the project at public meetings. (Opp. at 4:5.) Defendants also clearly had the right advocate at City meetings against DeNova's request to amend the City's General Plan, and to seek a referendum after the City approved a General Plan Amendment. CCP section 425.16 protects not just communications made "*before* a legislative . . . proceeding" (CCP § 425.16 (e)(1), but also "*in connection with*" such a proceeding or with any "*public issue or an issue of public interest*." CCP § 425.16 (e)(2)-(4). Thus, plaintiffs assert far too narrow of an interpretation of what the public issue was.

A matter of private concern should not be defined with such a level of abstraction as to enable it to be elevated in almost every case into a public issue. S*ee World Financial Group, Inc. v. HBW Ins. & Financial Services* (2009) 172 Cal.App.4th 1561, 1570; *Consumer Justice Center v. Trimedica International, Inc*. (2003) 107 Cal.App.4th 595, 601. But neither should a public issue be defined so narrowly as to unduly limit the protection of section 425.16. *See Seelig v. Infinity Broadcasting Corp*. (2002) 97 Cal.App.4th 798, 808 (the "public interest" requirement is "to be 'construed broadly' so as to encourage participation by all segments of our society in vigorous public debate related to issues of public interest); *see also M. G. v. Time Warner, Inc*. (2001) 89 Cal. App. 4th 623, 629. And this is certainly so when the situation involves the classic type of situation that section 425.16 was enacted to remedy – "a suit filed by a large land developer against environmental activists or a neighborhood association intended to chill the defendants' continued political or legal opposition to the developers' plans." *Wilcox v. Sup. Ct., supra*, 27 Cal.App.4th at 815; *Dixon v. Sup. Ct*. (1994) 30 Cal.App.4th 733, 741 (court found section 425.16 applicable despite plaintiff's claim that defendant's statements were made after the CEQA proceedings had terminated and were directed against a company that was not part of the CEQA proceedings).

The public issue involved in this case is plaintiffs' development plans for the Property and all necessary steps in the development process, including the City's General Plan Amendment and defendants' attempts to reverse that Amendment. (*See* Complaint, ¶ 19, 24, 25, 29.) *See Lee v. Fick* (2005) 135 Cal.App.4th 89, 98 (statements made after school decided to retain challenged teacher were still part of official proceeding because "parents can ask the school officials to reconsider [and a] request for reconsideration is part of the official proceedings"). The charges that defendants used improper conduct in connection with the Referendum Petition and about DeNova's alleged plan to build far more than 99 homes concern the public issue as so defined. So do the charges of corruption in getting the development project approved. (*See* Complaint, ¶ 67; Opp. at 4:25-5:6).) Further, any statements that FPM may have made proposing that someone other than DeNova acquire the Property and put it to some use other than a housing subdivision were made in connection with the opposition to the development. *See also Fox Searchlight, supra; Comstock v. Aber* (2012) 212 Cal.App.4th 931, 946.

Plaintiffs are correct that CCP § 425.16 does not eliminate the tort of defamation. (Opp. at 5:25, fn. 1.) They are incorrect, however, in asserting that defamatory speech is not protected speech under the first part

of the test. Only illegal speech is not protected. *See Mendoza v. ADP Screening & Selection Services, Inc*. (2010) 182 Cal.App.4th 1644, 1654; *Flatley v. Mauro* (2006) 39 Cal.4th 299, 311 (demand letter and subsequent telephone calls by an attorney that the court considered constituted extortion). For these purposes, "illegal" means criminal speech, not speech that simply violates some non-criminal statute, such as Civil Code section 44. *Mendoza, supra*. Defendants have not conceded, nor does the evidence conclusively establish, that they engaged in any criminal speech. (*Sweetwater Union School Dist. v. Gilbane Building Co*. (2016) 245 Cal.App.4th 19, properly cited by plaintiffs in their brief filed June 2, 2016 was depublished on June 8, 2016 because review was granted.)

Plaintiffs' argument that CCP § 425.16 does not apply because of the exemption under CCP § 425.17 (c) is also invalid. That exemption applies only to causes of action brought against a defendant "primarily engaged in the business of selling or leasing goods or services." Plaintiffs have not met their burden of proving that any of the defendants, even FPM, are "primarily" engaged in selling goods or services. (*See* Ex. K to C. Dean Decl.) FPM is not a separate legal entity in any event, only a political committee. (Thomson Decl., ¶ 5.) Plaintiffs have the burden of proving that the exemption from anti-SLAPP protection provided by CCP § 425.17 (c) applies (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 26) and have failed to meet it.

If the fact that one of the solutions proposed by the opponent of a development is a competing acquisition of the property meant that the opponent was transformed into a business competitor, the exemption would swallow the rule and the anti-SLAPP statute would no longer apply in the paradigmatic type of situation it was enacted to address. Plaintiffs have not pointed to anything in the construction or history of sections 425.16 and 425.17 to permit such a result. *Cf*. CCP § 425.16 (a)) (section 425.16 is to be broadly construed) and *Simpson Strong-Tie Co., Inc. v. Gore, supra*, 49 Cal.4th at 22 (CCP § 425.17 is to be construed narrowly.) Plainly, CCP § 425.17 was enacted to ensure that business competitors would not be chilled in enforcing their rights against each other to prevent unfair competitive practices. It was not enacted to wholly undermine the protection afforded by CCP § 425.16 to persons who exercise their constitutional or legislative rights to oppose land development, just because one solution they propose is acquisition of the land by someone else.

Plaintiffs' reliance on *Consumer Justice Center v. Trimedica International, Inc*. (2003) 107 Cal.App.4th 595 in support of their CCP § 425.17 argument is misplaced. *Consumer Justice* held that the trial court properly denied defendant's motion to strike because whether a commercial enterprise misrepresented the qualities of its product was not a matter of public interest, not because the exemption under section 425.17 applied because the defendant was primarily engaged in selling goods or services. Indeed, the holding of *Consumer Justice* could not have involved an interpretation of CCP § 425.17. *Consumer Justice* was decided in 2003. CCP § 425.17 did not become law until 2004.

E. Second Step – no probability of prevailing.

In order to establish they have a probability of prevailing on their claims, plaintiffs must show facts sufficient to support a favorable judgment if their evidence is credited (*Navellier v. Sletten* (2002) 29 Cal. 4th 82, 89, 93) and to overcome any privilege or defense asserted by the defendants. *See Flatley v. Munro* (2006) 39 Cal.4th 299, 323. Plaintiffs have failed to do so.

1. Interference with prospective economic advantage.

Defendants argue they have shown these claims are barred by the First Amendment right to petition the government under the *Noerr-Pennington* doctrine. The court agrees.

The *Noerr-Pennington* doctrine precludes suits for interference with prospective economic advantage when the interference consists of petitioning activity. *Hi-Top Steel Corp. v. Lehrer* (1994) 24 Cal.App.4th 570, 574; *see Tichinin v. City of Morgan Hill* (2009)177 Cal.App.4th 1049, 1064-1065, 1067-1068. Petitioning activity includes not just direct presentations to legislative bodies, but also flyers to residents (*Hi-Top, supra*) and publicity campaigns (*Eastern R. Conf. v. Noerr Motors* (1961) 365 U.S. 127, 1430) intended to influence public opinion in connection with official action.

The *Noerr-Pennington* doctrine does not apply when the petitioning activity is a mere sham. *Hi-Top, supra*, 24 Cal.App.4th at 576. However, this sham exception is "extraordinarily narrow" where the petitioning activity is before a legislative body rather than a court. *Kottle v. Northwest Kidney Ctrs*. (9th Cir. 1998) 146 F.3d 1056, 1061. The courts have noted that misrepresentations are "condoned" in the political arena. *California Transport v. Trucking Unlimited* (1972) 404 U.S. 508, 513). *See also Kottle, supra*, 146 F.3d at 1062 ("Misrepresentations are a fact of life in politics.")

Plaintiffs have not shown a probability of bringing themselves within the sham exception to the *Noerr-Pennington* doctrine. They have not shown that defendants' petitioning activities have been undertaken to delay the project without regard to whether defendants can reverse the City's General Plan Amendment. *See Lockary v. Kayfetz* (N. Dist. Cal. 1984) 587 F. Supp. 631, 642.

Defendants cite *Matossian v. Fahmie* (1980) 101 Cal.App.3d 128 and *Dixon v. Superior Court* (1994) 30 Cal.App.4th 733. *Matossian* applies the *Noerr-Pennington* doctrine to interference claims based on allegedly false statements about the plaintiff and *Dixon* relies in part on *Matossian*. *Dixon* was a case arising out of the precise factual setting at issue here – a development project and statements by an opponent of that project. Plaintiffs do not distinguish or even mention these cases.

2. Defamation.

Speaking generally, the elements of a claim for defamation are proof that defendants published a false, defamatory statement of or concerning plaintiffs that caused plaintiffs harm or as to which harm is presumed and that defendants were negligent or had malice depending on whether the statements were about private matters and a private figure or about a public figure or a matter of public concern. *See* CACI 1700 – 1705; *Taus v. Loftus* (2007) 40 Cal.4th 683.

The claims for defamation fail for two reasons: (1) plaintiffs have not established a probability of establishing a prima facie case as to some of them; and, more importantly, (2) plaintiffs have not shown that absolute privilege set forth in Civil Code section 47 does not apply. Civil Code section 47 protects not just statements made in local city council proceedings, but also prior communications if those actions have some logical connection to the official proceeding. *Cayley v. Nunn* (1987) 190 Cal App 3d 300 (immunizing statement made while gathering signatures for a petition that plaintiffs had illegally wiretapped defendants); *Pettitt v. Levy* (1972) 28 Cal.App.3d 484, 491 (applying the privilege to activities and conduct (formation of conspiracy and preparation of false building permit) separated in time and space from the city forums where the building permit was presented); *O'Keefe v. Kompa* (2000) 84 Cal. App. 4th 130, 134-135 (collection activities after trial).

No witness has testified that defendants said plaintiffs were guilty of corruption. (Complaint, ¶ 67 A.) Plaintiffs' proof that defendants made this statement is only a newspaper article. The article is hearsay on that point. Even if the newspaper article were admissible, the part that plaintiffs highlight only states that someone took city council members to task for accepting something from developers, with at least two of them calling it "corruption." It is questionable whether this statement can be read to charge the developers rather than the city council members of corruption. Further, if the words were about the developers, they were apparently uttered at a City Council meeting and thus were privileged under Civil Code section 47 (b).

The alleged charges that plaintiffs engaged in intimidation and similar conduct during their efforts to persuade residents not to sign, or to withdraw their signatures on, the Referendum Petition (¶ 67 B.) were uttered during a public debate where charged rhetoric is considered non-actionable opinion. *See Blackhawk Corp. v. Ewing* (1979) 94 Cal.App.3d 640 (holding mischaracterizations of a developer's project during a referendum petition signature drive – that it was high density when it was in reality low density; that it would require public subsidies when in fact it would not; that it was on Mt. Diablo when it was not – to be non-actionable opinion when uttered in a public debate where "the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole"); *Rosenaur v. Scherer* (2001) 88 Cal.App.4th 260, 283 (use of the words "thief" and "liar" in the course of a chance confrontation with a political foe at a shopping center was the type of loose, figurative, or hyperbolic language that is constitutionally protected).

The alleged charge that plaintiffs are planning a 288-unit development (Complaint, ¶ 67 C., D.) are factually unsupported, considered opinion in the context of this political debate, or privileged. The charge is

that this statement was made "on various websites and Facebook group pages, and at public hearings." Statements made at official hearings are privileged under Civil Code section 47 (b). As for statements made elsewhere, the only proof that plaintiffs submit is a letter to the editor written by Mark Thompson published in the Martinez News-Gazette on February 1, 2016. (Ex. G to C. Dean Decl.) The letter is labeled opinion at the bottom. *See Blackhawk Corp. v. Ewing, supra.* It was written to encourage voters to prevent DeNova from undercutting the Referendum and so must be considered to have "some logical connection" to the Referendum, which, itself, is an official proceeding or has some logical connection to the City proceeding it was intended to overturn. *Cayley v. Nunn, supra*; *Lee v. Fick, supra*. Plaintiffs have not distinguished *Blackhawk*, *Cayley*, or *Lee*, or submitted any contrary authority.

The alleged charge that the owners agreed with the designation of the Property as open space (¶ 67 E.) is not defamatory – it does not reduce anyone's reputation. Further it may refer to the prior owners not the current ones and plaintiff has not shown it was not made in a privileged setting.

The alleged charge about tax breaks (¶ 67 F.) was made by defendant Calhoun, who has been dismissed, and plaintiffs have not submitted evidence sufficient to support a factual finding that the other defendants are responsible for anything defendant Calhoun may have said. The alleged charge about the annexation of the Property into the City concerns a prior owner, not plaintiffs and was apparently made during a privileged City Council meeting. (Frazer Decl., ¶ 5.)

The alleged charge that the current owners of the Property are against the development when they are in fact for it (¶ 67 G.) also does not lower plaintiffs' reputation and again has not been shown to have been uttered outside of a privileged setting.

The charge about the number of signatures gathered (¶ 67 H.) is not defamatory, and plaintiffs have not submitted any argument about it. (*See* Opp. at 14:6-11.)

3. Conspiracy.

Conspiracy is not itself a tort (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1062); it is merely a basis for vicarious liability. *See Wyatt v. Union Mortgage Co*. (1979) 24 Cal. 3d 773, 784-785; *Okun v. Superior Court* (1981) 29 Cal. 3d 442, 454; *Pettitt v. Levy* (1972) 28 Cal.App.3d 484, 491. Because plaintiffs have not shown a probability of prevailing on their claims for the underlying torts of interference with prospective economic advantage or defamation, they have also not shown a probability of prevailing on their claim for conspiracy to commit those torts.

4. Declaratory and Injunctive Relief.

An injunction is a remedy, not a right. An injunction may not be granted unless an underlying cause of action can be established. *See MaJor v. Miraverde Homeowners Assn*. (1992) 7 Cal.App.4th 618.

Plaintiffs seek to enjoin defendants from using the name "Friends of Pine Meadow", and to require defendants to delete the FPM website and Facebook page, to destroy mailing lists, and to "cease and desist . . . the dissemination of any unverified statements or writings." (Complaint at 22:21-27.) However, plaintiffs have neither established they have a probability of prevailing on their claim that their rights were violated by the underlying wrongs they allege nor cited any authority that would permit the court to order the things they are requesting. Regardless of whether defendants' motives were malicious or innocent, plaintiffs have not provided any authority stating it is wrongful for people on one side of a political dispute to adopt a name for their political committee that confuses some members of the public as to who is behind the committee.

F. The Implied Request for Discovery.

Plaintiffs argue that the court should not find plaintiffs have not met their burden at this early stage of the case, before they have conducted discovery. According to the statute, a plaintiff needing discovery to oppose a motion under CCP § 425.16, must make a formal motion for discovery under CCP § 425.16 (g), not merely raise the point informally in her opposition to the motion to strike. *See Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 357. Plaintiffs did not do so.

Rulings on Evidentiary Objections

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FPM Defendants' Objections filed 6/8/16

1 – Sustained as to the words "nor my family" and "I know that none of the Friends knew my father."

2 – Sustained as to the words "my family, or the Pine Meadow Owners."

3 – Sustained as to the words "and implies that it is speaking on behalf of me by stating, for example."

4 – Sustained.

5 – Sustained.

6 – Overruled. Not specific enough about the language being objected to. *People v. Harris* (1978) 85 Cal.App.3d 954, 957.

7 – Overruled. *People v. Harris* (1978) 85 Cal.App.3d 954, 957.

8 – Sustained. The article is hearsay when used to establish that defendants made the statement.

9 – The objection to the characterization of what the article says is sustained.

10 – Sustained on line 25 as to the words “past and”

11 – Overruled.

12 – Overruled.

13 – Sustained.

14 – Sustained as to ¶ 45, 47, 48, 49. Overruled as to paragraphs 46 and 50.

15 – Sustained.

16 – Sustained.

17 – Sustained.

18 – Overruled.

19 – Sustained.

20 – Sustained.

21 – Sustained.

22 – Sustained.

23 – Overruled.

24 – Sustained.

25 – Sustained.

26 – Sustained.

27 – Sustained as to paragraph 36; overruled as to paragraph 37.

28 – Overruled.

29 – Sustained.

30 – Sustained.

31 – Sustained.

32 – Overruled.

33 – Sustained.

34 – Sustained.

35 – Sustained.

36 – Overruled.

37 – Sustained.

38 – Sustained.

39 – Sustained.

40 – Sustained.

41 – Overruled.

42 – Sustained.

43 – Overruled.

44 – Sustained as to the words “they were misled enough by the friends of Pine Meadow”

45 - Sustained.

Plaintiffs’ Objections filed 6/2/16

The numbers below refer to paragraph numbers of the applicable declarations.

Reynosa Declaration

6, last sentence – sustained.

8, last sentence – sustained

9 – sustained.

Benson Declaration

4, last sentence – sustained.

Epstein Declaration

7 – Overruled. The objection is not specific enough about the words being objected to. *People v. Harris* (1978) 85 Cal.App.3d 954, 957.

9 – Overruled.

11 – Sustained as to the first sentence only.

15 – Sustained.

Frazer Declaration

7 – Sustained.

Thompson Declaration

17 – Sustained.

18 – Sustained.

19 – Overruled.

24 – Overruled. The objection is not specific enough. *People v. Harris* (1978) 85 Cal.App.3d 954, 957.

25 – Sustained.

Platt Declaration

10 – Overruled.

18 – Overruled.

19 – Sustained.

20 – Sustained.

21 – Sustained as to any statements other than by Christine Dean personally.