ARTICLE:

CALIFORNIA'S ANTI-SLAPP STATUTE: A POTENT, YET CONFOUNDING, WEAPON

*By Brian D. Shaffer**

Lawsuits designed to chill the valid exercise of the constitutional right of free speech or the right to petition, denominated as "strategic lawsuits against public participation" (or "SLAPP" suits), have taken on increasing significance over the last several decades. The classic example of a SLAPP suit is one filed by a large business against local activists to halt or impede the activists' political or legal opposition to the company's plans. The SLAPP plaintiff's goal is not necessarily to prevail, but to effectively silence the opposition by preventing them from exercising their constitutional rights to speech and/or petition. The victim of a SLAPP suit could resort to traditional remedies (e.g., malicious prosecution), but those remedies can be difficult and costly to obtain, leaving the SLAPP victim with few viable options to prevent being essentially "muzzled" by a richer and more powerful adversary.

In response to this significant problem, the legislature enacted Code of Civil Procedure Section 425.16 in 1992 (the "anti-SLAPP" statute). The anti-SLAPP statute provides a potent weapon to a victim of a SLAPP suit. The anti-SLAPP statute allows a SLAPP defendant to file a special motion to strike very early in the case to challenge the plaintiff's claims on the merits. The recipient of an anti-SLAPP motion must clear evidentiary hurdles and satisfy sometimes amorphous legal standards simply to prevent dismissal of the case.

The nature of SLAPP litigation is dynamic and constantly evolving. On several occasions over the past decades, this publication discussed and analyzed the developing interpretations of the anti-SLAPP statute.[1] SLAPP issues have arisen in contexts that appear far removed from any constitutional battle. While the constitutional quandary posed by the classic SLAPP case described above makes perfect sense, some litigants seem to be surprised that a seemingly private dispute between two parties can be transformed into a complex struggle over constitutional principles entailing broad public interest concerns.

Since the party losing an anti-SLAPP motion has the right of immediate appeal, there is a large volume of anti-SLAPP appellate decisions. The breadth and

---

*Brian D. Shaffer is a litigation shareholder in the Walnut Creek office of Miller Starr Regalia. He also contributes to the Remedies chapter of *Miller & Starr, California Real Estate 4th*.

scope of the practice areas affected by SLAPP decisions is staggering. Courts are still struggling to analyze, interpret, and apply the anti-SLAPP statute in a consistent manner. As relevant here, a significant number of real estate cases apply the anti-SLAPP statute. These cases have produced holdings that are somewhat difficult to reconcile, some of which are discussed, compared, and contrasted below.

This article will summarize the mechanics of the anti-SLAPP statute, analyze the application of the anti-SLAPP statute in certain contexts, and provide some insights for lawyers handling cases potentially implicating constitutional free speech and/or petitioning activity and therefore falling within the purview of the anti-SLAPP statute.

I. THE MECHANICS OF THE ANTI-SLAPP STATUTE

The anti-SLAPP statute was enacted "to provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights."[2] The statute applies to "[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," unless the court finds a probability that the plaintiff will prevail on the claim.[3]

Application of the anti-SLAPP statute entails a two-step process. First, the moving party must make a threshold showing that the subject cause of action arose from protected speech or petitioning activity.[4] To meet this threshold showing, the speech or activity must fall within one of the following 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.[5]

If a defendant meets this burden by showing that the subject speech or activity was, in fact, protected conduct, the defendant must also show that the

plaintiff's claims arose out of that statement or activity. Courts have recognized that the statute should be broadly construed and that a plaintiff cannot avoid application of the statute by artfully pleading a cause of action as a garden variety tort or contract claim.[6] Thus, the label of the claim is irrelevant, and it is the "gravamen" of the claim that will determine whether the statute applies.[7] The "gravamen" of the claim is assessed by identifying the "allegedly wrongful and injury-producing conduct … that provides the foundation for the claim."[8] "If the core injury-producing conduct on which the plaintiff's claim is premised does not rest on protected speech or petitioning activity, collateral or incidental allusions to protected activity will not trigger application of the anti-SLAPP statute."[9] In sum, the acts underlying the plaintiff's cause of action must itself have been an act in furtherance of the right of petition or free speech.[10]

If the moving party does not demonstrate this initial prong, the anti-SLAPP motion is denied and the second step is irrelevant. However, if the court finds that the first step has been satisfied, it then moves to the second step and determines whether the non-moving party has demonstrated a probability of prevailing on the merits.[11]

The statute also provides for recovery of attorney's fees.[12] Notably, the SLAPP plaintiff is not on equal footing with the defendant when it comes to attorney's fees. The statute contains a one-way attorney's fee provision entitling the moving party to recover attorney's fees if he or she prevails.[13] In contrast, the party defending the anti-SLAPP motion can only recover fees if he or she proves that the anti-SLAPP motion was frivolous or was solely intended to cause unnecessary delay.[14]

In response to a disturbing abuse of the anti-SLAPP statute by litigants who used the statute to chill participation in matters of public significance and other improper contexts, the legislature added Code of Civ. Proc., § 425.17 to the anti-SLAPP statute. This restrictive follow-on statute[15] excludes certain types of claims from the anti-SLAPP motion to strike procedure, including among others, (1) claims brought solely in the public interest or on behalf of the general public if certain conditions are met, and (2) causes of action relating to businessperson's statements to a prospective customer regarding his or her or a competitor's products.[16]

The legislature also enacted a third anti-SLAPP section under Code of Civ. Proc., § 425.18, this time to control "SLAPP-back" lawsuits, defined as any

cause of action for *malicious prosecution or abuse of process* arising from the filing or maintenance of a prior cause of action that has been dismissed pursuant to a special motion to strike under section 425.16.[17] This statute provides, with conditions and limitations, for special motions to strike a SLAPP-back lawsuit.[18]

With this background in mind, this article will now analyze several contexts where the anti-SLAPP statute has been applied in interesting and seemingly conflicting ways to illustrate the potent, yet confounding, ways courts have evaluated the scope and breadth of the statute.

II. GETTING SLAPPED—THE BROAD SCOPE OF THE ANTI-SLAPP STATUTE IN PRACTICE.

A. HOA Disputes: Private Dispute or Matter of Public Interest?

Over the last few years, there have been several reported anti-SLAPP decisions in the context of disputes involving common interest developments. For instance, in *Colyear v. Rolling Hills Community Association of Rancho Palos Verdes* ("*Colyear*"), the court held that an application to resolve a dispute regarding tree-trimming requirements under a homeowner's association's governing documents involved matters of public interest and therefore involved protected activity under the anti-SLAPP statute.[19] There, Yu Ping Liu and Richard Colyear were both homeowners with properties kitty-corner from each other within the Rolling Hills planned residential community. Adjacent to each of their properties was that of Richard and Kathleen Krauthamer. The dispute in this case related to trees identified by Liu as being located on the Krauthamers' property, which trees blocked Liu's view.[20]

The properties were all subject to covenants, conditions, and restrictions (CC&Rs) of the homeowners association (HOA). The HOA adopted resolutions aimed at implementing a process for processing "all view impairment applications."[21] In accordance with that process, Liu filed an "Application for Assistance to Restore View" with the HOA with respect to the Krauthamer property, upon which Liu believed trees were situated that blocked his view.[22] The application did not reference Colyear's property, but Colyear received notice of the application and quickly filed a lawsuit against Liu, the HOA, its board, and individual board members seeking writ relief, alleging that Liu's application "may implicate" trees on Colyear's property.[23] Liu then withdrew his application to the HOA, the court sustained all defendants' demurrers, and Colyear filed an amended pleading that included a petition for writ of

traditional mandate and prohibition against the HOA and its board, and a complaint for declaratory relief, injunctive relief, to quiet title, and for damages against all defendants.[24] Colyear sought a declaration that tree-trimming provisions in the CC&Rs and HOA resolution did not apply to his property, and that the resolution was void to the extent it purported to do so.[25]

Liu then filed an anti-SLAPP motion to strike, asserting that his view impairment application constituted a written statement made in connection with an issue of public interest, and was therefore protected activity under § 425.16(e)(4), and that Colyear could not establish a probability of success on the merits.[26] Colyear opposed, arguing that his action stemmed from the "underlying controversy" regarding the proper application of the CC&Rs.[27] The trial court granted Liu's motion to strike.

The trial court's decision was affirmed on appeal. The court found that Liu's speech was protected as 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.[28] While Colyear portrayed the issue as "a private tree-trimming dispute between two neighbors," the court of appeal reviewed the issue of public interest in anti-SLAPP cases and found the statute to have been broadly defined to include private conduct that impacts a broad segment of society and/or that affects a community in a manner similar to that of a governmental entity.[29] The court here found an ongoing topic of debate between the HOA and homeowners that had resulted in multiple hearings, letters, and several changes to the board's policy on the matter of tree-trimming.[30] These were sufficient to defeat Colyear's suggestion that Liu's application was merely a dispute between two neighbors. The court also found Liu's application to be sufficiently tied to the asserted public interest.[31]

As to the next element, observing next the broad construction the Supreme Court has given the anti-SLAPP statute, the court sought to determine the gravamen of Colyear's cause of action. This requires examining the "core injury-producing conduct upon which the plaintiff's claim is premised."[32] "The defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech."[33] While Colyear argued that the dispute arose from the question of the applicability of a tree-trimming covenant, the court found Liu's petitioning act in submitting an application to the HOA, allegedly invoking an invalid HOA process and clouding Colyear's title, to be the only injury-producing conduct alleged by Colyear.[34] The court

distinguished cases where it characterized the defendant's protected speech as "ancillary to the heart of the plaintiff's claims."[35]

The court's reasoning on the issue of whether the dispute was one of public interest seems to be in conflict with its reasoning on the issue of the gravamen of Colyear's lawsuit. On one hand, the court found the dispute to be of public interest, and not a dispute between two neighbors, based on the public hearings, letters, and changes to the HOA's policy on tree-trimming. On the other hand, the court found Colyear's lawsuit to arise solely from Liu's application, not from any underlying controversy surrounding the issue of tree-trimming among the HOA and homeowners, which was the ultimate source of the dispute.

In contrast, in *Talega Maintenance v. Standard Pacific*, the court held that, inter alia, fraudulent statements made in a HOA meeting were unprotected because the HOA meeting was not an official proceeding and the statement was not an issue of public interest.[36] There, Talega was the primary developer of a large planned community in San Clemente.[37] The HOA included three Talega employees, who comprised a majority of the HOA board of directors.[38] After severe rains in 2005, trails on the property suffered partial slope failure.[39] At that time, title to the damaged property had been transferred to the HOA, and the developer board members represented that the HOA was responsible for the cost of repairing the damaged trails.[40] The HOA then spent more than $500,000 of HOA funds toward that end.[41] When severe rains again damaged the trails in 2010, the independent board members had formed an executive committee with no developer board members, and the executive committee learned that the trails had not been completed, that the failures were due to construction defects, and that developers were actually bound in perpetuity to provide repairs.[42]

The HOA filed suit alleging breach of fiduciary duty, fraud, constructive fraud, construction defect, negligence, and declaratory relief. Developers filed an anti-SLAPP motion in response to the causes of action for breach of fiduciary duty, fraud, constructive fraud, and negligence. The trial court denied the motion, finding that the defendants had failed to establish that any statements were an exercise of free speech; that the statements were made in connection with an official proceeding authorized by law; or that any statements involved a matter of sufficient public interest.[43]

Although the HOA had admitted that the fraud cause of action was based on

a statement made in a HOA meeting, the appellate court immediately rejected application of the anti-SLAPP statute to the breach of fiduciary duty, constructive fraud, and negligence claims, since those claims were based on the withholding of information and did not involve "written or oral statements."[44] Developers asserted that all of the causes of action were based on allegations that the developers "controlled, directed, and/or voted for certain actions taken by the HOA," but the court was not persuaded that "controlling, direction, and voting" constituted "statements" for the purpose of section 425.16.[45] Further, the developers had made no showing that their conduct was in furtherance of the exercise of free speech.[46] The court noted that voting is a type of protected First Amendment activity, and voting can occur in HOA meetings, but here any vote would have been *incidental* to the withholding of information.[47]

Next the court examined the fraud cause of action, concluding that it was not subject to the anti-SLAPP statute. Subdivision (e)(1) applies to statements "made before a legislative, executive, or judicial proceeding, *or by any other official proceeding authorized by law*." In this context, the court found that HOA meetings could not be considered "official proceedings" because they did not have a strong connection to governmental proceedings.[48] While homeowners associations have been described as "quasi-governmental," the court found that a homeowners association does not assist with *actual* government duties and its decisions are not subject to review by administrative mandate.[49] The appellate court also found that no *actual* governmental body was considering the issue of who was to pay for repairing the trails.[50]

Finally, the appellate court found that who would pay to repair the trails was not an issue of public interest. Although such matters have been broadly construed, where the issue is of interest only to a limited but definable segment of the public, "the constitutionally protected activity must occur in the context of an ongoing controversy, dispute or discussion, such that it warrants protection by a statute that embodies the public policy of encouraging participation in matters of public significance."[51] In this case there was no controversy because the HOA believed developer board members' statements. Thus, the allegedly fraudulent statement did not relate to an issue of public interest, and the trial court's ruling was affirmed.[52]

Reconciling the *Colyear* and *Talega* decisions is no easy task. In *Colyear,* what appeared to be a private dispute between two neighbors over trees was interpreted by the court as a matter of public interest. Meanwhile, the *Talega*

court viewed slope failure causing the destruction of trails at great expense was *not* a matter of public interest. Further, *Colyear* found the tree-trimming application to be protected activity at the heart of the claim, but *Talega* downplayed the HOA meeting as a sufficient official proceeding to fall within the scope of the statute. These cases illustrate the complex nature of the anti-SLAPP analysis in the context of HOA disputes, which in many cases would seem to be private disputes, but which now will require a close examination to determine if free speech or petitioning activity is implicated.

B. Landlord-Tenant Disputes: A Hotbed of SLAPP Issues

Another area rife with reported anti-SLAPP decisions is the landlord-tenant context. In general, the key determinant in anti-SLAPP motions in the landlord-tenant disputes is whether the cause of action at issue is based on the defendant's protected acts. If it is, then the first prong of the anti-SLAPP analysis is satisfied. If it is not, then the anti-SLAPP motion must be denied. However, correctly reaching this determination is no easy task and could be more accurately described as a complex game of splitting hairs.

For instance, in *Ulkarim v. Westfield LLC,* a tenant operated a cellular phone store at a property she leased from her landlord under a one-year lease.[53] The landlord served a notice of termination indicating that the lease would terminate on a certain date.[54] However, the tenant remained in possession and a filed a complaint against the landlord alleging breach of contract, negligent and intentional interference with prospective economic advantage, and unfair competition.[55] While this lawsuit was proceeding, the landlord brought a successful unlawful detainer action against the tenant.[56]

In the tenant's complaint, the tenant alleged that one of its competitors induced the landlord to terminate the lease, that the landlord had no right to terminate the lease absent a default, that she became a holdover tenant, and that the landlord failed to serve the required 30-day notice to terminate the holdover tenancy.[57] The tenant further alleged that the landlord interfered with her business by interrupting her phone and credit card processing services and by telling her employees and vendors that her business would be replaced by her competitor.[58]

The landlord filed an anti-SLAPP motion. The trial court found that each of the counts in the tenant's complaint were based in part on the landlord's service

of the termination notice, which the court determined was protected activity, and granted the motion.[59]

On appeal, the tenant argued, inter alia, that her claims did not arise from protected activity. The court cautioned that while an unlawful detainer complaint and the notice of termination that precedes it are protected activities, "the mere fact an action was filed after protected activity took place does not mean it arose from that activity."[60] Courts must distinguish a cause of action based on the notice of termination or unlawful detainer action and a cause of action based on the *decision to terminate* or other conduct connected to the termination.[61]

The court concluded that a cause of action does not arise from protected activities if "the gravamen of the tenant's complaint challenges the decision to terminate the tenancy and other conduct in connection with the termination apart from the service of a notice of termination or filing of an unlawful detainer complaint."[62] The court held that because activities such as terminating the lease in bad faith and interfering in the tenant's business by engaging in specific conduct did not arise from the service of the notice of termination or the filing of the unlawful detainer complaint, but rather from the landlord's decision to terminate, the order granting the motion to strike must be reversed.[63]

In contrast, in *Birkner v. Lam*, the court held that a tenants' claims against a landlord did arise from protected activities. There, the landlord served the tenants with a 60-day notice to terminate the tenancy.[64] The tenants notified the landlord that the tenants could not be evicted because they were protected tenants under a city rent control ordinance.[65] The landlord nevertheless refused to rescind the termination notice.[66] The tenants then sued the landlord for, inter alia, wrongful eviction and violation of the rent control ordinance.[67] In denying the landlord's anti-SLAPP motion, the trial court determined that the landlord's conduct was not in furtherance of his right to petition within the meaning of the anti-SLAPP statute, so the complaint was not based on activity protected by the statute.[68]

The court of appeal reversed. The court reiterated that the prosecution of an unlawful detainer action is indisputably protected activity within the meaning of the anti-SLAPP statute.[69] Here, the issue was whether the service of the termination notice fell within the scope of the anti-SLAPP statute. The court found that if the termination notice is a legal prerequisite for bringing an unlaw-

ful detainer action, as it was in that case, service of the notice does constitute activity in furtherance of the constitutionally protected right to petition.[70] Thus, the court found that the landlord has satisfied the first prong of the anti-SLAPP statute and the trial court's decision was reversed.[71]

These cases reveal the difficulty in analyzing anti-SLAPP issues and predicting how courts will resolve such issues. In *Ulkarim*, the court suggests that litigants must differentiate a landlord's *decision* to terminate a tenancy from the service of a notice of termination or filing of an unlawful detainer complaint *based on that decision*. That determination will oftentimes be challenging. It may be very difficult for courts to consistently determine whether or not a landlord's protected activity is merely incidental or collateral to unprotected activity that was really the basis for the tenant's claims. This issue is illustrated by *Birkner*, which, like *Ulkarim*, also pertained to a landlord's termination of a tenancy, but where the court reached the opposite conclusion as to the application of the anti-SLAPP statute. Both cases dealt with an allegedly improper lease termination or eviction but reached different conclusions as to the applicability of the anti-SLAPP statute.

Courts appear to increasingly follow the reasoning of *Ulkarim*, while criticizing the *Birkner* decision. *Birkner* has been criticized for failing to recognize that the critical consideration is whether the cause of action is based on defendant's protected activity.[72] The mere fact that a cause of action may have been *triggered* by protected activity (such as service of unlawful detainer papers) does not necessarily mean it *arose from* that activity. There is no reason to believe that this trend will not continue, but the diverging interpretations of the statute in this landlord-tenant context illustrates the difficulties in applying the anti-SLAPP statute.

C. A Boxer Trades In Punches For The Anti-SLAPP Statute

While not a real estate case, *Jackson v. Mayweather* is another example of the broad reach of the anti-SLAPP statute. Floyd Mayweather, Jr. is a well-known (and controversial) professional boxer. He is widely considered as one of the greatest boxers of all time, and is undefeated as a professional and a world champion in multiple divisions. This case deals with a tumultuous relationship between plaintiff Shantel Jackson and Mayweather.[73] After a break-up, Mayweather posted several messages on social media stating that Jackson had an abortion and had undergone extensive plastic surgery.[74] Jackson subsequently filed suit for invasion of privacy and defamation.[75]

Mayweather filed an anti-SLAPP motion. The court found that Mayweather had satisfied his burden of showing that the causes of action arose from protected activity within the meaning of the statute.[76] The trial court found that abortion is an issue of widespread public interest, Jackson was a person in the public eye, and Jackson's relationship with Mayweather was a matter of public interest and media attention.[77] However, the court concluded that Jackson had established a likelihood of prevailing her claims and, therefore, denied Mayweather's motion.[78]

On appeal, the court affirmed that the claims arose from protected activity under the anti-SLAPP statute. The court found that postings on Facebook and Instagram were made "in a place open to the public or a public forum" within the meaning of Section 425.16, subdivision (e)(3).[79] While the court expressed skepticism whether Mayweather's social media postings contributed to the public debate on women's reproductive rights, it nonetheless held that since Mayweather and Jackson were both high profile individuals, Mayweather's posts were tantamount to "celebrity gossip" and therefore considered under established case law as matters of public interest.[80] Therefore, the court affirmed that Mayweather satisfied his burden to establish Jackson's claims arose from protected activity.[81]

This case is notable not just because of the high profile nature of the defendant, but also because of its intersection with modern technology and methods of communication. Statements made on social media can be considered statements made in public or a public forum for purposes of the statute, which may be contrary to some expectations. Further, it could be argued that Mayweather took advantage of his own celebrity by encompassing his own crude comments within the scope of the anti-SLAPP statute. While the court clearly also relied on Jackson's own celebrity in reaching its conclusion, it could likewise be argued that Jackson's celebrity was merely derivative of Mayweather's. The moral of the story is that anti-SLAPP statute can be a powerful tool in a broad range of sometimes unexpected contexts.

CONCLUSION

These cases provide a glimpse of the sometimes confounding nature of anti-SLAPP cases. From a practical perspective, plaintiff's attorneys are well-served to avoid allegations implicating "acts in furtherance of a person's right of petition or free speech" protected by the anti-SLAPP statute. If an anti-SLAPP mo-

tion is filed, plaintiff's lawyers may have no time to reframe the pleadings to avoid the constitutional issues. Defendants, on the other hand, must analyze complaints to determine if an anti-SLAPP motion is feasible. Other than the cost to prepare and argue the motion, there is little reason not to file such a motion if a cognizable argument exists. The only downside is the potential for attorney's fees liability to plaintiff, but that exposure only exists if the motion is frivolous or improper. Unfortunately for plaintiff's lawyers, given the scope of the reported anti-SLAPP cases, defense lawyers will have much ammunition to develop at least a cognizable argument that the statute applies, so the evolution of anti-SLAPP jurisprudence is likely to continue at a rapid pace.

ENDNOTES:

[1]See Anti-SLAPP Motions in Real Estate Litigation: An Update, Bruce W. Laidlaw, Miller & Starr, Real Estate Newsalert, Nov. 2008, 19 No. 2; SLAPP Happy: An analysis of California's Anti-SLAPP (Strategic Lawsuits Against Public Participation) Statute, Basil S. Shiber & Douglas M. Smith, Miller & Starr, Real Estate Newsalert, Nov. 2004, 15 No. 2.

[2]*Rusheen v. Cohen*, 37 Cal. 4th 1048, 1055-56, 39 Cal. Rptr. 3d 516, 128 P.3d 713 (2006).

[3]Code Civ. Proc., § 425.16, subd. (b)(1).

[4]*Rusheen v. Cohen*, supra, 37 Cal. 4th at 1056.

[5]Code Civ. Proc., § 425.16, subd. (e).

[6]*Hylton v. Frank E. Rogozienski, Inc.*, 177 Cal. App. 4th 1264, 1271-1272, 99 Cal. Rptr. 3d 805 (4th Dist. 2009).

[7]*Ibid*.

[8]*Martinez v. Metabolife Intern., Inc.*, 113 Cal. App. 4th 181, 189, 6 Cal. Rptr. 3d 494 (4th Dist. 2003).

[9]*Hylton v. Frank E. Rogozienski, Inc., supra*, 177 Cal. App. 4th at 1272.

[10]*World Financial Group, Inc. v. HBW Ins. & Financial Services, Inc.*, 172 Cal. App. 4th 1561, 1568-1569, 92 Cal. Rptr. 3d 227 (2d Dist. 2009).

[11]*Baharian-Mehr v. Smith*, 189 Cal. App. 4th 265, 271, 117 Cal. Rptr. 3d 153 (4th Dist. 2010) (rejected by, Sheley v. Harrop, 9 Cal. App. 5th 1147, 215 Cal. Rptr. 3d 606 (3d Dist. 2017)).

[12]Code Civ. Proc., § 426.16, subd. (c)(1).

[13]*Ibid.*

[14]*Ibid.*

[15]Code Civ. Proc., § 426.17.

[16]See *Club Members For An Honest Election v. Sierra Club*, 45 Cal. 4th 309, 86 Cal. Rptr. 3d 288, 196 P.3d 1094 (2008); *JAMS, Inc. v. Superior Court*, 1 Cal. App. 5th 984, 993-994, 205 Cal. Rptr. 3d 307 (4th Dist. 2016); *Cruz v. City Of Culver City*, 2 Cal. App. 5th 239, 248-249, 205 Cal. Rptr. 3d 736 (2d Dist. 2016); *Save Westwood Village v. Luskin*, 233 Cal. App. 4th 135, 182 Cal. Rptr. 3d 328 (2d Dist. 2014); *People ex rel. Strathmann v. Acacia Research Corp.*, 210 Cal. App. 4th 487, 148 Cal. Rptr. 3d 361 (4th Dist. 2012).

[17]Code Civ. Proc., § 425.18.

[18]Code Civ. Proc., § 425.18, subd. (c).

[19]*Colyear v. Rolling Hills Community Association of Rancho Palos Verdes*, 9 Cal. App. 5th 119, 133-136, 214 Cal. Rptr. 3d 767 (2d Dist. 2017).

[20]*Id.* at 124-126.

[21]*Id.* at 125.

[22]*Id.* at 126.

[23]*Ibid.*

[24]*Ibid.*

[25]*Ibid.*

[26]*Id.* at 127.

[27]*Id.* at 127-128.

[28]*Id.* at 128.

[29]*Id.* at 133-134.

[30]*Ibid.*

[31]*Ibid.*

[32]*Id.* at 134, citing *Hylton v. Frank E. Rogozienski, Inc.*, 177 Cal. App. 4th 1264, 1271-72, 99 Cal. Rptr. 3d 805 (4th Dist. 2009).

[33]*Id.* at 134, citing *City of Cotati v. Cashman*, 29 Cal. 4th 69, 78, 124 Cal. Rptr. 2d 519, 52 P.3d 695 (2002).

[34]*Id.* at 135.

[35]*Ibid.*

[36]*Talega Maintenance Corporation v. Standard Pacific Corporation*, 225 Cal. App. 4th 722, 170 Cal. Rptr. 3d 453 (4th Dist. 2014).

[37]*Id.* at 725-727.

[38]*Ibid.*

[39]*Ibid.*

[40]*Ibid.*

[41]*Ibid.*

[42]*Ibid.*

[43]*Id.* at 727.

[44]*Id.* at 728-730.

[45]*Ibid.*

[46]*Ibid.*

[47]*Ibid.*

[48]*Id.* at 732.

[49]*Ibid.*, citing *Silk v. Feldman*, 208 Cal. App. 4th 547, 553, 145 Cal. Rptr. 3d 484 (2d Dist. 2012).

[50]*Id.* at 732.

[51]*Id.* at 734.

[52]*Id.* at 735.

[53]*Ulkarim v. Westfield LLC*, 227 Cal. App. 4th 1266, 1270-72, 175 Cal. Rptr. 3d 17 (2d Dist. 2014).

[54]*Ibid.*

[55]*Ibid.*

[56]*Ibid.*

[57]*Id.* at 1271-1272.

[58]*Ibid.*

[59]*Id.* at 1272.

[60]*Id.* at 1275.

[61]*Id.* at 1275-1276.

[62]*Id.* at 1279.

[63]*Id.* at 1282.

[64]*Birkner v. Lam*, 156 Cal. App. 4th 275, 278-280, 67 Cal. Rptr. 3d 190 (1st Dist. 2007).

[65]*Ibid.*

[66]*Ibid.*

[67]*Ibid.*

[68]*Ibid.*

[69]*Id.* at 281.

[70]*Id.* at 282.

[71]*Id.* at 285.

[72]*Ulkarim v. Westfield LLC*, *supra*, 227 Cal. App. 4th at 1275–1282 (finding it exceedingly difficult to reconcile *Birkner*); see also *Moriarty v. Laramar Management Corporation*, 224 Cal. App. 4th 125, 136–138, 168 Cal. Rptr. 3d 461 (1st Dist. 2014).

[73]*Jackson v. Mayweather*, 10 Cal. App. 5th 1240, 217 Cal. Rptr. 3d 234 (2d Dist. 2017).

[74]*Ibid.*

[75]*Ibid.*

[76]*Ibid.*

[77]*Ibid.*

[78]*Ibid.*

[79]*Id.* at *5.

[80]*Id.* at *6.

[81]*Id.* at *6-7. However, the court reversed the trial court's determination that Jackson had established a probability of prevailing on the merits of her claims.

