

1 Drafted by Mary F. Mock  
2 For Attorney for Plaintiff Julia Child  
3 [client's real name protected]

4  
5 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
6 **COUNTY OF SAN LUIS OBISPO**

7  
8 JULIA CHILD, an individual,  
9 Plaintiff,  
10 vs.  
11 SISTER BETTY, an individual,  
12 Defendant

Case No. Redacted  
First Amended Complaint Filed: Redacted  
[Assigned to Hon. Judge Jac Crawford, Dept.  
2]

**PLAINTIFF'S OPPOSITION TO  
DEFENDANT'S SPECIAL MOTION TO  
STRIKE UNDER CODE CIV. PROC. §  
425.16 AND CIVIL CODE § 47**

13  
14 Date: [Redacted]  
15 Time: 10:30 a.m.  
16 Dept.:

Trial Date: None Set

17  
18 Plaintiff Julia Child respectfully submits the following opposition to the special  
19 motion to strike of Defendant Sister Betty.

20 ///  
21 ///  
22 ///  
23 ///  
24 ///  
25 ///

26  
27  
28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Defendant Sister Betty’s special motion to strike Plaintiff’s third and fourth causes of  
4 action for fraud and suppression of facts should be denied. These causes of action do not arise  
5 from acts taken in furtherance of the defendant's constitutional right of petition or free speech in  
6 connection with a public issue because litigation was not anticipated when Defendant made the  
7 relevant misrepresentations.

8 Plaintiff’s fraud claims are not, like a SLAPP suit, “a meritless suit filed primarily to chill  
9 the defendant’s exercise of First Amendment rights.” *Wilcox v. Superior Court* (1994) 27  
10 Cal.App.4th 809, 815, fn. 2, *disapproved on other grounds in Equilon Enterprises v. Consumer*  
11 *Cause, Inc.* (2002) 29 Cal. 4th 53, 68, fn. 5. Rather, far before either party had contemplated  
12 litigation or hired counsel, Defendant made provably false misrepresentations about her intent and  
13 ability to repay a promissory note. These misrepresentations harmed Plaintiff, who has not  
14 received a single payment since the note became due in 2008. Moreover, “[u]ntruthful  
15 speech...has never been protected for its own sake.” *Virginia State Bd. of Pharmacy v. Virginia*  
16 *Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).

17 Thus, because Defendant’s statements do not fall within the purview of the anti-SLAPP  
18 statute and because Defendant’s statements are provably false, the special motion to strike should  
19 be denied.

20 **II. LEGAL STANDARD ON SPECIAL MOTION TO STRIKE UNDER CODE OF**  
21 **CIVIL PROCEDURE § 425.16**

22 Resolution of an anti-SLAPP motion requires the court to engage in a two-step process. First,  
23 the court must decide whether the defendant has made a threshold showing that the challenged cause  
24 of action is one arising from protected activity. That is, the moving defendant must demonstrate that  
25 the act(s) of which plaintiff complains were taken “in furtherance of the [defendant’s] right of  
26 petition or free speech under the United States or California Constitution in connection with a public  
27 issue...,” as defined by the statute. Code Civ. Proc. § 425.16, subd. (b)(1). “The statutory phrase  
28 ‘cause of action ... arising from’ means simply that the defendant’s act underlying the plaintiff’s

1 cause of action must itself have been an act in furtherance of the right of petition or free speech.  
2 [Citation.]” *City of Cotati v. Cashman* (2002) 29 Cal. 4th 69, 78. “[T]he critical point is whether  
3 the plaintiff’s cause of action itself was based on an act in furtherance of the defendant’s right of  
4 petition or free speech.” *Ibid.*

5         Only if the court finds that such a showing has been made, does the Plaintiff then need to  
6 demonstrate a probability of prevailing on the claim. Only a cause of action that satisfies both  
7 prongs of the anti-SLAPP statute – i.e., that arises from protected speech or petitioning and lacks  
8 even minimal merit – is a SLAPP, subject to being stricken under the statute.” *Oasis West Realty,*  
9 *LLC v. Goldman* (2011) 51 Cal. 4th 811, 821 (citing *Navellier v. Sletten* (2002) 29 Cal. 4th 82,  
10 89).

11         Furthermore, even if a cause of action contains allegations of both protected and  
12 unprotected activity, if the allegations referring to arguably protected activity are only incidental to  
13 a cause of action based essentially on nonprotected activity, collateral references to protected  
14 activity should not subject the cause of action to the anti-SLAPP statute. *Martinez v. Metabolife*  
15 *Intl, Inc.* (2003), 113 Cal.App.4th 181,188.

16         Here, the fraud causes of action do not arise from Defendant’s protected speech and  
17 Plaintiff can demonstrate a probability of prevailing on the merits.

18 **III. DEFENDANT CANNOT SHOW THAT THE THIRD AND FOURTH CAUSES OF**  
19 **ACTION FALL WITHIN THE ANTI-SLAPP STATUTE**

20         “[A] defendant in an ordinary private dispute cannot take advantage of the anti-SLAPP  
21 statute simply because the complaint contains some references to speech or petitioning activity by  
22 the defendant.” *Martinez v. Metabolife Intl, Inc., supra*, 113 Cal.App.4th at 188 (citing *Paul v.*  
23 *Friedman* (2002) 95 Cal.App.4th 853, 866.)

24         Here, the bulk of the communications between the parties do not fall under the litigation  
25 privilege because they were conducted in good faith with a view toward mutual goals. And  
26 although communications made in anticipation of litigation can constitute protected activity for  
27 purposes of the anti-SLAPP statute, Plaintiff’s fraud claims are not principally grounded in threats  
28 of litigation, but on the misrepresentations made by Defendant years before any litigation was

1 contemplated. Even if the third and fourth causes of action refer to any communications that were  
2 made in anticipation of litigation, which they do not, such allegations are only incidental to the  
3 fraud claims.

4 A. The Gravamen of Plaintiff's Suit Is Not To Chill Speech

5 "[I]t is the principal thrust or gravamen of the plaintiff's cause of action that determines  
6 whether the anti-SLAPP statute applies [citation]...." *Martinez v. Metabolife Intl., Inc.* (2003) 113  
7 Cal.App.4th 181, 188 (*citing City of Cotati v. Cashman, supra*, 29 Cal. 4th at 79. When the  
8 allegations referring to arguably protected activity are only incidental to a cause of action based  
9 essentially on nonprotected activity, collateral allusions to protected activity should not subject the  
10 cause of action to the anti-SLAPP statute. *Martinez v. Metabolife Intl., Inc., supra*, 113  
11 Cal.App.4th at 188.

12 The principal thrust or gravamen of Plaintiff's fraud and suppression claims is that, starting  
13 in 2008, Defendant made numerous misrepresentations and concealments of material fact relating  
14 to her intent and ability to repay a promissory note. FAC, ¶ 19, 25. When the Note became due in  
15 2008, Plaintiff asked the Defendant whether or not she would be repaying on the Note. Defendant  
16 represented, on numerous occasions, that she intended to repay it, but could not afford to. FAC, ¶  
17 19. These are the false statements that form the basis for Plaintiff's fraud claims. The bulk of these  
18 misrepresentations constituted nonprotected activity, as they were made before either party had  
19 anticipated litigation or even hired counsel. Child Decl., ¶¶ 10-11. Accordingly, the "gravamen" of  
20 Plaintiff's third and fourth causes of action is not to chill defendant's free speech rights, but to  
21 allege valid claims for fraud and suppression of material facts.

22 Throughout her motion to strike, however, Defendant repeatedly mischaracterizes *all* of  
23 the communications dating from 2008 between herself and Plaintiff as "settlement negotiations,"  
24 despite the fact that the parties had not hired attorneys until 2011 and suit was not filed until  
25 December 1, 2011. The exchanges between two sisters trying to work out a new agreement can  
26 scarcely be described as "settlement negotiations" of the type contemplated by the litigation  
27 privilege. Thus, as the gravamen of Plaintiff's fraud causes of action are not based on Plaintiff's  
28 act(s) in furtherance of a right of petition or free speech, the motion to strike must be denied.

1           B.       The Pre-Suit Communications Alleged In The Fraud Causes of Action Do Not Fall  
2                               Within the Litigation Privilege

3           Defendant argues that the fraud claims arise from protected activity because the  
4 “settlement” or negotiation discussions between the parties and, at times, their respective counsel,  
5 were privileged pursuant to Civil Code § 47 (the litigation privilege). It is true that, at some point  
6 in 2011, the parties retained counsel to help them negotiate a new agreement to secure the  
7 repayment of the note. Child Decl., ¶ \_\_. However, neither the litigation privilege nor the anti-  
8 SLAPP statute applies to statements made during contract negotiations where “the overall tone of  
9 the communications is one of persuasion and a desire to cooperate to achieve mutual goals.”  
10 *Haneline Pac. Properties, LLC v. May* (2008) 167 Cal.App.4th 311, 319.

11           In *Haneline*, one co-owner of leased property sent letters and e-mails to the other,  
12 advocating termination of the lease and allegedly urging the co-owners not to execute a contract to  
13 sell his share of the property. *Id.* at 315-316. The court held that because the overall tone of the  
14 communications was one of persuasion and a desire to cooperate to achieve mutual goals, they did  
15 not fall within the litigation privilege, even though the communications also mentioned “pursuing  
16 remedies,” such as litigation. *Id.* at 319.

17           The court also observed that while the “spectre of litigation ‘loomed’ over the entire course  
18 of the parties’ communications” the same could be said of any nearly high stakes negotiation.” *Id.*  
19 at 320. “To suggest that nearly any attempt at negotiation is covered by the privilege, especially  
20 when attorneys are involved, is unduly overbroad.” *Id.* Thus, even where parties allude to legal  
21 remedies or employ counsel in the course of good faith negotiations, those communications are  
22 not covered by the litigation privilege and therefore not subject to the anti-SLAPP statute.

23           Here, the parties endeavored in good faith to negotiate a new agreement for Defendant to  
24 repay the debt. The correspondence cited by the Defendant in her motion to strike includes the  
25 following statements:

26                               “There should be no doubt that both Julia and Sister are sincerely  
27                               committed to taking every possible and necessary step to resolve  
28                               this matter. It is also clear that it in both of their best interests that

1 any resolution be done with due consideration for their financial  
2 status especially in view of the current real estate market.”

3 Ex. 3 to Declaration of Opposing Counsel in Support of Defendant’s Special Motion to Strike  
4 [Letter dated October 7, 2011 from Plaintiff’s counsel to Defendant’s counsel].

5 “Of course, the above proposal is very general and specific terms  
6 need to be discussed further. Once you have had a chance to review  
7 this with Ms. Betty, we will need to schedule a time to work out the  
8 details.”

9 Ex. 3 to Declaration of Opposing Counsel in Support of Defendant’s Special Motion to Strike  
10 [Letter dated October 7, 2011 from Plaintiff’s counsel to Defendant’s counsel]. Other  
11 correspondence between the Plaintiff and Defendant also indicates that the overall tone of their  
12 mutual efforts to come up with a new agreement to secure repayment on the Note did not fall  
13 within the litigation privilege:

14 “I understand that times are tough, and I’m willing to work with you  
15 in order to get this debt paid off with reasonable terms.... ”

16 Ex. A to Child Decl., ¶ 13 [Email dated June 19, 2011 from Plaintiff to Defendant].

17 “Here is another draft of a secured Promissory Note and Deed of  
18 Trust for your review. Please let me know as soon as possible if this  
19 is agreeable. ... I just want to settle this whole thing without  
20 attorneys or court as I know you do too.”

21 Ex. B to Child Decl., ¶ 14 [Email dated June 24, 2011 from Plaintiff to Defendant].

22 “I am willing to agree to the 15 year terms, however ... I propose a  
23 minimum of 4% interest and this needs to be an amortized schedule.  
24 ... Please let me know you would like to proceed.”

25 Ex. C to Child Decl., ¶ 15 [Email dated June 25, 2011 from Plaintiff to Defendant].

26 This additional correspondence shows that here, unlike in *Haneline*, the spectre of  
27 litigation did not loom over the entire course of their communications dating from when the note  
28 became due in 2008. It was only in 2011, after good faith negotiations had proved fruitless, and

1 the statute of limitations had nearly run on Plaintiff's action, that Plaintiff began to contemplate  
2 litigation. Moreover, where the correspondence does allusions to litigation or legal remedies, those  
3 allusions are merely collateral to the primary goal of negotiating a new repayment agreement.  
4 Thus, because the vast majority of the communications between the parties in negotiating for a  
5 new agreement to secure Defendant's repayment were conducted with an overall tone of  
6 persuasion and a desire to cooperate, these communications do not fall within the litigation  
7 privilege. On this basis alone, Defendant's motion to strike should also be denied.

8 **IV. EVEN IF, ASSUMING ARGUENDO, THAT THE THIRD AND FOURTH CAUSES**  
9 **OF ACTION CONTAIN ALLEGATIONS OF PROTECTED ACTIVITY, THEY**  
10 **ARE NOT SUBJECT TO BEING STRICKEN UNDER THE ANTI-SLAPP**  
11 **STATUTE**

12 The third and fourth causes of action for fraud and suppression of facts do not, on their  
13 face, allege protected activity. But even if the claims were found to allege a mixture of protected  
14 and unprotected activity, they should not be stricken because the protected activity is merely  
15 incidental to the unprotected activity and because Plaintiff can show a probability of prevailing on  
16 any part of her fraud claims.

17 A. Any Allegations Of Arguably Protected Activity In The Third And Fourth Causes  
18 of Action Are Merely Incidental To The Unprotected Activity

19 Where a cause of action is based on both protected activity and unprotected activity, it is  
20 subject to section 425.16 "unless the protected conduct is 'merely incidental' to the unprotected  
21 conduct." *Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184  
22 Cal.App.4th 1539, 1551; *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton*  
23 *LLP* (2005) 133 Cal.App.4th 658, 672–673.

24 Here, the communications between the parties and/or their respective counsel that could be  
25 construed to contain threats of litigation or statements made in anticipation of litigation were only  
26 incidental to Plaintiff's fraud claims. The few letters or e-mails that alluded to litigation followed a  
27 nearly three-year course of communications between the parties, during most of which time  
28 neither party had hired counsel or contemplated litigation. That Plaintiff's unsuccessful attempt to

1 secure payment and negotiate a new agreement ultimately resulted in some threats of litigation is  
2 merely incidental to the principal allegations in the third and fourth causes of action of  
3 Defendant’s false statements regarding her intent and ability to pay. Accordingly, because any  
4 allegations of protected activity that could be gleaned in the third and fourth causes of action are  
5 merely incidental to allegations of nonprotected activity, the claims should not be struck under the  
6 anti-SLAPP statute.

7 B. A Cause Of Action Containing A Mix Of Unprotected And Protected Activity  
8 Should Not Be Stricken If Plaintiff Can Show A Probability Of Prevailing On Any  
9 Part Of Her Claim

10 In *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal. 4th 811, 821, the California  
11 Supreme Court reiterated that if a plaintiff “can show a probability of prevailing on any part of its  
12 claim, the cause of action is not meritless” and will not be stricken under the anti-SLAPP statute.  
13 “[O]nce a plaintiff shows a probability of prevailing on any part of its claim, the plaintiff has  
14 established that its cause of action has some merit and the entire cause of action stands.” *Id.* (citing  
15 *Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 106.)

16 The court in *Mann* stated:

17 “Where a cause of action refers to both protected and unprotected  
18 activity and a plaintiff can show a probability of prevailing on *any*  
19 *part of its claim*, the cause of action is not meritless and will not be  
20 subject to the anti-SLAPP procedure. . . . Rather, once a plaintiff  
21 shows a probability of prevailing on any part of its claim, the  
22 plaintiff *has established* that its cause of action has some merit and  
23 the entire cause of action stands. Thus, a court need not engage in  
the time-consuming task of determining whether the plaintiff can  
substantiate all theories presented within a single cause of action and  
need not parse the cause of action so as to leave only those portions  
it has determined have merit.”

24 *Mann, supra*, 120 Cal.App.4th at 106. As the Plaintiff can establish a probability of prevailing on  
25 her fraud claims, Defendant’s motion must be denied.

26 ///

27 ///

28



1 C. Plaintiff Can Establish A Probability of Prevailing On The Merits Of Her Fraud  
2 Causes of Action

3 i. Plaintiff Can Establish More Than The Required “Minimal Merit”

4 Even if Defendant could show that the fraud claims arise out of protected activity, its  
5 motion to strike would still fail because it is probable that Plaintiff can prevail on these claims.  
6 Under the anti-SLAPP statute, even where a lawsuit arises out of protected activity, a motion to  
7 strike still may not be granted if “the plaintiff has established that there is a probability that [she]  
8 will prevail on the claim.” Code Civ. Proc. § 425.16(b)(1). The question is whether the plaintiff  
9 can put forth evidence “that, if believed by the trier of fact, [is] sufficient to support a judgment in  
10 plaintiff’s favor.” *Zamos v. Stroud* (2004) 32 Cal. 4th 958, 970 (affirming denial of motion to  
11 strike where plaintiff put forth evidence that, if believed by a fact-finder, would be sufficient to  
12 render judgment in their favor.) In making that determination, the Court can consider the factual  
13 declarations submitted, but must not weigh the credibility or probative strength of competing  
14 evidence. *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal. 4th 260, 291. It is “the court’s  
15 responsibility to accept as true the evidence favorable to the plaintiff.” *Id.* (quoting *HMS Capital,*  
16 *Inc. v. Lawyers Title Co.*, (2004) 118 Cal.App.4th 204, 212.

17 In short, a plaintiff’s burden of establishing a probability of prevailing is not high: courts  
18 accept as true all evidence favoring the plaintiff, and consider the defendant’s evidence only to  
19 ascertain whether it defeats the plaintiff’s claim as a matter of law. *Overstock.com, Inc. v.*  
20 *Gradient Analytics, Inc.* (2007) 151 Cal.App.4th 688, 699-700. Only a cause of action lacking  
21 “even minimal merit” constitutes a SLAPP. *Navellier v. Sletten, supra*, 29 Cal. 4th at 89.

22 Here, Plaintiff’s Declaration contains evidence of the falsity of Defendant’s representations  
23 of her intent to repay the note, her inability to repay the Note, and her suppression of material facts  
24 regarding her intent and ability to repay the Note. For example, after the Note became due in 2008,  
25 Sister moved into the Property, applied for a new mortgage loan and extensively renovated the  
26 Property without telling Plaintiff. She continued to tell Plaintiff that she did not have any money  
27 and did not pay any amount on the Note. Child Decl., ¶¶ 9-12. In October 2011, Plaintiff  
28 discovered that Sister had actually taken out a new mortgage loan on the Property for over

1 \$170,000. Child Decl., ¶ 17. Even after receiving those loan funds, Sister had represented to  
2 Plaintiff that she had no money to repay the Note. Child Decl., ¶ 17. Although Plaintiff believed,  
3 for the longest time, that her sister Sister intended to repay her, she eventually came to suspect that  
4 Sister was deliberately misrepresenting her intent to pay and stalling Plaintiff's efforts to obtain  
5 repayment. Child Decl., ¶¶ 10-11, 16. Thus, Plaintiff has shown that her fraud claims in the third  
6 and fourth causes of action have more than the required "minimal merit."

7 ii. Plaintiff Can Establish Justifiable Reliance and Damages Under the  
8 Third and Fourth Causes of Action

9 In her opposition, Defendant argues Plaintiff did not justifiably rely on Defendant's  
10 representations and could not have suffered damages from the alleged fraud or suppression of  
11 facts. Opposition, pp. 13-14. However, whether reliance is justified is a question for the trier of  
12 fact. *Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498, 503. Moreover, in determining  
13 justifiable reliance, a plaintiff is not held to the higher standard of precaution of a hypothetical,  
14 reasonable person. *Blankenheim v. E.F. Hutton, Co., Inc.* (1990) 217 Cal.App.3d 1463, 1474. In  
15 any event, it is entirely probable that a trier of fact would find that Plaintiff reasonably relied on  
16 Defendant's representations because they were sisters.

17 Second, Defendant cites no authority for the proposition that a Plaintiff opposing an anti-  
18 SLAPP motion must prove her damages at the pleading stage. Defendant also mis-reads the causes  
19 of action. Nowhere does Plaintiff plead that her damages are the delayed pursuit of the debt.  
20 Rather, the damages are, among other things, the delayed payment itself. Under the Note, \$60,000  
21 of her inheritance was due to Plaintiff by November 8, 2008. Nearly four years later, Plaintiff has  
22 still not received any repayment. If she had received the money when it was due, Plaintiff could  
23 have invested or used the money in any number of ways that would have benefitted her.

24 As Plaintiff's fraud claims in the third and fourth causes of action have more than the  
25 required "minimal merit," the Court must deny Defendant's motion to strike them.

26 V. **IF THE MOTION IS DENIED, PLAINTIFF IS ENTITLED TO REASONABLE**  
27 **ATTORNEYS' FEES**

28 A plaintiff prevailing on an anti-SLAPP motion that is frivolous or solely intended to cause

1 unnecessary delay is entitled to reasonable attorney fees under *Code of Civil Procedure* § 128.5.  
2 *Code Civ. Proc.* § 425.16(c); *Ketchum v. Moses* (2001) 24 Cal. 4th 1122, 1131. There is no merit  
3 to Defendant's anti-SLAPP motion because the third and fourth causes of action for fraud and  
4 suppression of facts are clearly not based on conduct taken in furtherance of Defendant's free  
5 speech or petition rights, as fraud is not protected for its own sake. Furthermore, the gravamen of  
6 the third and fourth causes of action are not based on any collateral allusions to litigation made by  
7 the Defendant, but on her misrepresentations that she intended to repay the Note, but could not  
8 afford to, even after she undertook expensive renovations and received funds from a new  
9 mortgage loan.

10 Plaintiff's counsel charges \$\_\_\_ per hour and spent approximately 15 hours preparing the  
11 opposition and will spend about 2 hours attending the hearing on the special motion to strike.  
12 Thus, if the motion is denied, Plaintiff is entitled to total attorney's fees award of \$\_\_\_\_\_.

13 **VI. CONCLUSION**

14 For the foregoing reasons, Plaintiff Julia Child respectfully requests that the Court deny  
15 Defendant's Special Motion to Strike.

16  
17 DATED: January 17, 2012

18  
19 By: \_\_\_\_\_

20 Plaintiff's Attorney  
21 Attorney for Plaintiff Julia Child  
22  
23  
24  
25  
26  
27  
28