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9

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF STANISLAUS

12 JANICE KEATING,
13 Plaintiff,
14 v.
15 MODESTO IRRIGATION DISTRICT,
16 ROBERT FROBOSE, and DOES 1 to
100, inclusive,
17 Defendants.
18

Case No.: CV-24-003639
[ASSIGNED FOR ALL PURPOSES TO THE
HONORABLE JOHN R. MAYNE, DEPT. 21]
Complaint Filed: May 14, 2024
**DEFENDANTS MODESTO IRRIGATION
DISTRICT AND ROBERT FROBOSE'S
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF SPECIAL
MOTION TO STRIKE PLAINTIFF'S
COMPLAINT**
Date: August 15, 2024
Time: 8:30 a.m.
Dept.: 21
*[Filed concurrently with Defendant's Notice of
Special Motion to Strike Plaintiff's Complaint;
Declaration of Robert Frobose in Support Thereof;
Request for Judicial Notice; [Proposed] Order]*
**(*Exempt from filing fees pursuant to Gov.
Code, § 6103.)**

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The anti-SLAPP statute was enacted because of “a disturbing increase in lawsuits brought primarily to chill the valid exercise of constitutional rights of freedom of speech and petition for the redress of grievances.” (Code of Civ. Proc., § 425.16(a).) The Legislature declared that it “is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled...To this end, this section shall be construed broadly.” (Code of Civ. Proc., § 425.16(a); *Briggs v. Eden Council for Hope and Opportunity* (1999) 19 Cal.4th 1106, 1119.)

Plaintiff Janice Keating (“Keating”) and Defendant Robert Frobose (“Frobose”) are elected Board members of the Modesto Irrigation District (“MID”). The gravamen of Keating’s causes of action against Frobose arise from speech or conduct during Board of Directors (“Board”) meetings or about policy matters before MID. Keating’s causes of action are the quintessential example of the type of lawsuit that the Legislature has acted to forestall through the anti-SLAPP statute. Because the thrust of Keating’s causes of action relate to statements allegedly made and alleged conduct during Board meetings and/or about the business of the Board, all of her causes of action arise from protected activity, and thus must be stricken. Plus, Keating cannot demonstrate a probability of prevailing on her claims. Thus, the Court must grant this motion and strike Keating’s entire Complaint.

II. STATEMENT OF ALLEGED FACTS

Keating and Frobose were elected to the MID Board in November 2022. (Complaint, ¶ 6.) On January 17, 2023, Keating, Frobose, and other Board members attended a special meeting of the Board to inspect the LaGrange Dam. (Complaint, ¶ 9; Frobose Decl. at ¶ 2,) Keating alleged that Frobose, on three occasions during the LaGrange Dam inspection, stood near Keating and discussed the hiring of special counsel for the MID Board. (Complaint, ¶ 9; Frobose Decl. at ¶¶ 2, 7.)

After Keating left the LaGrange Dam, she alleged Frobose continued to discuss the hiring

1 of Ronda Lucas as special counsel for the MID Board with her.¹ (Complaint, ¶ 10, Frobose Decl.
2 at ¶¶ 7–8.) On January 18, 2023, Keating alleged she met with MID former GM.
3 (Complaint, ¶11.) Keating alleged she told the GM that Frobose was “intimidat[ing]” her at the
4 La Grange Dam Board meeting to hire Ronda Lucas as special counsel. (*Id.*)

5 On January 20, 2023, Keating received a public meeting Board agenda regarding the
6 hiring of special counsel. (Complaint, ¶¶ 12-13.) On January 24, 2023, the MID Board voted to
7 hire Ronda Lucas as special counsel, and Keating was the only Board member to vote no. (*Id.*)
8 During the Board meeting, Keating alleged Frobose “chastised” her for her questions regarding
9 MID’s hiring of special counsel. (*Id.*) At one point during the Board meeting, Frobose allegedly
10 told Keating “You need to shut up.” (*Id.*)

11 In subsequent Board meetings, Keating alleged Frobose continued to be “rude,
12 disrespectful, and combative towards her.” (Complaint, ¶14.) Frobose would allegedly “snort,”
13 interrupt Keating, and “shake his head as if she was speaking nonsense.” (*Id.*) Once, during a
14 Board meeting, Frobose allegedly said to Keating, “you don’t know what you’re talking about.”
15 (*Id.*) Once, when Frobose walked past Keating during a public Board meeting, Frobose allegedly
16 said to Keating, “I would comment on your dress, but I have taken the required sexual harassment
17 training.” (Complaint, ¶ 15; Frobose Decl. at ¶ 6.) Frobose allegedly attacked Keating’s positions
18 on virtually every issue being discussed at MID Board meetings. (Complaint, ¶ 18.)

19 **III. STANDARD OF REVIEW FOR ANTI-SLAPP MOTIONS**

20 The anti-SLAPP statute provides a two-step analysis: “A cause of action against a person²
21 arising from any act of that person in furtherance of the person's right of petition or free speech
22 under the United States or California Constitution in connection with a public issue shall be
23 subject to a special motion to strike, unless the court determines that the plaintiff has established
24 that there is a probability that the plaintiff will prevail on the claim.” (Code Civ. Proc.

25
26 ¹ Keating was so engrossed in this issue of public concern before MID that she was motivated to
27 write an editorial to the Modesto Bee about the hiring of special counsel by MID. (*See* District’s
Request for Judicial Notice, Exhibit 1.)

28 ² The word “person” as used in the statute includes government entities. (*Bradbury v. Superior
Court* (1996) 49 Cal.App.4th 1108, 1114; Code of Civil Proc., § 425.16(b).)

1 §425.16(b)(1).)

2 The plaintiff's burden of proof is the same burden governing a motion for summary
3 judgment. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 714; *Varian Medical Systems, Inc. v. Delfino*
4 (2005) 35 Cal.4th 180, 192.) The Supreme Court explained that a plaintiff responding to an anti-
5 SLAPP motion must state and substantiate causes of action by demonstrating that they are both
6 legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable
7 judgment. (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.) In deciding the
8 question of potential merit, the trial court considers the pleadings and evidentiary submissions of
9 both the plaintiff and the defendant, and must grant the motion if the defendant's anti-SLAPP
10 motion "defeats the plaintiff's attempt to establish evidentiary support" for the causes of action.
11 (*Wilson*, 28 Cal.4th 811 at 821.)

12 **A. STEP ONE: MID AND FROBOSE MUST SHOW THAT KEATING'S**
13 **CAUSES OF ACTION ARISE FROM PROTECTED ACTIVITY**

14 In ruling on an anti-SLAPP motion, the Court engages in a two-step process. First, the
15 Court must decide whether the defendant has made a showing that the principal thrust or
16 "gravamen"³ of the plaintiff's causes of action "arise from"⁴ protected activity. (Code of Civ.
17 Proc., § 425.16(b); *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76; *Martinez v. Metabolife*
18 *Internat., Inc.* (2003) 113 Cal. App. 4th 181, 188.) At this first step, MID and Frobose "bear the
19 burden of identifying all allegations of protected activity, and the claims for relief [causes of
20 action] supported by them." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 396.) In *Navellier*, the
21 Supreme Court cautioned that the "anti-SLAPP statute's definitional focus is *not* the form of the
22 plaintiff's cause of action but, rather, the defendant's activity that gives rise to [his] asserted
23 liability—and whether that activity constitutes protected speech..." (*Navellier, supra*, 29 Cal.4th

24 ³ "Gravamen" of the plaintiff's claims means the material part of the case. (*Renewable Resources*
25 *Coalition, Inc. v. Pebble Mines Corp.* (2013) 218 Cal.App. 4th 384, 396; *Wallace v. McCubbin*
26 (2011) 196 Cal. App. 4th 1169, 1190.)

27 ⁴ "Arises from" protected activity means that a defendant's act(s) underlying the plaintiff's claims
28 were an act(s) in furtherance of the right of petition or free speech. (*ComputerXpress, Inc. v.*
Jackson, supra, 93 Cal.App.4th at 1001.) In other words, whether the plaintiff's claims were
based on acts in furtherance of the defendant's right of petition or free speech. (*Equilon, supra*, 29
Cal. 4th at pp. 67-68; see also *Briggs, supra*, 19 Cal. 4th at p. 1114.)

1 at p. 92.) Also, the moving party need not show that the plaintiff's lawsuit was actually intended
2 to chill protected activity, nor is the moving party required to show the lawsuit actually chilled
3 protected activity. (*Equilon, supra*, 29 Cal.4th at p. 58, 67; *Cotati, supra*, 29 Cal.4th at p. 75)

4 According to the Supreme Court, a defendant meets its burden on the first step of the anti-
5 SLAPP analysis simply by demonstrating that the act(s) underlying the plaintiff's causes of action
6 fits one or more of the categories spelled out in section 425.16, subdivision (e). (*City of Cotati v.*
7 *Cashman*, (2002) 29 Cal. 4th 69, 77–78.) Conduct protected by section 425.16, subdivision (e)
8 includes: “(1) *any* written or *oral statement* or writing made before a *legislative*, executive, or
9 judicial *proceeding, or any other official proceeding authorized by law*; (2) *any* written or *oral*
10 *statement* or writing *made in connection with an issue under consideration or review by a*
11 *legislative*, executive or judicial *body*, or any other official proceeding authorized by law; (3) *any*
12 written or *oral statement* or writing *made in a place open to the public or a public forum in*
13 *connection with an issue of public interest*; (4) *or any other conduct of in furtherance of the*
14 *exercise of the constitutional right of petition or the constitutional right of free speech in*
15 *connection with a public issue of public interest.*” (Code of Civil Proc., § 425.16(e) (emphasis
16 added).) “When relief is sought based on allegations of both protected and unprotected activity,
17 the unprotected activity is disregarded at this stage.”⁵ (*Baral, supra*, 1 Cal. 5th at p. 396.) In
18 other words, not all of the alleged activity need be protected activity to satisfy step one.

19 **B. STEP TWO: KEATING MUST SHOW A PROBABILITY OF SUCCESS**
20 **ON HER CAUSES OF ACTION**

21 Next, the burden shifts to the plaintiff to demonstrate through admissible evidence a
22 probability that she will prevail on her causes of action. (*Equilon, supra*, 29 Cal. 4th at p. 67;
23 *Navellier v. Sletten* (2002) 29 Cal.4th 82, 88; Code Civ. Proc., § 425.16(b)(1).)) At this second
24 step, “the burden shifts to the plaintiff to demonstrate that each challenged claim based on
25 protected activity is legally sufficient and factually substantiated.”⁶ The court...must determine

26 ⁵ Keating’s allegation that one time Frobose walked past Keating and said, “I would comment on
27 your dress, but I have taken the required sexual harassment training,” is the only fact pleaded
28 arguably based on unprotected activity, and according to the Supreme Court, this allegation must
be disregarded at this stage of the anti-SLAPP analysis. (Complaint, ¶ 15.)

⁶ “When the Legislature declared that a cause of action arising from protected activity be stricken

1 whether the plaintiff's showing...would be sufficient to sustain a favorable judgment. If not, the
2 claim [cause of action] is stricken. Allegations of protected activity supporting the stricken claim
3 are eliminated from the complaint, unless they also support a distinct claim on which the plaintiff
4 has shown a probability of prevailing." (*Baral, supra*, 1 Cal. 5th at p. 396.)

5 The plaintiff "must demonstrate that the complaint is both legally sufficient and supported
6 by a sufficient prima facie showing of facts to *sustain a favorable judgment* if the evidence
7 submitted by the plaintiff is credited." (*Cross v. Cooper* (2011) 197 Cal.App.4th 357, 385;
8 *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811 , 821. (emphasis added).) Keating
9 bears the burden of submitting legal *and* evidentiary support for any such argument, and will not
10 be able to do so. (*Cross*, 197 Cal.App.4th at 385.)

11 **IV. ARGUMENT**

12 **A. KEATING'S CAUSES OF ACTION AGAINST FROBOSE ARISE FROM** 13 **PROTECTED ACTIVITY UNDER THE ANTI-SLAPP STATUTE**

14 In *Navellier*, the Supreme Court stressed that the focus on the first step of the anti-SLAPP
15 analysis is the defendant's *activity* that gives rise to alleged liability and whether that activity
16 constitutes protected speech or protected activity. (*Navellier, supra*, 29 Cal.4th at p. 92.)

17 Frobose's statements, which constitute the gravamen or universe of alleged facts supporting
18 Keating's causes of action, all arise from protected activity in his capacity as an elected Board
19 member of a legislative body, i.e., the Board of Directors overseeing MID, a public entity. The
20 statements attributed to Frobose by Keating relate to the activities of MID Board members, to
21 policy matters within the jurisdiction of the MID Board, and/or to statements made during
22 legislative meetings.

23
24 unless the plaintiff establishes a probability of prevailing, it had in mind allegations of protected
25 activity that are asserted as grounds for relief. The targeted claim must amount to a cause of
26 action in the sense that it is alleged to justify a remedy. By referring to a cause of action against a
27 person arising from any act of that person in furtherance of the protected rights of petition and
28 speech, the Legislature indicated that particular alleged acts giving rise to a claim for relief may
be the object of an anti-SLAPP motion. Thus, in cases involving allegations of both protected and
unprotected activity, the plaintiff is required to establish a probability of prevailing on any claim
for relief based on allegations of protected activity. Unless the plaintiff can do so, the claim and
its corresponding allegations must be stricken." (*Baral, supra*, 1 Cal.5th at 395.)

1 The following facts pleaded by Keating *all* constitute protected activity under Code of
2 Civil Procedure section 425.16, subdivision (e), and are the gravamen of each of her causes of
3 action⁷:

- 4 • Keating, a woman, and Frobose were elected to the MID Board in November 2022.
5 (Complaint, ¶ 6.)
- 6 • On January 17, 2023, Keating, Frobose, and other Board members attended a Board
7 meeting to inspect the LaGrange Dam. (Complaint, ¶ 9.) The dam inspection was
8 noticed as a special Board meeting under the Brown Act. (Frobose Decl. at ¶ 2, Exh.
9 A.)
- 10 • Keating alleged that Frobose, on three occasions during the January 17, 2023
11 LaGrange Dam Board Meeting, stood near Keating and discussed the hiring of special
12 counsel for the MID Board. (Complaint, ¶ 9; Frobose Decl. at ¶¶ 2, 7.)
- 13 • After Keating left the LaGrange Dam, Frobose continued to discuss the hiring of
14 Ronda Lucas as special counsel for the MID Board with her. (Complaint, ¶ 10;
15 Frobose Decl. at ¶ 7.)
- 16 • On January 18, 2023, Keating met with MID's then-General Manager, Ed Franciosa.
17 (Complaint, ¶ 11.) Keating told Franciosa that Frobose was "intimidat[ing]" her
18 during the LaGrange Dam inspection to hire Ronda Lucas as special counsel. (*Id.*)
- 19 • On January 20, 2023, Keating received a public meeting agenda regarding MID's
20 hiring of special counsel. (Complaint, ¶ 12.)
- 21 • On January 24, 2023, the MID Board voted to hire special counsel. (Complaint, ¶ 13.)
22 Keating was the only Board member to vote against the retention of Ronda Lucas as
23 special counsel. (*Id.*) During the public Board meeting, Frobose "chastised" Keating
24 about her questions regarding MID's hiring of special counsel. (*Id.*) At one point
25 during the public Board meeting, Frobose told Keating "You need to shut up." (*Id.*)
- 26 • In subsequent Board meetings, Frobose continued to be "rude, disrespectful, and
27 combative towards her." (Complaint, ¶ 14.) During Board meetings, Frobose would
28 "snort," interrupt Keating, and "shake his head as if she was speaking nonsense." (*Id.*)
Once, during a Board meeting, Frobose said to Keating, "you don't know what you're
talking about." (*Id.*)
- Frobose attacked Keating's positions on virtually every issue being discussed at MID
Board meetings. (Complaint, ¶ 18.)

23 These allegations, which form the basis for *all* of Keating's causes of action, are all: (1)
24 oral statements made before a legislative proceeding; and/or (2) oral statements made in
25 connection with an issue under consideration or review by a legislative body; and/or (3) oral
26 statements made in a place open to the public or a public forum in connection with an issue of
27

28 ⁷ Each of her causes of action incorporate by reference all of these facts arising from protected
activity. (Complaint ¶¶ 23, 29, 33, 38, 41.)

1 public interest; and/or (4) other conduct of in furtherance of the exercise of free speech in
2 connection with a public issue of public interest. (Code of Civ. Proc., § 425.16, subd. (e)(1)-(4).)

3 These circumstances alone make Frobose's statements protected activity under the anti-
4 SLAPP statute, and satisfy MID and Frobose's step-one burden. (*Equilon Enterprises v.*
5 *Consumer Cause* (2002) 29 Cal.4th 53, 67; *Moraga-Orinda Fire Protection Dist. v. Weir* (2004)
6 115 Cal.App.4th 77, 83.) According to the Supreme Court, a defendant has met the showing
7 required in the first step of the anti-SLAPP analysis by showing that the acts underlying the
8 plaintiff's causes of action fits *one* of the categories spelled out in section 425.16, subdivision (e).
9 (*City of Cotati v. Cashman* (2002) 29 Cal. 4th 69, 77-78.) Here, Frobose's comments and
10 conduct fall into *all four* protected activities spelled out in the black-letter law in section
11 425.16(e). Keating's allegations about Frobose's statements are of the kind that the anti-SLAPP
12 statute was designed to protect. Keating and Frobose are both elected officials, and the gravamen
13 of Keating's causes of action are statements Frobose has made to her or about her at public MID
14 Board meetings. Indeed, Frobose's statements and conduct, no matter how subjectively unsavory
15 to Keating, are protected because they were statements made during MID Board meetings, or in
16 connection with issues before the Board. (Code of Civ. Proc., § 425.16(e)(1)-(4).) Thus MID and
17 Frobose have met their burden on the first step of the anti-SLAPP analysis.

18 **B. KEATING CANNOT MEET HER BURDEN TO SHOW SHE IS LIKELY**
19 **TO PREVAIL ON HER CAUSES OF ACTION, AND THUS, THIS**
20 **MOTION MUST BE GRANTED**

21 Since MID and Frobose have satisfied step one, the burden shifts to Keating to prove a
22 likelihood of prevailing on her causes of action. A plaintiff's burden goes beyond establishing
23 that the causes of action are legally sufficient; a plaintiff must substantiate each element of the
24 subject claims through competent, admissible evidence. (*DuPont v. Superior Court* (2000) 78
25 Cal.App.4th 562, 568.) This burden is "similar to the standard applied to evidentiary showings in
26 summary judgment motions." (*Kyle v. Carmon* (1999) 71 Cal. App. 4th 901, 908.) This showing
27 must be made by "competent admissible evidence within the personal knowledge of the declarant,
28 with reference to the familiar standard applied to evidentiary showings in summary judgment
motions. (§ 437c, subds. (b) and (d))." (*Ludwig v. Superior Court* (1995) 37 Cal. App. 4th 8, 15-

16.) As such, Keating must demonstrate that her claims are both legally sufficient and supported by facts that are sufficient to sustain a favorable ruling on a summary judgment motion. (*Peregrine, supra*, 133 Cal.App.4th at 675; *Navellier v. Sletten* (2002) 29 Cal.4th 82, 93; Code of Civil. Proc., § 425.16(b)(1); *Taus v. Loftus* (2007) 40 Cal.4th 683, 713–14.) Keating cannot demonstrate a probability of prevailing, so this anti-SLAPP motion must be granted. (*Beilenson v. Superior Court* (1996) 44 Cal.App.4th 944, 953.)

1. **Frobose’s Statements, Even if Rude or Uncouth, Are Protected by Legislative Immunity**

The first reason Keating cannot demonstrate a probability of prevailing is that legislators, like Frobose and Keating, are afforded absolute immunity for their statements. A privileged statement is one made in any legislative proceeding, such as a Board of Director meeting for a public entity. (Civ. Code, § 47(b).) The privilege provided for by Civ. Code § 47[b] has been given broad application.

The legislative privilege⁸ has been held to be absolute, even where the statements made are rude or uncouth. (*Scott v. McDonnell Douglas Corp.* (1974) 37 Cal. App. 3d 277, 285.) In *Scott*, for example, three councilmembers maliciously and willfully conspired to defame the City Manager because he was perceived to be an impediment to a zoning ordinance change. (*Id.* at 281–82.) During a city council meeting, the three councilmembers distributed a letter to the chief of police, other members of council, the city clerk, and to the plaintiff, which charged the plaintiff (the City Manager) with a lack of moral and ethical character, describing him as a “dictator” who “impose[d] totalitarian power maintained only through the use of force.” (*Id.* at 283.) The letter stated that for “as long as I serve this city as a City Councilman I will not be horse-whipped or hog-tied by you.” (*Id.*) An additional letter, which was read at a subsequent city council meeting, portrayed the plaintiff as a liar. (*Id.* at 284.) In *Scott*, the court held that the statements made and distributed during the city council meetings were privileged and protected by Civil Code section

⁸ “The essential rights and privileges of a legislative body and/or its individual members to be free from the threat of civil suits arising out of discussions in legislative proceedings derives in the main from the English Bill of Rights granted by William and Mary in 1688. In California, this freedom from liability for statements made before a legislative body is codified in section 47 of the Civil Code.” (*Scott, supra*, 37 Cal. App. 3d at 285.)

1 47. (*Id.* at 288.) The court maintained that the existence of malice on the part of the declarant
2 does not defeat the privilege if it is shown that the statement bears some connection to the work
3 of the legislative body. (*Id.* at 285.) The general immunity afforded legislators extends to all that
4 is spoken or done in the course of legislative proceedings. (*Id.* at 288.) However, although the
5 application of the privilege requires the demonstration of some connection with the proceedings,
6 there is no requirement of relevancy, materiality, or pertinence (in their technical sense). (*Id.* at
7 285.) It is the context or setting itself that makes the issue a public issue; all that matters is that
8 the activity take place in an official proceeding *or* be made in connection with an issue being
9 reviewed by an official proceeding. (*Braun v. Chronicle Publishing Co.* (1997) 52 Cal. App. 4th
10 1036, 1047.)

11 Moreover, the legislative privilege does not require that the statements made by a member
12 of a legislative body be directed toward achieving the object of legislation. (*Scott, supra*, 37 Cal.
13 App. 3d. at 288.) Rather, the rule is well settled that the general immunity afforded legislators
14 extends to all that is spoken or done during legislative proceedings. (*Id.*, citing *Powell v.*
15 *McCormack*, 395 U.S. 486, 502.) The rationale for the extended coverage of the legislative
16 privilege is that such immunity is essential because freedom of speech is intrinsic to the idea of a
17 deliberative assembly. (*Id.* at 288.) “While this rule has been subject to some palpable abuses, the
18 benefits far outweigh a narrow interpretation of Civil Code section 47, even though it
19 countenances vehement, caustic, and at times vigorous attacks on [and between] government
20 officials.” (*Id.*)

21 Frobese’s statements and conduct, no matter how subjectively unsavory to Keating, are
22 protected by the legislative privilege because they were statements made during MID Board
23 meetings and/or in connection with issues before the Board. (Civ. Code, § 47(b); *Scott, supra*, 37
24 Cal. App. 3d 277; *Braun, supra*, 52 Cal. App. 4th 1036.) It is of note that Keating’s allegations
25 far *less* severe, offensive, and rude than those from *Scott*. If calling someone a liar, a dictator,
26 lacking moral and ethical character, among other incendiary allegations, is privileged, then telling
27 someone to “shut up” and that they “don’t know what [they are] talking about” must also be
28 privileged. (*Scott, supra*, 37 Cal. App. 3d. at 283–84; Complaint, ¶¶ 13–14.) Keating cannot

point to the content of Frobose's language to defeat the privilege because the statements were made at MID Board meetings and are thus directly connected to the work of the legislative body. (*Id.* at 285.) Notwithstanding Keating's otherwise hyperbolic characterization of Frobose's comments, Frobose's alleged statements and communication style⁹ are still afforded absolute protection by the legislative privilege, particularly in the context of elected officials' conduct at public meetings or on matters before the public entity.¹⁰ As such, Keating cannot show a likelihood of success on any of her claims because Frobose's statements are protected by the legislative privilege. This motion must be granted.

2. **Keating Cannot Produce Evidence to Establish Her First Cause of Action for Whistleblower Retaliation under Labor Code Section 1102.5**

To show retaliation under California Labor Code section 1102.5(b), Keating must prove that (1) MID was her employer, (2) that Keating disclosed information concerning suspected violations of the law to a government agency, and (3) that MID took an adverse employment action against Keating because of the disclosure. (Labor Code § 1102.5(b); *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260.) A prerequisite to asserting a Labor Code section 1102.5 violation is the existence of an employer-employee relationship at the time the alleged retaliatory action occurred. (*Soukup*, 39 Cal.4th at 287–288.) The Legislature did not include elected officials within the scope of the term “employee” for the purposes of Labor Code section 1102.5. (*Brown v. City of Inglewood* (2023) 92 Cal. App. 5th 1256.) In *Brown*, a Labor Code section 1102.5 retaliation claim “asserted by an elected city treasurer against the city and several members of the city council was not legally sufficient, in the context of an anti-SLAPP analysis, because the treasurer was not an employee for the purposes of the statute.” (*Id.* at 1258.)

Here, Keating cannot produce evidence to show whistleblower retaliation because she was not an employee who blew the whistle on illegal activity by MID and was then subjected to an

⁹ The Constitution does not require that the effective expression of ideas be restricted to rigid and predetermined patterns. (*See NAACP v. Button* (1963) 371 U.S. 415, 431.)

¹⁰ The protection of speech, even if it is rude or impolite is generally upheld, especially in the context of public meetings, because of the principle that such expressions can contribute to the free interchange of ideas and the ascertainment of the truth. (*In re Kay* (1970) 1 Cal. 3d 930, 939.)

adverse employment action¹¹ by MID because of her protected whistleblowing activity. Keating is an elected Board member of MID, and thus not an employee for the purposes of Labor Code section 1102.5, and MID is not her employer. (Complaint, ¶ 6; *Brown, supra*, 92 Cal. App. 5th 1256, 1256.) In addition, even assuming Keating was an employee, and she is not, Keating does not allege she blew the whistle on any illegal activity perpetrated by MID, and even if she had, MID took no adverse employment action against Keating for allegedly blowing the whistle on MID. Keating cannot show a likelihood that she will prevail on this claim, and thus her 1st cause of action must be stricken.

3. **Keating Cannot Produce Evidence to Establish Her Second Cause of Action for Gender Discrimination**

To establish FEHA gender discrimination, Keating must present evidence to show: (1) she was a member of a protected class, (2) she was qualified for the position she sought or performing competently in the position she held, (3) she suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests a discriminatory motive. (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354–55.) Only an employee can sue an employer for discrimination under FEHA. (Cal. Gov.Code, § 12900 et seq.; *Reno v. Baird* (1998) 18 Cal.4th 640.) An employee must also demonstrate that gender was a substantial motivating factor for any adverse employment action taken against the employee. (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232; *Kelley v. The Conco Companies* (2011) 196 Cal.App.4th 191, 203 [holding FEHA requires a plaintiff alleging employment discrimination based on sex must show that gender is a substantial factor in the discrimination, and that if the plaintiff had been a man she would not have been treated in the same manner].)

Here, Keating's gender discrimination claim suffers the same fate as her first cause of action for whistleblower retaliation. Keating, as an elected official, is not an employee and thus cannot be discriminated against as a matter of law. Plus, even assuming Keating was an employee, and she is not, Keating cannot assert facts to show that MID took any adverse

¹¹ The Supreme Court has held that the proper standard for defining an adverse employment action is "whether the action materially affected the terms and conditions of *employment*." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 536 Cal. 4th 1028, 1036.)

1 employment action against her. Further, even assuming Keating were an employee and that MID
2 took an adverse employment actions against her, Keating cannot present facts to show that MID
3 had a demonstrated a gender animus against her. Thus, since Keating cannot even present
4 evidence to establish a *prima facie* case for gender discrimination, let alone that she has a
5 probability of prevailing, the 2nd cause of action for FEHA gender discrimination must be
6 stricken.

7 **4. Keating Cannot Present Sufficient Evidence to Establish Her Third**
8 **Cause of Action for Gender Harassment**

9 To establish gender harassment under FEHA Keating must show (1) she was a member of
10 a protected class; (2) she was subject to unwelcome harassment; (3) the harassment was based on
11 her protected classification; and (4) the harassment was severe or pervasive enough so as to alter
12 the conditions of employment. (*Etter v. Veriflo Corp.* (1998) 67 Cal. App. 4th 457, 463). A
13 hostile work environment claim must be based on “harassing” conduct that is outside the scope of
14 necessary job performance. (*Janken v. GM Hughes Elecs.* (1996) 46 Cal.App.4th 55, 62-63).
15 “Harassment” includes verbal conduct such as epithets or slurs, physical conduct such as touching
16 or assault, and visual conduct such as derogatory cartoons. (*Janken*, 46 Cal.App.4th 55, 63 [citing
17 2 Cal. Code Regs., § 7287.6(b)(1)].) Alleged harassment must be both objectively and
18 subjectively offensive, so that a reasonable person would find it hostile or abusive, and one that
19 the victim in fact did find hostile or abusive. (*Holmes v. Petrovich Dev. Co.* (2011) 191 Cal. App.
20 4th 1047, 1059; *McCoy v. Pacific Maritime Assn.* (2013) 216 Cal.App.4th 283, 293.) Conduct
21 that is “occasional, isolated, sporadic, or trivial” is not harassment. (*McCoy*, 216 Cal.App.4th 283,
22 293.) “That means a plaintiff who subjectively perceives the workplace as hostile or abusive will
23 not prevail under the FEHA, if a reasonable person in the plaintiff’s position, considering all the
24 circumstances, would not share the same perception.” (*Id.*). Annoying or merely offensive
25 comments are not actionable. (*Lyle, supra*, 38 Cal.4th at 283.) In addition, a plaintiff must
26 establish the offending conduct was imputable to her employer. (*Id.*) Simple teasing, offhand
27 comments, and isolated incidents (unless extremely serious) do not constitute harassment. (*Etter*,
28 67 Cal. App. 4th at 463-464). “[W]hen the harassing conduct is not severe in the extreme, more

1 than a few isolated incidents must have occurred to prove a claim based on working conditions.”
2 (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 284.) Lastly, personnel
3 management decisions are not harassment as a matter of law. (*Janken, supra*, 46 Cal.App.4th at
4 64.)

5 Here, Keating alleges no conduct by Frobose that is actually gender-based. There is one
6 fact that Keating pleaded that arguably falls outside the scope of protected activity as defined by
7 425.16(e) and Civil Code section 47, and MID and Frobose anticipate that Keating will use this
8 one-time comment to support her claim for harassment. Keating alleged that one time Frobose
9 walked past her and said, “I would comment on your dress, but I have taken the required sexual
10 harassment training.” (Complaint, ¶ 15.) Notably however, this one-time comment cannot be
11 used as a sword by Keating to defeat the anti-SLAPP motion. “The anti-SLAPP procedures are
12 designed to shield a defendant’s constitutionally protected conduct from the undue burden of
13 frivolous litigation. It follows, then, that courts may rule on plaintiff’s specific claims of protected
14 activity, rather than reward artful pleading by ignoring such claims if they are mixed with
15 assertions of unprotected activity.” (*Baral, supra*, 1 Cal. 5th at p. 393.) The Supreme Court has
16 held that where a cause of action includes protected and unprotected activity, the plaintiff’s
17 burden on the second step of the anti-SLAPP analysis is affected. (*Baral, supra*, 1 Cal. 5th at p.
18 385.) A mixed claim is a cause of action that contains both allegations based on protected activity
19 and allegations based on unprotected activity. (*Id.* at p. 385–88.) “An anti-SLAPP motion, like a
20 conventional motion to strike, may be used to attack parts of a count as pleaded.” (*Baral, supra*, 1
21 Cal.5th at 393.) Because the Legislature “had in mind allegations of protected activity that are
22 asserted as grounds for relief,” the defendant’s special motion to strike may target “particular
23 alleged acts giving rise to a claim for relief” (*Id.* at 395.) Thus, Keating will have to show that
24 her harassment claim will survive based on this one-time comment about harassment training
25 since all of the other allegations about Frobose’s behavior clearly and manifestly relate to
26 protected activity under Code of Civil Procedure section 425.16, subdivision (e) and Civil Code
27 section 47.

28 An offhand, one-time comment about having taken sexual harassment training and it

1 impacting what Frobose should say about a dress is *not* a gender-based comment. The comment is
2 also neither severe nor pervasive, which Keating is required to show she is likely to prove. The
3 only other statements Keating complained of relate to Frobose's attempts to persuade Keating
4 about the hiring of special counsel, and Frobose's comments to her about other issues before the
5 Board, none of which are gender-based comments nor severe or pervasive gender harassment. In
6 addition, none of the aforementioned comments Keating complains of meet the objectively
7 offensive standard required for a harassment claim, and her subjective feelings are not sufficient
8 to prevail on her harassment claim. Even assuming Frobose's comments were subjectively
9 offensive to Keating, "merely offensive" comments are insufficient to support a hostile work
10 environment claim. (*Lyle, supra*, 38 Cal.4th at 283.) Further, statements Frobose made to
11 Keating involving personnel management decisions, such as whether to hire special counsel for
12 MID, are not actionable gender harassment as matter of law. (*Janken*, 46 Cal.App.4th at 64.)
13 Keating speculates that statements made to her during Board meetings or about issues before the
14 Board are gender harassment because she is the only woman on the Board. (Complaint, ¶ 14–17.)
15 Keating's speculations are not sufficient to support a claim for gender harassment. (*Kerr v. Rose*
16 (1990) 216 Cal.App.3d 1551, 1564.) Thus, since Keating cannot present evidence to show
17 gender harassment, her 3rd cause of action must be stricken.

18 **5. Keating Cannot Present Sufficient Evidence to Establish Her Fourth**
19 **Cause of Action for Failure to Prevent Harassment**

20 Keating's failure to prevent harassment cause of action is without merit because Keating
21 is unable to prove harassment. An employer who knows or should have known of unlawful
22 harassment, and fails to take immediate and appropriate corrective action, may be liable for the
23 resulting damages. (Gov. Code, § 12940(k); *Thompson v. City of Monrovia* (2010) 186
24 Cal.App.4th 860, 880.) However, because the statute does not create a stand-alone tort, a plaintiff
25 has no cause of action for a failure to investigate, unless actionable misconduct occurred. (*Id.*
26 [citing *Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 288].) Keating is
27 unable to prove harassment. As a result, Keating's derivative cause of action for failure to prevent
28 harassment also fails, and this Court must strike Keating's 4th cause of action for failure to

1 prevent harassment.

2 6. **Keating Cannot Present Sufficient Evidence to Establish Her Fifth**
3 **Cause of Action for FEHA Retaliation**

4 To establish FEHA retaliation, Keating must prove that she engaged in protected activity,
5 that MID subjected her to an adverse employment action, and that a causal link exists between the
6 protected activity and the adverse employment action. (*Yanowitz v. L'Oreal* (2005) Cal.4th 1028,
7 1054.) Only an employee can sue an employer for retaliation under FEHA. (Cal. Gov.Code, §
8 12900 et seq.; *Jones v. Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158.) An employee
9 engages in a protected activity when (1) they make a charge, testify, assists or participates in any
10 manner in proceedings or hearings under the FEHA; or (2) oppose acts made unlawful by the
11 FEHA. (Gov. Code, § 12940(h).)

12 Here, Keating cannot present evidence to show FEHA retaliation because she was not an
13 employee who engaged in protected activity and was then subjected to an adverse employment
14 action by MID. Keating is an elected Board member of MID, and thus not an employee for the
15 purposes of FEHA. (Complaint, ¶ 6.) In addition, even assuming Keating was an employee, and
16 she is not, Keating did not engage in protected activity, and MID did not take any adverse
17 employment action against Keating. Lastly, Keating's allegations of protected activity do not also
18 support a distinct claim on which she has a probability of prevailing. Keating cannot meet her
19 burden of proving FEHA retaliation, and thus, this Court must strike Keating's 5th claim for
20 FEHA Retaliation.

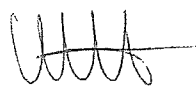
21 **V. CONCLUSION**

22 For the foregoing reasons, Defendants MID and Frobose respectfully requests that this
23 Court grant their special motion to strike Keating's entire lawsuit, including her first, second,
24 third, fourth, and fifth causes of action against MID and/or Frobose.

25 Dated: July 15, 2024

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