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12 Attorneys for Defendants
13 **GINA M. AUSTIN and**
14 **AUSTIN LEGAL GROUP**

15 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
16 **FOR THE COUNTY OF SAN DIEGO – CENTRAL DIVISION**

17 AMY SHERLOCK, an individual and on
18 behalf of her minor children, T.S. and S.S.,
19 ANDREW FLORES, an individual,

20 Plaintiffs,

21 v.

22 GINA M. AUSTIN, an individual; AUSTIN
23 LEGAL GROUP, a professional
24 corporation, LARRY GERACI, an
25 individual, REBECCA BERRY, an
26 individual; JESSICA MCELFRISH, an
27 individual; SALAM RAZUKI, an
28 individual; NINUS MALAN, an individual;
FINCH, THORTON, AND BARID, a
limited liability partnership; ABHAY
SCHWEITZER, an individual and dba
TECHNE; JAMES (AKA JIM) BARTELL,
an individual; NATALIE TRANG-MY
NGUYEN, an individual, AARON
MAGAGNA, an individual; BRADFORD
HARCOURT, an individual; SHAWN
MILLER, an individual; LOGAN
STELLMACHER, an individual;
EULENTIAS DUANE ALEXANDER, an
individual; STEPHEN LAKE, an
individual, ALLIED SPECTRUM, INC. a
California corporation, PRODIGIOUS
COLLECTIVES, LLC, a limited liability
company, and DOES 1 through 50,
inclusive,

Defendants.

ELECTRONICALLY FILED
Superior Court of California,
County of San Diego

07/29/2022 at 12:51:00 PM

Clerk of the Superior Court
By Adriana Ive Anzalone, Deputy Clerk

CASE NO.: 37-2021-00050889-CU-AT-CTL

**DEFENDANTS GINA M. AUSTIN AND
AUSTIN LEGAL GROUP'S REPLY TO
PLAINTIFFS' OPPOSITION TO MOTION
TO STRIKE PLAINTIFFS' FIRST
AMENDED COMPLAINT PURSUANT TO
CODE OF CIVIL PROCEDURE SECTION
425.16 (ANTI-SLAPP STATUTE)**

[IMAGED FILE]

Date: August 5, 2022

Time: 9:00 a.m.

Dept.: C-75

Judge: Hon. James A. Mangione

Filed: December 3, 2021

Trial: Not Set

1 Defendants GINA M. AUSTIN and AUSTIN LEGAL GROUP (collectively, “Austin” or
2 “Defendants”), hereby submit the following reply to Plaintiffs AMY SHERLOCK, an individual
3 and on behalf of her minor children, T.S. and S.S., and ANDREW FLORES’ (collectively,
4 “Plaintiffs”) opposition to Defendants’ Special Motion to Strike Plaintiffs’ First Amended
5 Complaint pursuant to Code of Civil Procedure section 425.16 (the “anti-SLAPP statute”).

6 **I.**

7 **INTRODUCTION**

8 Defendants have satisfied their burden under the first prong of the anti-SLAPP statute—
9 Plaintiffs’ claims all arise out of Austin acting within her scope as an attorney and petitioning for
10 condition use permits (“CUPs”) on behalf of her clients. Such petitioning conduct is explicitly
11 protected by section 425.16. Accordingly, the burden shifts to Plaintiffs. In order to survive
12 Defendants’ special motion to strike, Plaintiffs were required to present admissible evidence
13 sufficient to establish a reasonable probability of success on each element of every claim.

14 Notwithstanding the fact that Plaintiffs served an unsigned opposition, which can and
15 should be disregarded on that basis alone,¹ Plaintiffs failed to meet their burden as to every claim
16 alleged against Defendants. Plaintiffs’ Opposition does not provide a single piece of evidence and
17 does not discuss a single element for any of their claims. Given Plaintiffs complete failure to
18 provide any evidence, Defendants’ anti-SLAPP motion must be granted.

19 **II.**

20 **ARGUMENT**

21 **A. Under The First Prong of the Anti-SLAPP Analysis, Austin has Established that**
22 **Plaintiffs’ Claims Arise from Activity Protected by the Anti-SLAPP Statute**

23 The protected activities described in subdivision (e)(1) of Code of Civil Procedure section
24

25 ¹ Code of Civil Procedure section 446 requires that “[e]very pleading shall be subscribed by the
26 party or his or her attorney.” Code of Civil Procedure section 128.7 likewise requires that
27 “[e]very pleading, petition, written notice of motion, or other similar paper shall be signed by at
28 least one attorney of record in the attorney’s individual name, or, if the party is not represented by
an attorney, shall be signed by the party.” The Section further provides that “[a]n unsigned
paper shall be stricken...” The opposition served by Plaintiffs was unsigned and, by Code,
should be stricken.

1 425.16 include statements or writings “made before a legislative, executive, or judicial
2 proceedings, or any other official proceeding authorized by law.” These protected activities
3 include petitioning administrative agencies. (*Briggs v. Eden Council for Hope & Opportunity*
4 (1999) 19 Cal.4th 1106, 1115 [“[t]he constitutional right to petition . . . includes . . . seeking
5 administrative action”].)

6 The core injury-producing conduct underlying Plaintiffs’ claims against Austin is her
7 efforts to assist her clients in the administrative process of seeking CUPs. As such, Plaintiffs’
8 claims are based on petitioning activity, namely, acting within her scope as an attorney and filing
9 applications with the local zoning authority on behalf of her clients. (Code Civ. Proc., § 425.16,
10 subd. (e)(1).) “A defendant's burden on the first prong is not an onerous one.” (*Optional Capital,*
11 *Inc. v. Akin Gump Strauss, Hauer & Feld LLP* (2017) 18 Cal.App.5th 95, 112.) All that is
12 required is for Defendants to “identify allegations of protected activity.” (*Baral v. Schnitt* (2016)
13 1 Cal.5th 376, 396.) Defendants have clearly met this low bar.

14 Plaintiffs do not dispute that Austin engaged in petitioning activity on behalf of her
15 clients. Rather, Plaintiffs’ entire opposition is based on an incorrect and unsupported assertion
16 that Austin’s petitioning activities were “illegal.” As discussed below, Plaintiffs baseless assertion
17 of illegality is insufficient to survive anti-SLAPP scrutiny.

18 **B. The Exception for Illegal Conduct Does Not Apply**

19 Relying on *Flatley v. Mauro* (2006) 39 Cal. 4th 299, 324-328 (*Flatley*), Plaintiffs argue
20 that Austin’s petitioning activities are not protected under Code of Civil Procedure section 425.16
21 because they are “illegal as a matter of law.” [Opposition, Section A, 13-16]. First and foremost,
22 Plaintiffs mischaracterized the holding in *Flatley*. Secondly, Plaintiffs failed to present any
23 evidence, let alone sufficient evidence, to conclusively establish that Austin’s petitioning activity
24 was illegal as a matter of law.

25 Our Supreme Court has emphasized that section 425.16’s exception for illegal activity is
26 very narrow and applies only in cases where the illegality is undisputed. (*Zucchet v. Galardi*
27 (2014) 229 Cal.App.4th 1466, 1478.) Conduct that would otherwise come within the scope of the
28 anti-SLAPP statute does not lose its coverage simply because it is alleged to have been unlawful

1 or unethical. (*Flatley, supra*, 39 Cal.4th at p. 317.) The asserted protected activity loses protection
2 **only if** it is established through a defendant’s concession or by uncontroverted and conclusive
3 evidence that the conduct was illegal as a matter of law. (*Collier v. Harris* (2015) 240
4 Cal.App.4th 41, 55.) The mere fact the plaintiff alleges the defendant engaged in unlawful
5 conduct does not cause the conduct to lose its protection under the anti-SLAPP statute. (*Birkner v.*
6 *Lam* (2007) 156 Cal.App.4th 275, 285.) Conversely, in meeting the initial burden, the
7 defendant need not show as a matter of law that his or her conduct was legal. (*Soukup v. Law*
8 *Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 286.) Thus, if a plaintiff claims that the
9 defendant’s conduct is illegal and thus not protected activity, the plaintiff bears the burden of
10 conclusively proving the illegal conduct, with admissible evidence.

11 Here, Austin does not concede that she engaged in any unlawful activities. Nor is there
12 any uncontroverted evidence that her petitioning activities were unlawful as a matter of law.
13 Plaintiffs’ mere allegations that Austin engaged in unlawful activities is insufficient to render her
14 petitioning activity unlawful as a matter of law and outside the protection of Code of Civil
15 Procedure section 425.16.

16 **C. Rare Cases Where the Exception for Illegal Conduct Has Been Applied**

17 **1. *Flatley v. Mauro***

18 In contrast to Plaintiffs’ claims, *Flatley* involved claims based on activities that were
19 indisputably unlawful as a matter of law and therefore unprotected under the anti-SLAPP statute.
20 The plaintiff in *Flatley* sued an attorney for civil extortion and related causes of action based on
21 the attorney’s alleged criminal attempt to extort money from the plaintiff by threatening to
22 publicize the plaintiff’s alleged rape of the attorney’s client—unless the plaintiff paid the attorney
23 and his client a seven-figure settlement. (*Flatley, supra*, 39 Cal.4th at pp. 305-311.) In opposing
24 the attorney’s anti-SLAPP motion, the plaintiff adduced uncontroverted evidence that the attorney
25 had engaged in the alleged extortion attempt. (*Id.* at pp. 328-329 [“[the attorney] did not deny that
26 he sent the letter, nor did he contest the version of the telephone calls set forth in [the plaintiff’s
27 attorneys’] declarations”].) Based on the uncontroverted evidence that the attorney attempted
28 to extort money from the plaintiff, the court in *Flatley* concluded that the attorney made the

1 extortion attempt, which was “illegal as a matter of law,” and therefore not a protected form of
2 speech under Code of Civil Procedure section 425.16. (*Id.* at pp. 317-320.) The *Flatley* court
3 emphasized, however, that its conclusion that the defendant's conduct “constituted criminal
4 extortion as a matter of law [was] based on the specific and extreme circumstances of this case.”
5 (*Id.* at p. 332, fn. 16.)

6 **2. *Paul for Council v. Hanyecz***

7 As another example of unprotected illegal conduct, the *Flatley* court cited *Paul for*
8 *Council v. Hanyecz* (2001) 85 Cal.App.4th 1356 (*Paul*), disapproved on other grounds in *Equilon*
9 *Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68, fn. 5. In *Paul*, the complaint
10 alleged that the defendants interfered with the plaintiff's candidacy by making illegal campaign
11 contributions to an opponent. The defendants moved to dismiss under the anti-SLAPP
12 statute. (*Paul, supra*, at pp. 1361–1362.) However, the defendants’ own moving papers
13 effectively conceded that their laundered campaign contributions violated the law. Thus, the court
14 concluded as a matter of law that the defendant could not show that their money laundering
15 conduct was constitutionally protected even though it was undertaken in connection with making
16 political contributions. (*Id.* at p. 1365.) As in *Flatley*, the *Paul* court emphasized the narrow
17 circumstances in which a defendant's assertedly protected activity could be found to be illegal as
18 a matter of law:

19 In order to avoid any misunderstanding as to the basis for our
20 conclusions, we should make one further point. This case, as we have
21 emphasized, involves a factual context in which defendants have
22 effectively conceded the illegal nature of their election campaign
23 finance activities for which they claim constitutional protection.
24 Thus, there was *no dispute* on the point and we have concluded, as a
25 matter of law, that such activities are *not* a valid exercise of
26 constitutional rights as contemplated by section 425.16. However,
27 had there been a factual dispute as to the legality of defendants'
28 actions, then we could not so easily have disposed of defendants'
motion.

26 (*Paul, supra*, 85 Cal.App.4th at p. 1367, first italics added; accord, *Flatley, supra*, 39
27 Cal.4th at p. 317.)

28 ///

1 **D. Under the Second Prong of the Anti-SLAPP Analysis, Plaintiffs Have Not Even**
2 **Attempted to Establish a Probability of Prevailing on Their Claims**

3 To survive an anti-SLAPP motion, Plaintiffs must present admissible evidence on each
4 element of every claim. Plaintiffs make no meaningful attempt to address any of the elements of
5 their claims and more importantly, Plaintiffs' Opposition presents no evidence.

6 Section 425.16 is clear – once a moving defendant shows that the statute applies, the
7 burden shift to the plaintiff to demonstrate a probability of prevailing on their claims. (Code Civ.
8 Proc., § 425.16, subd. (b)(1).) If a “factual dispute exists about the legitimacy of the defendant’s
9 conduct, it cannot be resolved within the first step [of the anti-SLAPP analysis] but must be raised
10 by the plaintiff in connection with the plaintiff’s burden to show a probability of prevailing on the
11 merits.” (*Flatley, supra*, 39 Cal.4th at p. 316.) The showing required to establish conduct illegal
12 as matter of law is not the same showing as the plaintiff’s second prong showing of probability of
13 prevailing. (*Id.* at p. 320.)

14 Glaringly missing from Plaintiffs' Opposition is any discussion of the elements for their
15 asserted claims. There is likewise **no** evidence offered, thus making it impossible for Plaintiffs to
16 meet their burden under the second prong. Additionally, it appears Plaintiffs have conflated their
17 burden under the second prong with the burden required to establish conduct illegal as a matter of
18 law. Establishing conduct illegal as a matter of law (if applicable) is a complete and separate
19 burden in and of itself. This type of showing cannot stand in place of the burden required under
20 the second prong to show a probability of prevailing. Plaintiffs' failure to present any evidence
21 independently requires that Defendants' motion be granted.

22 **D. Section 426.15 Makes No Provision for Amending the Complaint**

23 Section 425.16 makes no provision for amending the complaint. (*Simmons v. Allstate Ins.*
24 *Co.* (2001) 92 Cal.App.4th 1068, 1073.) Decisional law makes it very clear that a plaintiff cannot
25 amend his or her complaint to try and escape an anti-SLAPP motion. (See *Contreras v. Dowling*
26 (2016) 5 Cal.App.5th 394, 411 [“[a] plaintiff ... may not seek to subvert or avoid a ruling on an
27 anti-SLAPP motion by amending the challenged complaint ... in response to the motion”];
28 accord, *ARP Pharmacy Services, Inc. v. Gallagher Bassett Services, Inc.* (2006) 138 Cal.App.4th

1 1307, 1323 [plaintiff cannot amend pleading to avoid pending anti-SLAPP motion]; *Navellier v.*
2 *Sletten* (2003) 106 Cal.App.4th 763, 772 [plaintiff cannot use an “eleventh-hour amendment” to
3 plead around anti-SLAPP motion]; see *Simmons, supra*, at p. 1073 [“we reject the notion that
4 such a right should be implied”].)

5 Plaintiffs have failed to show a reasonable probability of prevailing as to any of the causes
6 of action at issue. It would not only be futile to permit Plaintiffs to amend, but it would also
7 completely undermine the statute by providing a ready escape from section 425.16’s quick
8 dismissal remedy. (*Simmons, supra*, 92 Cal.App.4th at p. 1073.) Thus, the Court should deny
9 Plaintiffs’ improper request for leave to amend.

10 **III.**

11 **CONCLUSION**

12 As set forth above, and in the moving papers, Plaintiffs First Amended Complaint alleges
13 claims against Defendants based on petitioning activity. Such conduct is protected under section
14 425.16, which requires Plaintiffs to affirmatively demonstrate a probability of prevailing based on
15 admissible evidence. However, Plaintiffs Opposition provides no evidence and falls far from
16 meeting the burden imposed under the second prong of the anti-SLAPP statute. For these reasons,
17 Defendants’ special motion to strike must be granted.

18 **PETTIT KOHN INGRASSIA LUTZ & DOLIN PC**

19
20 Dated: July 29, 2022

By: 

21 Douglas A. Pettit, Esq.
22 Matthew C. Smith, Esq.
23 Kayla R. Sealey, Esq.
24 Attorneys for Defendants
25 **GINA M. AUSTIN and**
26 **AUSTIN LEGAL GROUP**

PROOF OF SERVICE
Amy Sherlock, et al. v. Gina M. Austin, et al.
San Diego Superior Court Case No. 37-2011-00051643-CU-PO-NC

I, the undersigned, declare that:

I am and was at the time of service of the papers herein, over the age of eighteen (18) years and am not a party to the action. I am employed in the County of San Diego, California, and my business address is 11622 El Camino Real, Suite 300, San Diego, California 92130.

On **July 29, 2022**, I caused to be served the following documents:

- **DEFENDANTS GINA M. AUSTIN AND AUSTIN LEGAL GROUP’S REPLY TO PLAINTIFFS’ OPPOSITION TO MOTION TO STRIKE PLAINTIFFS’ FIRST AMENDED COMPLAINT PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 425.16 (ANTI-SLAPP STATUTE)**

BY MAIL: By placing a copy thereof for delivery in a separate envelope addressed to each addressee, respectively, as follows:

- BY FIRST-CLASS MAIL (Code Civ. Proc. §§ 1013(a)-(b))**
- BY OVERNIGHT DELIVERY (Code Civ. Proc. §§ 1013(c)-(d))**
- BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED (Code Civ. Proc. §§ 1013(a)-(b))**

BY ELECTRONIC SERVICE (California Rule of Court 2.251): By submitting an electronic version of the document(s) via file transfer protocol (FTP) to OneLegal Online Court Services through the upload feature at www.onelegal.com.

BY PERSONAL SERVICE: I caused the above-described document to be personally served on the parties listed on the service list below at their designated business addresses pursuant to Code Civ. Proc. §1011.

<p>Andrew Flores, Esq. Law Office of Andrew Flores 427 C Street, Suite 210 San Diego, CA 92101 Tel: (619) 356-1556 Fax: (619) 274-8053 Email: Andrew@FloresLegal.Pro Plaintiff in <i>Propria Persona</i> and Attorney for Plaintiffs Amy Sherlock, Minors T.S. and S.S.</p>	<p>James D. Crosby, Esq. Attorney at Law 550 West C Street, Suite 620 San Diego, CA 92101 Tel: (619) 450-4149 Email: crosby@crosbyattorney.com Attorney for Defendants LARRY GERACI and REBECCA BERRY</p>
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Natalie T. Nguyen, Esq. NGUYEN LAW CORPORATION 2260 Avenida de la Playa La Jolla, CA 92037 Tel: (858) 757-8577 Email: natalie@nguyenlawcorp.com Defendant NATALIE TRANG-MY NGUYEN <i>PRO SE</i>	
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I am readily familiar with the firm’s practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the United States Postal Service on that same day with postage thereon fully prepaid at San Diego, California, in the ordinary course of business. I am aware that service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **July 29, 2022**, at San Diego, California.



Luis Zamora