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Plaintiff, *in propria persona*

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

BRUCE THOMAS MURRAY,

Plaintiff

v.

MEDICAL BOARD OF CALIFORNIA;

KIMBERLY KIRCHMEYER, in her capacity as executive director, Medical Board of California;

KERRIE D. WEBB, in her capacity as staff counsel, Medical Board of California; and

DOES 1-11, inclusive,

Defendants

Case No. 18STCV03576

PLAINTIFF BRUCE T. MURRAY'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' SPECIAL MOTION TO STRIKE UNDER CCP 425.16 (ANTI-SLAPP)

Hearing Date:	March 11, 2019
Time:	8:30 a.m.
Judge:	Hon. Malcolm Mackey
Dept.:	55
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Trial Date:	Not set

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SUMMARY

Plaintiff Bruce Thomas Murray brought his action against the Medical Board of California and its agents because they wrongfully refused his requests to provide him with personal and medical information regarding his deceased mother, Audrey Bevan Murray.

Plaintiff's case is based primarily on the California Information Practices Act (CIPA), which mandates that public agencies release the personal information that they collect, upon request, to the individual to whom the information pertains, or his or her representative. Cal. Civ. Code §§ 1798.24-34.

In addition to wrongfully refusing to provide his mother's personal information, Defendants also failed to assist Plaintiff in the identification of records, in violation of Cal. Gov. Code § 6253.1, as stated in Plaintiff's third cause of action. Furthermore, Plaintiff alleges violation of the California Constitution and public policy.

Plaintiff requests that the court enjoin the named agents of the Medical Board to release the information he seeks, and he requests damages against the Medical Board, as allowed by Cal. Civ. Code § 1798.48. Plaintiff further requests attorney's fees pursuant to Cal. Civ. Code § 1798.48(b), Cal. Code Civ. Proc. § 1021.5, and/or equitable principles.

Based on Plaintiff's assertion of his lawful right to receive personal information under CIPA, the Defendants now claim that Plaintiff's lawsuit attempts to infringe on their constitutional right to free speech. On this theory, they have filed a special motion to strike under California's anti-SLAPP provision, Cal. Code Civ. Proc. § 425.16. At first glance, Defendants' assertion is far-fetched. On closer examination, their motion is indeed entirely meritless. This memorandum will explain exactly why.

Briefly, California's anti-SLAPP provision applies to any "cause of action against a person [1] ***arising from*** [2] any act of that person [3] in furtherance of [4] the person's right of petition or [5] free speech …" *Id.* [Emphasis added.] This memorandum will analyze each identified element and sub-element of the statute.

As the analysis of the first element will show, Defendants' anti-SLAPP motion fails at the outset, because Plaintiff's lawsuit arises not from protected speech, but from the Medical Board's refusal to provide him with the information to which he is lawfully entitled. Otherwise stated,

Plaintiff's lawsuit is based on the Medical Board's act of refusal, not the speech its agents used in conveying that refusal. Thus, the very first element is not satisfied.

The Defendants' anti-SLAPP motion is problematic for another reason: The element of the statute marked number '4' above designates a person's right of petition as protected activity under the anti-SLAPP statute. Here, Plaintiff was aggrieved at the Medical Board's refusal to release to him any information in their possession regarding his deceased mother. Accordingly, Plaintiff sought redress for his grievances with the Superior Court. Defendants now seek to short-circuit Plaintiff's right to petition with their anti-SLAPP motion. In so doing, Defendants would deny Plaintiff his basic right to due process. So as it turns out, Defendants' anti-SLAPP motion is itself a thinly disguised SLAPP action. Therefore, Plaintiff requests that the court not only deny Defendants' anti-SLAPP motion, but also sanction them for their abuse of the process.

ARGUMENT

I. THE DEFINITION OF 'SLAPP' SUITS, AND THE POLICY BEHIND CALIFORNIA'S ANTI-SLAPP PROVISION

A. Plaintiff's case against the Medical Board is not a SLAPP suit, by any definition.

"A SLAPP suit—a strategic lawsuit against public participation—seeks to chill or punish a party's exercise of constitutional rights to free speech and to petition the government for redress of grievances. The Legislature enacted section 425.16—known as the anti-SLAPP statute—to provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights." *Tamkin v. CBS Broad., Inc.*, 193 Cal. App. 4th 133, 142 (2011).[1]

Plaintiff brought his suit against the Medical Board and its agents because they refused his requests to provide him with personal and medical information[2] regarding his deceased mother,

[1] In *Optional Capital v. Akin Gump*, the court provided another useful definition of SLAPP suits: "A SLAPP is a civil lawsuit that is aimed at preventing citizens from exercising their political rights or punishing those who have done so. While SLAPP suits masquerade as ordinary lawsuits such as defamation and interference with prospective economic advantage, they are generally meritless suits brought primarily to chill the exercise of free speech or petition rights by the threat of severe economic sanctions against the defendant, and not to vindicate a legally cognizable right." *Optional Capital, Inc. v. Akin Gump Strauss, Hauer & Feld LLP*, 18 Cal. App. 5th 95, 109 (2017).

[2] "The term 'personal information' means any information that is maintained by an agency that identifies or describes an individual, including, but not limited to … **medical** or employment history." Cal. Civ. Code § 1798.3(a). [Emphasis added.]

Audrey Murray. Plaintiff is entitled to this information under the California Information Practices Act (Cal. Civ. Code § 1798 et seq.) Accordingly, CIPA is the primary legal basis of Plaintiff's suit.

Plaintiff challenges the Defendants' denials of his requests, not the Defendants' expression of those denials – or their right to make such expressions under the First Amendment to the United States Constitution or Article 1, Section 2 of the California Constitution.[3] Plaintiff does not seek to chill Defendants' speech; in fact, he wants more of their speech in the form of more information regarding the cause and circumstances of his mother's death. Furthermore, Plaintiff's lawsuit does not seek to infringe on the right of MBC agents to interact with other California citizens and consumers who contact the board. In fact, Plaintiff hopes this lawsuit will cause the MBC to be more communicative with consumers. In sum, more speech, not less. Thus, Plaintiff's action against the Medical Board is quite the opposite of a SLAPP suit.

The public policy behind California's anti-SLAPP provision is built right into the statute and placed immediately up front, in the first paragraph of the law: "The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly." CCP § 425.16(a).

A successful outcome of Plaintiff's action against the Medical Board would have no negative impact on the Defendants' constitutional right to speech. If anything, a positive outcome would expand Defendants' ability to communicate with consumers. Plaintiff seeks to thaw the Medical Board's speech, not to chill it.

II. A. PLAINTIFF'S CLAIMS DO NOT '*ARISE FROM*' ANY CONSTITUTIONALLY PROTECTED ACTIVITY ON THE PART OF DEFENDANTS.

1. Plaintiff's claims stem from the Defendants' refusal to release information that Plaintiff is entitled to receive, not the Defendants' right to express their refusal.

[3] "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." Cal. Const. Art. I, § 2.

"The statutory phrase 'cause of action ... arising from' means simply that 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. In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was based on an act in furtherance of the defendant's right of petition or free speech." *Optional Capital, Inc. v. Akin Gump Strauss, Hauer & Feld LLP,* 18 Cal. App. 5th 95, 110 (2017). [Emphasis added.]

In *Wilson v. Cable News Network,* the court provided further explanation of the "arising from" element: "To determine whether a cause of action arises from protected activity … the trial court must distinguish between (1) speech or petitioning activity that is mere evidence related to liability and (2) liability that is based on speech or petitioning activity. Prelitigation communications ... may provide evidentiary support for the complaint without being a basis of liability. The mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute. Moreover, that a cause of action arguably may have been 'triggered' by protected activity does not entail that it is one arising from such. Thus, the statute does not automatically apply simply because the complaint refers to some protected speech activities." *Wilson v. Cable News Network, Inc.,* 6 Cal. App. 5th 822, 831–32 (2016). [Citations omitted.]

Here, Plaintiff's case arises from the Defendants' denials of his requests for personal information regarding his deceased mother. These denials are contained within three letters written by Kerrie Webb to Bruce Murray during the course of an extended "meeting and conferring" between the two regarding Plaintiff's requests. (See Decl. of Kerrie D. Webb in Supp. of Defs.' Anti-SLAPP Mot. to Strike, Exhs. A-E.)

In the *Wilson* court's terminology, these letters are evidence relevant to Plaintiff's claims under CIPA, but not evidence of liability for Webb's speech itself. Plaintiff's claims arise from Webb's acts of denial, not her act of writing the letters and expressing her legal opinion regarding Plaintiff's request. Plaintiff may disagree with Webb's legal opinion, but his lawsuit does not seek to punish her for expressing it. The fact that Webb used the written word to convey her denials does not suddenly transform Plaintiff's case into a free speech case – subject to an anti-SLAPP motion. Indeed, there would be no other reasonable means for Webb to convey her denials other than by using speech, except perhaps by totally ignoring Plaintiff's requests. To eliminate speech from this

course of events is an absurd proposition. Thus, using the *Wilson* court's logic, the use of speech was ***necessary*** in this case, but the speech involved was not ***sufficient*** to trigger anti-SLAPP protection.

Other courts describe the "arising under" element in terms of the "gravamen" of the complaint: "In order for a complaint to be within the anti-SLAPP statute, the critical consideration is whether the cause of action is based on the defendant's protected free speech or petitioning activity. To make that determination, we look to the principal thrust or gravamen of the plaintiff's cause of action." *Yeager v. Holt,* 23 Cal. App. 5th 450, 456 (2018).

Here, the gravamen of Plaintiff's complaint is the Medical Board's decision to deny his request for information, not the speech Defendants used to make this denial. Therefore, because Plaintiff's case does not arise from any act by Defendants in furtherance of their right of free speech, Defendants' anti-SLAPP motion should be denied.

2. The 'Act' element: Defendants' act of refusing to release personal information to Plaintiff was not an act in furtherance of Defendants' right of free speech.

"Next, we determine whether defendants' acts are in furtherance of their exercise of the right of free speech. An act is in furtherance of the right of free speech if the act helps to advance that right or assists in the exercise of that right." *Tamkin,* 193 Cal. App. 4th at 143.

"Where a plaintiff's claim is based upon 'an action or decision' of the defendant, it is not enough that some protected activity by the defendant precedes that action or decision, that some protected activity is the means of communicating that action or decision, or that some protected activity constitutes evidence of that action or decision. To fall under the anti-SLAPP statute, the challenged action or decision itself must be protected activity. Accordingly, where a plaintiff's claim attacks only the defendant's decision to undertake a particular act, and if that decision is not itself protected activity, that claim falls outside the ambit of the anti-SLAPP statute." *Mission Beverage Co. v. Pabst Brewing Co.*, 15 Cal. App. 5th 686, 700–01 (2017).

Here, the acts that Plaintiff complains of are the Defendants' refusals to release his mother's personal and medical information to him, contrary to Cal. Civ. Code § 1798.34. Plaintiff challenges Defendants' decision, but not Defendants' right to convey their decision via speech. Defendants' written refusals do not trigger a metamorphosis of the Information Practices Act into the First Amendment. Defendants' acts of denying Plaintiff's requests do not further their right to exercise

free speech, nor does Plaintiff's lawsuit abridge Defendants' freedom of speech. Thus, the "act" [4] element of anti-SLAPP statute is not satisfied, and Defendants' motion should be denied.

3. Plaintiff's lawsuit does not attack Defendants' constitutionally protected activity – or the furtherance of it.

Elements 3, 4, and 5 of the anti-SLAPP statute, as marked above, constitute the activity that the statute aims to protect, i.e., the right of [5] free speech and the right of [4] petition – and the [3] furtherance of these rights. The statute then specifies four categories of protected activity, as most relevant here, "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." Cal. Code Civ. Proc. § 425.16(e)(2).

The Medical Board's rejections of Plaintiff's requests for information are contained within three letters from Kerrie Webb to Bruce Murray, as included in Exhibits B, C and F in the Declaration of Kerrie D. Webb. Each rejection letter has a corresponding request letter from Plaintiff, also included in Kerrie Webb's declaration. This dialogue is clearly protected speech, as would be generally covered by § 425.16(b)(1). Plaintiff had the constitutional right to request the information, and Webb had the same right (and duty) to respond. Indeed, Plaintiff is happy she responded, rather than simply ignoring him. The fact that Plaintiff disagrees with Webb's viewpoint is beside the point. Plaintiff's lawsuit does not attack her freedom to express this viewpoint. He advocates this liberty, just as he guards his own right to express his viewpoint.

In their discussion of protected activity, Defendants attempt to completely recast Plaintiff's case not as a request for personal information, but an attack on the Medical Board's investigation into Dr. James C. Matchison. (See Defs.' Mem. at 15:26-28: "Plaintiff's causes of action arise from Defendants' confidential investigation and the communications 'made in connection with …any other official proceeding authored by law.'") Defendants' argument completely misstates Plaintiff's

[4] In an evidentiary context, Defendants' acts of refusing Plaintiff's requests would be considered ***verbal acts*** or ***acts of independent legal significance,*** such as "I accept your offer for a contract" or "I reject your offer." David P. Leonard, RULES OF EVIDENCE AND SUBSTANTIVE POLICY, 25 Loy. L.A. L. Rev. 797, 804 (1992). Such verbal acts are not considered "assertions" or "statements," and therefore are not considered hearsay. *Id.* Thus, Kerrie Webb's verbal act of denying Plaintiff's requests for information could be admitted into evidence as non-hearsay. *A fortiori,* an act of independent legal significance does not necessarily receive First Amendment protection, such as maliciously shouting "Fire!" in a crowded movie theater. (See the notes of decisions to Cal. Evid. Code § 1241.)

case. Plaintiff does not challenge anything about the Medical Board's investigation, including its confidentiality. Plaintiff fully expects any information unrelated to his request for his mother's personal and medical information to be appropriately redacted, according to the procedures set out in CIPA. Cal. Civ. Code § 1798.46. Defendants' attempt to recast Plaintiff's suit as an attack on the MBC's investigation of Dr. Matchison is a straw man and a red herring.

4. Defendants' own featured case illustrates why Plaintiff's case is not a SLAPP suit.

In their discussion of protected activity, Defendants cite *Dwight R. v. Christy B.*, 212 Cal.App.4th 697 (2013) as their leading case. (Defs.' Mem. at 16:4.) In fact, *Dwight* provides a good example of what is and what is not a SLAPP suit. In that case, the Plaintiff, the father of two young girls, alleged that the Defendant, a therapist, conspired with the Plaintiff's former mother-in-law and several social workers to falsely accuse him of sexually abusing his five-year-old daughter. *Id.* at 409. The therapist, a mandated reporter, filed a report detailing her suspicion that Dwight was sexually abusing his daughter. *Id.* at 411. The father alleged that in making this report, the therapist violated his and his daughters' civil rights under 42 U.S.C. § 1983. Thus, the father directly attacked the therapist's mandated report. The court rightly determined that the Plaintiff sought to infringe on protected activity, and the court appropriately granted Defendants' anti-SLAPP motion.[5]

By contrast here, Plaintiff never challenged the Medical Board's decision to initiate the investigation into Dr. Matchison; he does not challenge the outcome; nor does he challenge anything about the investigation itself. Defendants' case is inapposite. Plaintiff in no way attacks the MBC's investigative process. Therefore Defendants' anti-SLAPP motion should be denied.

5. Analogous cases show that Plaintiff's case is not a SLAPP suit.

Defendants' anti-SLAPP memorandum cites many cases, but none of them analogous. An examination of the leading cases clearly shows that Plaintiff's action is not a SLAPP suit.

[5] Another case cited by Defendants also illustrates why Plaintiff's case is not a SLAPP suit. *Santa Barbara Cty. Coal. Against Auto. Subsidies v. Santa Barbara Cty. Assn. of Gover*, 167 Cal. App. 4th 1229 (2008). In that case, an opponent of county ballot measure brought action against the local transportation authority (SBCAG), alleging that authority unlawfully advocated and spent public funds for passage of the ballot measure. *Id.* at 1234. SBCAG did in fact spend funds to draft and prepare the measure for the ballot. The court determined that SBCAG's activity was not prohibited electoral advocacy because SBCAG had the statutory authority to draft the ballot measure, and its activity occurred before the measure was qualified for placement on the ballot. *Id.* at 1239. The plaintiff's suit aimed directly at SBCAG's lawful activity in preparing a ballot measure, and therefore his claims crossed the line into protected activity. *Id.*

In *San Ramon Valley Fire Protection Dist. v. Contra Costa County Employees' Retirement Association*, both the Superior Court and the Court of Appeal rejected the Defendants' anti-SLAPP motion – which was premised on the Defendants' erroneous contention that their decision to increase employee contributions to the Fire Protection District's retirement plan constituted protected activity under CCP § 425.16. The Retirement Association had voted to increase the employee contributions following a discussion at a public meeting. The firefighters challenged the decision. The Defendants' argued that the suit attacked their constitutionally protected right to free speech. Both the superior court and the appellate court disagreed.

"Even if the conduct of individual public officials in discussing and voting on a public entity's action or decision could constitute an exercise of rights protected under the anti-SLAPP statute—an issue we need not and do not reach—this does not mean that litigation challenging a public entity's action or decision always arises from protected activity. In the present case, the litigation does not arise from the speech or votes of public officials, but rather from an action taken by the public entity administered by those officials." *San Ramon Valley Fire Prot. Dist. v. Contra Costa Cty. Employees' Ret. Assn.*, 125 Cal. App. 4th 343, 346–47 (2004).

Like the present case, that case turned on the "arising from" element of the California anti-SLAPP statute. "As our Supreme Court has put it, 'the mere fact an action was filed after protected activity took place does not mean it arose from that activity.' The anti-SLAPP statute cannot be read to mean that 'any claim asserted in an action which arguably was filed in retaliation for the exercise of speech or petition rights falls under section 425.16, whether or not the claim is based on conduct in exercise of those rights.' California courts rightly have rejected the notion 'that a lawsuit is adequately shown to be one arising from an act in furtherance of the rights of petition or free speech as long as suit was brought after the defendant engaged in such an act, whether or not the purported basis for the suit is that act itself.'" *Id.* at 353–54, quoting from *City of Cotati v. Cashman* 29 Cal.4th 69, 76–77 (2002).

The fact scenario in *San Ramon* bears relevant similarities to this case. There, Defendants made their decision to increase employee contributions following a discussion at a public meeting and a vote. Here, the Medical Board made its decision to deny Plaintiff's requests for information following an exchange of letters between Bruce Murray and Kerrie Webb. Plaintiff's case in no way attacks the freedom of exchange between Murray and Webb, only the Medical Board's action and

decision to deny the release of information. Furthermore, unlike the *San Ramon* fact scenario, the exchange between Murray and Webb did not take place in public, making this case the stronger argument for no infringement of free speech.

The California Supreme Court recently endorsed *San Ramon* in a case involving a former assistant professor who brought an action against California State University Los Angeles for alleged racial discrimination in a tenure decision. *Park v. Bd. of Trustees of California State Univ.,* 2 Cal. 5th 1057 (2017). The assistant professor was denied tenure, and he brought an action under the Fair Employment and Housing Act. *Id.* at 1061. The university brought an anti-SLAPP motion, arguing that Plaintiff's case was based on the numerous communications that led up to the tenure decision, and thus these communications were protected activities under the anti-SLAPP statute. *Id.* The trial court disagreed and denied the motion. A divided Court of Appeal reversed. The Supreme Court reversed the judgment of the Court of Appeal. As in *San Ramon,* the Court determined that the Plaintiff's case did not "arise from" any protected activity on the part of the Defendants.

"A claim is not subject to a motion to strike simply because it contests an action or decision that was arrived at following speech or petitioning activity, or that was thereafter communicated by means of speech or petitioning activity. Rather, a claim may be struck only if the speech or petitioning activity itself is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted." *Id.* at 1060.

The Court observed that the Plaintiff's claim did not arise from statements made during the Plaintiff's grievance proceeding, or any specific evaluations of him in the tenure process, as the Defendants had argued. *Id.* at 1068. Instead, the case was based on "the denial of tenure itself and whether the motive for that action was impermissible. The tenure decision may have been communicated orally or in writing, but that communication does not convert Park's suit to one arising from such speech. The dean's alleged comments may supply evidence of animus, but that does not convert the statements themselves into the basis for liability. As the trial court correctly observed, Park's complaint is 'based on the act of denying plaintiff tenure based on national origin. Plaintiff could have omitted allegations regarding communicative acts or filing a grievance and still state the same claims.'" *Id.*

Following the ruling in *Park,* the Court of Appeal upheld a superior court's ruling to deny the County of San Bernardino's anti-SLAPP motion against a former county social worker who had

brought whistleblower action against county. *Whitehall v. Cty. of San Bernardino*, 17 Cal. App. 5th 352 (2017). Prior to the lawsuit, the county placed the employee on administrative leave while it investigated suspected job misconduct. The county fired her two months later. The employee filed a complaint against the County based on whistleblower liability and retaliation. In its anti-SLAPP motion, the county argued that the employee's case "arose from" its protected activity of conducting employee investigations. The court disagreed:

"[The] county's act of placing social worker on leave did not arise from protected activity under anti-SLAPP law," the court held. *Id.* "The County's conduct of an investigation into employee wrongdoing, like the public hearings in *San Ramon Valley Fire Protection Dist., supra,* may be a proper exercise of its speech or petition rights. However, the act of placing plaintiff on administrative leave, with the intention of firing her, did not arise from the County's protected activity. It was in retaliation for plaintiff's act of revealing to the juvenile court the manipulation of evidence in a dependency case. … [T]he plaintiff challenged the retaliatory employment decision, not the process that led up to that point. The County's act of placing plaintiff on administrative leave, with the intention of terminating her employment, was not an exercise of its petitioning or free speech rights." *Id.* at 362.

Similarly in this case, the Plaintiff challenges the Medical Board's decision to deny him personal information under Cal. Civ. Code § 1798.34, not the process that led up to that point or the Defendants' communication of that denial. Thus, the Medical Board's act of denying Plaintiff's request for information is not constitutionally protected activity subject to the anti-SLAPP statute.

6. Defendants' mini trial-by-affidavit does not defeat Plaintiff's case on the merits.

In considering anti-SLAPP motions, the court "does not weigh the moving party's evidence against the opposing party's evidence, but addresses the factual and legal issues …" *Slaney v. Ranger Ins. Co.*, 115 Cal. App. 4th 306, 318 (2004). Otherwise stated, "We do not resolve the merits of the overall dispute, but rather identify whether its pleaded facts fall within the statutory purpose, to prevent and deter lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." *Wilson*, 6 Cal. App. 5th at 831.

Here, in their discussion of the "protected activities" element, Defendants launch into an extended discussion of their rationale for denying Plaintiff's requests for information. (Defs.' Mem. at 16:17-28; 17:1-21.) Defendants' justification for denying Plaintiff's request for information

proceeds as follows: (1) First they deny Plaintiff's right, as an heir and beneficiary, to receive his deceased mother's personal information, despite overwhelming law to the contrary; (2) then they re-cast Plaintiff's request for personal information as a public records request; (3) they misconstrue a provision of CIPA that directs the release of public information "pursuant to the California Public Records Act" § 1798.24(g) – using this subsection as a "trap-door" from CIPA to CPRA; (4) then they erroneously claim a mandatory exemption under the permissive exemptions in Cal. Gov. Code § 6254; (5) they ignore the fact that CIPA expressly supersedes the CPRA exemptions (Cal. Civ. Code § 1798.70); and finally, (6) they use their false mandatory exemption under § 6254(f) as the basis for asserting an absolute privilege for themselves under Cal. Evid. Code § 1040.

Defendants' sprawling syllogism is invalid at every level:

(1) Plaintiff's beneficial right to the information he is seeking: CIPA directs public agencies to release personal information to "a person representing the individual" (§ 1798.24), but the statute does not discuss how to deal with the personal information of deceased persons. The standard for releasing the personal medical information of deceased persons is set out in the Confidentiality of Medical Information Act: "An authorization for the release of medical information by a provider of health care, health care service plan, pharmaceutical company, or contractor shall be valid if it … (c) is signed and dated by one of the following … (4) The **beneficiary or personal representative** of a deceased patient." Cal. Civ. Code § 56.11(c). [Emphasis added.] This standard is applied to the Information Practices Act: "The disclosure of medical information regarding a patient that is subject to Cal. Civ. Code § 1798.24(b) requires an authorization that complies with the provisions of Cal. Civ. Code §§ 56–56.37." 37-429 California Forms of Pleading and Practice--Annotated § 429.203. Plaintiff's beneficial right to receive the information he is seeking is thoroughly supported in numerous other laws. (See Pl.'s Mem. of P. & A. Opp'n. to Defs.' Dem. 12-13.)

(2-4) Defendants' "trap-door" treatment of the Information Practices Act. CIPA contains a provision that directs the release of **public information** "pursuant to the California Public Records Act" § 1798.24(g), but Defendants contort this provision to mean, ***an agency shall withhold personal information pursuant to the Public Records Act;*** then they jump to the exemptions listed in the CPRA (Cal. Gov. Code § 6254); and presto, CIPA disappears, and all of

Audrey Murray's personal and medical information is magically exempt, and accessible only to the Medical Board and its agents.[6] This construction of the laws is wrong for the following reason:

(5) CIPA supersedes the applicable provisions of CPRA, not the other way around. Defendants' hopscotch from CIPA to the CPRA exemptions is expressly prohibited by statute: "This chapter **shall be construed to supersede** any other provision of state law, including Section 6253.5 of the Government Code, or **any exemption in Section 6254** or 6255 of the Government Code, which authorizes any agency to withhold from an individual any record containing personal information which is otherwise accessible under the provisions of this chapter." Cal. Civ. Code § 1798.70. [Emphasis added.] Defendants want to have it exactly in reverse.

(6) The qualified privilege of Cal. Evid. Code § 1040: The Evidence Code sets forth a two-tiered privilege regime for "official information … acquired in confidence by a public employee in the course of his or her duty": (1) an unqualified privilege, when "disclosure is forbidden by an act of the Congress of the United States or a statute of this state"; and (2) a qualified privilege for all other official information. Here, Defendants use their erroneous absolute exemption of § 6254 to claim an absolute privilege for themselves under the Evidence Code. In this way, the Defendants weave a Gordian knot of absolute privilege and total exemption. In reality, Defendants have no exemption as a basis for withholding the personal information Plaintiff requests; and the privilege belongs to the Plaintiff, not the Defendants.

[7] The missing step: Finally and perhaps even more importantly, Defendants' totally ignore the fact that both the CIPA and CPRA contain provisions for in camera inspection and the redacting of information that is exempt or privileged to someone else:

- "In any suit brought under the provisions of subdivision (a) of Section 1798.45: (a) The court may examine the contents of any agency records in camera to determine whether the records or any portion thereof may be withheld as being exempt from the individual's right of access and the burden is on the agency to sustain its action." Cal. Civ. Code § 1798.46.

[6] Furthermore, the exemptions listed in Cal. Gov. Code § 6254 are permissive, not mandatory, i.e., "this chapter does not require the disclosure of any of the following records … (f) Records of complaints to, or investigations conducted by, or … any investigatory or security files compiled by any other state or local agency for … licensing purposes." § 6254(f). Also see *Williams v. Superior Court*, 5 Cal. 4th 337 (1993); and *Register Div. of Freedom Newspapers v. County of Orange*, 158 Cal. App. 3d 893, 901 (1984).

- "Any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law." Cal. Gov. Code § 6253. Furthermore, in cases under CPRA, the law empowers the court to "to decide the case after examining the record in camera." Cal. Gov. Code § 6259.

Here, it is plausible and quite probable that some of Audrey Murray's personal and medical information may be contained in MBC investigatory files that are otherwise subject to an exemption.[7] But the law provides a clear process for dealing with this problem through inspection and redaction. Similarly, the MBC's files may contain information that is privileged to someone else, such as the identity of the MBC's consulting experts. Again, the law provides the process for sorting out and redacting this information. But the Defendants want to completely evade this process. They refuse to prepare Audrey Murray's files for release to Plaintiff, thus forcing the Plaintiff to file a lawsuit, and forcing the court to do the document preparation that the Medical Board should be doing as a matter of routine. Defendants' behavior is unreasonable and wasteful.

7. Controlling cases support Plaintiff's right to receive his deceased mother's personal information under CIPA.

As in their procedural discussion of the anti-SLAPP provision, Defendants fail to provide any analogous or controlling cases to support their version of law and facts on the merits. Unlike the heavily litigated anti-SLAPP statute, the case law on CIPA is relatively limited. Not surprisingly, the cases on point contradict Defendants' view.

In a leading case, a group of taxpayers brought suit against the Franchise Tax Board, the Board of Equalization, former State Controller Kathleen Connell, and 12 other state employees. The Plaintiffs alleged, among many other things, that the Defendants failed to provide access to personal information, as required by CIPA. *Bates v. Franchise Tax Bd.,* 124 Cal. App. 4th 367, 376 (2004). The court expressly affirmed the provisions of Cal. Civ. Code § 1798.70, which supersede the exemptions of Cal. Gov. Code § 6254. "This interpretation is consistent with the express purpose of the IPA, to govern the collection, maintenance, and use of *personal* information." *Id.* at 377.

[7] Plaintiff's written discovery is aimed at identifying what documents exist, or do not exist, and what categories of information – privileged, exempt or otherwise – are contained within them. (See Defs.' Exhs. in Supp. of Demurrer, Exh. 3. Also see Pl.'s Exhs. in Supp. of Mot. for Sanctions Pursuant to CCP §§ 128.5 and 425.16(c)(1).

Here, Plaintiff seeks his mother's personal and medical information pursuant to Cal. Civ. Code §§ 1798.24-34, and Defendants can't lawfully deny this information by invoking a blanket exemption under § 6254 or asserting an absolute privilege for themselves under Cal. Evid. Code § 1040. The privilege belongs to Plaintiff.

In the context of this opposition to Defendants' anti-SLAPP motion, Plaintiff is not required to establish "that there is a probability that the plaintiff will prevail on the claim" because his case does not arise from any protected activity on the part of Defendants. CCP § 425.16(b)(1). However, as shown in the analysis above, and Defendants' skewed version of the law and facts just doesn't fly.

B. Defendants' refusal to provide Plaintiff personal information under the Information Practices Act constitutes an act that affects both the private and public interest.

Plaintiff's action against the Medical Board has two primary aspects: One, the purely private interest of Plaintiff to obtain information regarding his mother's final days; and two, the broader public interest relating to the Medical Board's responsiveness – or lack thereof – to the general public. Accordingly, Plaintiff's seventh cause of action alleges violations of public policy, as set out in the Information Practices Act, the Business & Professions Code, the California Constitution, and the California Public Records Act.

Defendants have asserted a general demurrer to Plaintiff's seventh cause of action (Defs.' Mem. in Supp. of Dem. at 20:11-28); and in their concurrent motion to strike, Defendants call Plaintiff's seventh cause of action "irrelevant and improper." (Defs.' Mem. in Supp. of Mot. to Strike at 10:1.) But in their anti-SLAPP motion, Defendants' suddenly discover the public policy aspect of Plaintiff's action: "This is an issue of public concern as the Board is mandated to protect the public by investigating the conduct of its licensees to determine if there were any departures from the standard of care." (Defs.' Mem. at 18:15-16.) "Any complaint about a physician (i.e., a licensee of the board), is an issue of public interest." *Id.* at 4-5.

Plaintiff is pleased at the Defendants' serendipity in discovering public policy and its relevance to Plaintiff's case. Plaintiff takes this as a ringing endorsement of his seventh cause of action, and *a fortiori*, all six preceding causes of action.

Because Plaintiff's case does not arise from any protected activity on the part of Defendants, the connection of his case with a public issue has no bearing on Defendants' anti-SLAPP motion. But Defendants' advocacy of the public policy relevance of Plaintiff's claims only serves to support Plaintiff's case in chief.

III. DEFENDANTS' AFFIRMATIVE DEFENSES FAIL IN BOTH THEIR DEMURRER AND THEIR ANTI-SLAPP MOTION.

Defendants' anti-SLAPP memorandum, like their demurrer, presents two affirmative defenses: res judicata and timeliness. Briefly, Defendants' res judicata defense fails because Plaintiff's prior writ action was not decided on the merits. *Murray v. Medical Board of Calif. et al.*, No. BS158575, Los Angeles Super. Ct. (2017). (See Defs.' RFJN, Exh. 12 at 11-12.) Defendants' timeliness defense fails for a number of reasons, primarily because none of Kerrie Webb's letters to Plaintiff were final for the purpose of accrual, and the parties continued to meet and confer up until Webb's final letter to Plaintiff, on January 29, 2018. (See Decl. of Kerrie Webb, Exh. F.) Thus, Plaintiff timely presented his claims to the Department of General Services on May 30, 2018. (V.C. at 3, ¶ 14; RFJN, Exhs. 24-25.)

The remainder of Defendants' points regarding "step 2" of the anti-SLAPP statute ("probability that the plaintiff will prevail on the claim") are addressed in part II(A)(6)-(7) above.

CONCLUSION

Plaintiff's claims against the Medical Board of California and its agents do not arise from any act relating to the furtherance of Defendants' constitutional right to free speech. However, Defendants' anti-SLAPP motion aims squarely at Plaintiff's right to seek redress for his grievances. Thus, Defendants' anti-SLAPP motion is itself a SLAPP motion. Therefore, Defendants motion and their tactics should be rejected in the strongest terms.

Dated: February 11, 2019

By:

Bruce T. Murray,

Plaintiff *in propria persona*