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January 25, 2021

**VIA U.S. MAIL**

Appeals Committee  
California Joint Powers Insurance Authority  
8081 Moody Street  
La Palma, CA 90623

Re: Appeal from Coverage Denial Re *James Bieber v. Gene James, et. al.*  
Orange Cty. Sup. Ct., Case No. 30-2020-01145593-CU-DF-CJC (2020)

To Whom it May Concern:

This firm represents the City of San Clemente (the “City”). This letter addresses litigation filed against San Clemente City Councilmember Gene James by James Bieber (“Plaintiff”) entitled *James Bieber v. Gene James, et. al.*, Orange County Superior Court, Case No. 30-2020-01145593-CU-DF-CJC (2020) (the “Action”).

The California Joint Powers Insurance Authority (“JPIA”) denied coverage of the Action under the Memorandum of Coverage: Primary Liability Program (as amended from time to time, the “MOC”). This denial was communicated via letters to James dated July 22, 2020 and to San Clemente Interim City Manager Erik Sund dated December 15, 2020.

Pursuant to Section 5.J.(iii) of the MOC, the City hereby appeals the JPIA’s denial of coverage for the Action and for Mr. James. If requested (or helpful), the City will supplement this letter with additional documentation or analysis.

**I. BACKGROUND**

**A. Plaintiff’s allegations.**

The following is a brief summary of the allegations of Plaintiff’s complaint (the “Complaint”). The City takes no position as to the truth of these allegations, but recites them for purposes of this coverage analysis.

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Plaintiff alleges that he is a resident of San Clemente and owns a business “involved in print mailing for political campaigns.” (Compl., ¶ 4.) Plaintiff alleges that James, also a resident of San Clemente, ran for San Clemente city council in 2018, but lost. (*Id.*, ¶ 6.)

After James’ unsuccessful bid in 2018, Plaintiff alleges that he and James entered into a working relationship to support a future run by James in November 2020. (*Id.*, ¶ 7.) To that end, James and Plaintiff spent several months in 2019 “talking about strategy” for James’ run. (*Id.*)

Plaintiff alleges that on or about May 8, 2019, San Clemente City Councilmember Steve Schwartz passed away, leaving a vacancy on the council and forcing a special election for the open seat to be held in November 2019. (*Id.*, ¶ 8.) In support of James’ candidacy, Plaintiff alleges that he circulated emails to San Clemente political insiders and produced and circulated “three campaign mailers” advocating for James. (*Id.*, ¶¶ 10–15.) James won the November 2019 election and became a city councilmember shortly thereafter.

According to Plaintiff, it came to light that the promotional materials that Plaintiff created contained a misstatement concerning James’ military career. (Compl., ¶¶ 9–16.) Although Plaintiff spends much of his Complaint lambasting James for the misstatement, the relevance of this purported misstatement—and James’ knowledge of the misstatement—to Plaintiff’s claims is unclear.

In any event, Plaintiff alleges that in May 2020 “local San Clemente activist” Melissa Phelps shared with Plaintiff text messages between James and “two other local residents” Anthony Rubolino and Martina McBurney-Wheeler. (*Id.*, ¶ 18.) Plaintiff claims that these messages show that Phelps asked James whether he “had made an alliance with a rival councilmember (Chris Hamm)” who Phelps said had been at James’ home. (*Id.*, ¶ 18.) James then allegedly demanded to know how Phelps and the other two knew this information. (*Id.*) When they refused to answer, Plaintiff expressed concern for the safety of his family, and allegedly stated “So you refused to tell me... Bieber threatened to kill me, and my wife shouldn’t be freaked out.” (*Id.*) James allegedly followed up this comment by stating “[t]here are witnesses to Bieber... besides its not me... my wife is completely freaked out since your post.” (*Id.*)

Plaintiff’s Complaint alleges various claims related to James’ purported statements that Plaintiff had threatened to kill James, including (1) defamation, (2) defamation per quod, (3) trade libel, and (4) intentional interference with prospective economic advantage. (*Id.*, ¶¶ 20–50.)

**B. Additional facts.**

The City offers the following additional information in support of this appeal – based in part on allegations and statements in James’ anti-SLAPP motion filed in the Action on September

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8, 2020 (the “Anti-SLAPP Motion”).<sup>1</sup> In addition, James has confirmed to the City that he could and would swear to the following facts under penalty of perjury.

According to James, Plaintiff created the promotional materials referenced in his Complaint at the bequest of James’ political party. (Anti-SLAPP Mot. at 8, § II.B.) Around the same time, James drew the ire of some members of his party by accepting a taboo union endorsement and by criticizing local toll roads. (*Id.*)

Following these perceived slights to James’ party—which constitutes a significant portion of Plaintiff’s client base—Plaintiff turned on James. (*Id.* at 8-9.) At a bar in or around February 2020, James reports that Plaintiff demanded that James cause certain individuals in the City government to be fired. When James refused, Plaintiff told James that he is “an oozing piece of shit” and that “[w]e’re going to kill you.” (*Id.* at 9.) James believes that Plaintiff’s words were motivated by a political adversary.

Several months later, James became aware that someone was watching his home and reporting visitors. (*Id.* at 9, § II.C.) James believes that this surveillance was related to his political office and his meetings with a controversial fellow councilmember. (*Id.*) James was confronted by three of his constituents—City activist Melissa Phelps, Anthony Rubolino, and Martina McBurney-Wheeler—about his purported connection to the elected official. The three claimed that they were aware that the official had been at James’ home. Concerned for the personal safety of his family, James demanded to know the basis for his constituents’ claim. Over the course of this conversation, James communicated to his constituents the threats that Plaintiff had made to James in or around February 2020. (*Id.*)

James will further declare under penalty of perjury that communicating with his constituents and interfacing with his Council colleagues is one of his responsibilities as a city councilmember.

**C. JPIA’s denial of coverage.**

James tendered the Action to the JPIA shortly after Plaintiff filed his Complaint. On July 22, 2020, the JPIA issued a letter to James denying his claim for coverage under the MOC and claiming that James was not “acting within the scope [of his] duties or employment” as a city councilmember at the time of the acts giving rise to the Action. Notably, the JPIA provided no analysis for this conclusion.

On December 15, 2020, the JPIA denied James’ appeal and affirmed the denial of coverage. Again, the JPIA concluded—without analysis or legal authority—that “[t]he allegations of threats

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<sup>1</sup> A true and correct copy of the Anti-SLAPP Motion is attached hereto as Exhibit 1.

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and defamation made by . . . Bieber do not allege any actions by . . . James within the scope of his duties as a Council Member.”

## **II. ANALYSIS OF COVERAGE UNDER MOC.**

### **A. The Complaint triggers coverage under Section 2.A of the MOC.**

Section 2.A of the MOC identifies various coverages, including, as relevant here, coverage for “Broadcast/Publication Injury.” This phrase is defined in the MOC as encompassing the following conduct:

**any form of defamation or other tort related to disparagement or harm to the character, reputation or feelings of any natural person or organization including but not limited to libel, slander, product disparagement, trade libel, infliction of emotional distress, outrage, or outrageous conduct.**

(MOC, Sec. 3. [emphasis added].)

Importantly, your July 22, 2020 and December 15, 2020 letters do not appear to dispute that Plaintiffs’ claims are within Section 2.A’s “Broadcast/Publication Injury” coverage. The Complaint alleges, specifically, two “defamation” claims, one “trade libel” claim, and one “other tort claim” (intentional interference with prospective economic advantage) that alleges “disparagement or harm to the character” of Plaintiff’s “person” and “organization.” As such, Plaintiff’s Action is within the express terms of Section 2.A.

### **B. James was arguably acting within the scope of his duties as a city councilmember.**

As the sole basis for your denial of coverage, you contend that the Action does not trigger coverage because James was not acting within the scope of his duties at the time of the conduct giving rise to the Action. Specifically, you rely upon the MOC’s definition of “Protected Party,” which limits coverage of acts by “elected or appointed officials” to those committed “within the scope of their duties or employment . . . .” (MOC, Sec. 3.) You also rely upon Section 2.D, which states that “the defense and/or indemnity protections afforded by this agreement to a past or present elected or appointed official or Employee of a Member are not broader than the Member’s own duty to defend and indemnify its official or Employee under California Government Code section 825, *et seq.* and 995, *et seq.*” (MOC, Sec. 2.D). California Government Code sections 825 and 995 limit a public entity’s duty to defend and indemnify an employee to only those acts committed within the scope of their employment. Cal. Gov. Code §§ 825(a), 995.

Thus, the ultimate question is whether James was acting within the scope of his duties as councilmember when he made the statements that he made. As further explained below, James

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can credibly claim that he was acting within the scope of his duties, and, accordingly, the JPIA should defend the Action.

Whether an employee is acting within the scope of his employment is a question of fact. *See Unruh-Haxton v. Regents of Univ. of California*, 162 Cal. App. 4<sup>th</sup> 343, 368 (2008), *as modified* (May 15, 2008). In determining whether an employee is acting within the scope of their employment, courts ask whether the conduct was foreseeable to the enterprise employing the employee. *See Yamaguchi v. Harnsmut*, 106 Cal. App. 4<sup>th</sup> 472, 484 (2003). “Foreseeability” for purposes of this analysis “merely means that in the context of the particular enterprise an employee’s conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer’s business.” *Id.* (quoting *Farmers Ins. Group v. County of Santa Clara*, 11 Cal. 4<sup>th</sup> 992, 1003 (1995).)<sup>2</sup>

In California, scope of employment “has been interpreted broadly” to include conduct that is not specifically centered around the objective of the enterprise, but, rather, is personal in nature. *Farmers Ins. Group v. County of Santa Clara*, 11 Cal. 4<sup>th</sup> 992, 1004 (1995). The California Supreme Court in *Farmers Ins. Group v. County of Santa Clara*, for instance, observed that the scope of employment includes acts “by an employee [who] is not engaged in the ultimate object of his employment at the time of his wrongful act”; “acts necessary to the comfort, convenience, health, and welfare of the employee while at work, though strictly personal”; and acts by “the employee [who] is combining his own business with that of his employer, or attending to both at substantially the same time . . . .” *Id.* In other words, the law recognizes liability for conduct of a personal nature as long as it foreseeably arises from the employer’s enterprise.

Further testament to the breadth of the law’s application is that even “willful and malicious torts” can be within the scope of employment. *Id.* Courts have found that a wide range of torts were within the scope of employment, including, as here, defamation. *See Rivera v. Nat’l R.R. Passenger Corp.*, 331 F.3d 1074, 1081 (9<sup>th</sup> Cir. 2003) (holding that allegedly defamatory statement by plaintiff’s co-worker was within course and scope of co-worker’s employment); *McLachlan v. Bell*, 261 F.3d 908, 910 (9<sup>th</sup> Cir. 2001) (holding that allegedly defamatory statement by plaintiff’s subordinate that plaintiff “might become violent” was within course and scope of subordinate’s employment.) Indeed, the Court in *Mazzola v. Feinstein* found that allegedly defamatory statements by a county supervisor were within the scope of her employment even though they were made off-the-record and outside of an official proceeding. 154 Cal. App. 871, 876 (Ct. App. 1973)

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<sup>2</sup> This standard applies both in the private employment context and is also applied in the context of California Government Code Section 995. *See Farmers Ins. Group v. County of Santa Clara*, 11 Cal. 4<sup>th</sup> 992, 1003 (1995) (“As used in the Tort Claims Act, ‘[t]he phrase ‘scope of his employment’ is intended to make applicable the general principles that the California courts use to determine whether the particular kind of conduct is to be considered within the scope of employment in cases involving actions by third persons against the employer for the torts of his employee.’”) (quoting 4 Cal. Law Rev. Com. Rep. (Dec. 1963) p. 814, fn. 3.).

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(supervisor’s accusations that local union leader orchestrated firebombing were within scope of employment).

Here, James could credibly testify that communicating with constituents and responding to communications from constituents is an affirmative duty attendant to his council membership. Plaintiff affirmatively pleads that the conversation during which the allegedly defamatory statements were made were between James and three of his constituents, one of whom—Melissa Phelps—Plaintiff describes as a “political activist.” Plaintiff also affirmatively pleads that the specific comment that led to James’ purportedly defamatory statements—Ms. Phelps’ query about James’ political alliances—were centered directly upon his position as councilmember.

Further, the circumstances surrounding the events leading to James’ allegedly defamatory statements support the conclusion that the Action arises from James’ position as a city councilmember. Specifically, James would testify that the threat that he relayed to his constituents was made by Plaintiff during a heated political conversation with Plaintiff earlier that year that included threats against James arising directly from James’ refusal to advance Plaintiff’s local political agenda. These facts suggest that this conversation was not personal in nature, but, rather, that James’ testimony could show that it concerned actions that Plaintiff hoped that James would take in his capacity as councilmember.

Given James’ duty to communicate with constituents regarding matters of local government, a trier of fact could find that James allegedly wrongfully conduct—committed during communications with his constituents regarding his political affiliations—was a foreseeable consequence of his council membership, and, therefore, within the scope of his duties as councilmember. This is true even though the specific statements purportedly giving rise to liability concerned the personal safety of his family. *See Farmers Ins. Group*, 11 Cal. 4<sup>th</sup> at 1004 (“Moreover, ‘where the employee is combining his own business with that of his employer, or attending to both at substantially the same time, no nice inquiry will be made as to which business he was actually engaged in at the time of inquiry, unless it clearly appear that neither directly nor indirectly could he have been serving his employer.’”) (*quoting John R. v. Oakland Unified School Dist.*, 48 Cal. 3d 438, 447 (1989)); *see also, Neal v. Gatlin*, 35 Cal. App. 871, 876 (Ct. App. 1973) (“The fact that portions of the letters are alleged to contain false statements does not remove the acts of writing the letters from the scope of the respondents’ employment.”). Nor is it determinative that a trier of fact may find James’ conduct to be tortious. *Farmers Ins. Group*, 11 Cal. 4<sup>th</sup> at 1004. (“It is also well settled that an employer’s vicarious liability may extend to willful and malicious torts of an employee as well as negligence.”).

Further, by denying coverage the JPIA puts the City in an untenable position. A trier of fact could reasonably conclude that James’ conduct was within the scope of his duties, thereby obligating the City to indemnify and defend James even though the JPIA has refused to honor its commitments to the City under the MOC. Since the grant of coverage in the MOC is intended to



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be coextensive with the City's obligations under the Government Code, it would be anomalous and unfair for the City to bear the defense of this Action alone.

**III. CONCLUSION**

For the reasons discussed, the City disputes and hereby appeals JPIA's denial of coverage, and requests that the JPIA reverse its decision and provide full coverage with respect to the Action.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Chris Deal'.

Christopher E. Deal  
Scott C. Smith  
of BEST BEST & KRIEGER LLP

# **EXHIBIT 1**



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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
10 COUNTY OF ORANGE

12 JAMES BIEBER,  
13 Plaintiffs,  
14 v.  
15 GENE JAMES and DOES 1-50  
16 inclusive,  
17 Defendants.

Case No. #30-2020-01145593-CU-DF-CJC  
Honorable David A. Hoffer

**Defendant Gene James’ Notice of Motion  
and Special Motion to Strike Plaintiff  
James Bieber’s Complaint Pursuant to  
Cal. Civ. Proc. § 425.16 (anti-SLAPP);  
Memorandum of Points and Authorities**

Date: November 30, 2020  
Time: 1:30 p.m.  
Dept: C-42  
Reservation No.: 73369782

22 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

23 PLEASE TAKE NOTICE that on November 30, 2020, at 1:30 p.m.,<sup>1</sup> or as soon  
24 thereafter as counsel may be heard in Department C-42 of the above-captioned Court,  
25 located at 700 Civic Center Drive West, Santa Ana, California 92701, defendant Gene  
26 James (“James” or “Defendant”) will, and hereby moves, for an order pursuant to

27 <sup>1</sup> Defendant attempted to schedule the hearing date on this motion within 30 days of  
28 service of the motion, but due to the Court’s calendar, was unable to do so. [Declaration  
of Kevin M. Brown, filed concurrently herewith, ¶ 2.]

1 California Code of Civil Procedure section 425.16 (the anti-SLAPP statute) striking each  
2 cause of action asserted by plaintiff James Bieber (“Bieber” or “Plaintiff”) in his  
3 complaint against Defendant (for defamation, defamation per quod, trade libel, and  
4 intentional interference with prospective economic advantage) and dismissing Plaintiff’s  
5 complaint in its entirety.

6 PLEASE TAKE FURTHER NOTICE that if Defendant’s motion is granted, he  
7 will move pursuant to California Code of Civil Procedure section 425.16(c) to recover  
8 attorneys’ fees and costs. Thus, Defendant requests that an order granting his anti-SLAPP  
9 motion state that the Court will subsequently entertain and rule on a motion for an award  
10 of fees and costs pursuant to section 425.16 of the anti-SLAPP statute. (*American*  
11 *Humane Association v. Los Angeles Times Communications* (2001) 92 Cal.App.4th 1095,  
12 1103.) Defendant expressly reserves his right to bring such motion after the Court issues  
13 its order on this motion.

14 This motion is made on the following grounds:

15 1. Each of Plaintiff’s four causes of action arise from, or are related to, an  
16 alleged statement made by Defendant that was in furtherance of his right of freedom of  
17 speech under the First Amendment and/or the California Constitution. The prelitigation  
18 statement, which also relates to a public issue and/or an issue of public interest, therefore  
19 constitutes protected activity under the anti-SLAPP statute.

20 2. Plaintiff will not be able to show a probability of prevailing on the merits of  
21 his claims and against Defendant’s defenses. Each of Plaintiff’s causes of action are  
22 premised on the claim that Defendant, who is a member of the San Clemente City Council  
23 and running for re-election, sent a message to constituents and/or political activist(s)  
24 stating that Plaintiff threatened to kill him. Whether or not Plaintiff meant this as a threat  
25 to end Defendant’s life or as a political euphemism (indeed, Plaintiff produces political  
26 “hit” mailers for a living), it actually occurred—and Defendant recounting it to several of  
27 his constituents is protected by the litigation privilege and is also “other conduct in  
28 furtherance of the exercise of the constitutional right of petition or the constitutional right

1 of free speech in connection with a public issue or an issue of public interest.” (See Cal.  
2 Civ. Proc. § 425.16(e)(2) and (e)(4); *Beilenson v. Superior Court* (1996) 44 Cal.App.4th  
3 944, 950 [holding Cal. Civ. Proc. Section 425.16 applies to suits involving statements  
4 made during a political campaign].) Further, Plaintiff cannot establish damages or actual  
5 malice.

6 This motion is based on this Notice of Motion and Motion, the attached  
7 Memorandum of Points and Authorities, the concurrently filed Declarations of Gene  
8 James and Kevin M. Brown, the pleadings and papers on file in this action, and on such  
9 other and further argument and evidence as the Court may properly receive.

10  
11 Dated: September 8, 2020

SNELL & WILMER L.L.P.

12  
13 By: 

14 Christy D. Joseph  
15 Brett W. Johnson  
16 Kevin M. Brown  
17 Attorneys for Defendant  
18 Gene James

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 Political activities, and the candidates and elected officials who engage in them, are  
4 protected by the First Amendment and the California Constitution, as well as California’s  
5 Anti-SLAPP statute.<sup>2</sup> By filing this lawsuit, Plaintiff James Bieber (“Bieber” or  
6 “Plaintiff”) seeks to accomplish through the California Superior Court that which he is  
7 usually paid to do in his office—affect elections by attacking elected public servants.  
8 After all, Mr. Bieber is a journeyman of an Orange County political party who designs  
9 and mails political “hit” pieces.<sup>3</sup> But California law proscribes his change in venue by  
10 prohibiting legal actions against public servants like Mr. James who exercise their First  
11 Amendment Rights and whose prelitigation statements about receiving a death threat—  
12 political or otherwise—are of public interest.

13 Mr. Bieber’s lawsuit falls squarely within the purview of the anti-SLAPP statute  
14 for two reasons, either of which could form the basis for granting Mr. James’ motion.  
15 First, the comment at issue—Mr. James informing three of his constituents that Mr.  
16 Bieber threatened him—qualifies as a privileged “prelitigation” statement due to a related  
17 ongoing public investigation by the District Attorney’s office into Mr. James based on Mr.  
18 Bieber’s mailings about him. Second, Mr. James is an elected official running for  
19 reelection, and his statement about Mr. Bieber’s threats is of public interest. As a  
20 consequence, it is Mr. Bieber’s burden under prong two of the anti-SLAPP analysis to  
21 prove that he is likely to prevail on the merits of his four causes of action. This he cannot  
22 do. At the outset, the statement is privileged, the statement is true, i.e., Mr. Bieber  
23 disdained Mr. James and threatened him, Mr. Bieber did not suffer any damages, and Mr.  
24 James did not act with actual malice.

25 ///

26 ///

27 \_\_\_\_\_  
28 <sup>2</sup> Cal. Civ. Proc. § 425.16.

<sup>3</sup> See Declaration of Gene James (“James Decl.”) filed concurrently herewith, ¶ 7.

1 II. STATEMENT OF FACTS

2 A. Mr. James Is a Public Official Who Is in the Middle of a Campaign

3 Mr. James is a member of the San Clemente City Council. [James Decl. ¶ 2.] He  
4 was elected in November 2019 after a special election; his reelection is in a few months,  
5 i.e., November 2020. [Complaint ¶¶ 7–8; James Decl. ¶ 2.] The timing of this lawsuit—  
6 which has already been publicly reported in the local newspaper—is no accident. [James  
7 Decl. ¶ 3.] Its practical effect is to undermine Mr. James’ bid for reelection. [*Id.* at ¶ 4.]  
8 The consummate public servant, Mr. James joined the U.S. Army at 17 years old  
9 immediately after graduating from High School in 1972 as the Vietnam War was winding  
10 down. [*Id.* at ¶ 2.] He retired honorably after 20 years of service. [*Ibid.*] His military and  
11 post-military careers focused on law enforcement and security; he also devoted his time to  
12 numerous charitable endeavors prior to serving his local community as a member of the  
13 City Council. [*Id.* ¶¶ 5–6.]

14 B. Mr. Bieber, Whose Job Is to Produce Hit Pieces for an Orange County  
15 Political Party, Threatened Mr. James Because of His Positions

16 Mr. Bieber owns a company, Bieber Communications, that produces political  
17 mailers. [Complaint ¶ 4; James Dec. ¶ 7.] In 2019 and at the bequest of the county party,  
18 Mr. Bieber created several mailers that misstated the final award<sup>4</sup> Mr. James received  
19 upon leaving active duty. [Complaint ¶ 15; James Dec. ¶ 8.] Around the same time, Mr.  
20 James drew the ire of some members of his political party related to his acceptance of a  
21 forbidden union endorsement and his criticism of the Toll Roads, the latter of which is a  
22 political lightning rod due the significant financial implications for many businesses and  
23 political power brokers. [James Dec. ¶ 9.] As a result of the mailers being sent out,  
24 someone contacted the Orange County District Attorney’s Office, which subsequently  
25 opened an investigation into the allegations of “stolen valor” related to the mailers Mr.  
26 Bieber produced. [*Id.* at ¶ 10.] Meanwhile Mr. Bieber, whose business, on information  
27

28 <sup>4</sup> Mr. James received the Meritorious Service Medal, but the mailer stated he received the Legion of Merit. [James Decl. ¶ 8.]



1 and belief, is wholly dependent on the affected political party, subsequently turned against  
2 Mr. James in a personal and visceral way. [*Id.* at ¶¶ 7, 11.] At a local bar in February  
3 2020, Mr. Bieber confronted Mr. James and said, “You’re an oozing piece of shit. We’re  
4 going to kill you.” [*Id.* at ¶ 11.] Not wanting to further engage with Plaintiff, Mr. James  
5 left the bar. [*Id.* at ¶ 12.] Mr. James wasn’t sure whether Mr. Bieber meant it as a political  
6 takedown comment or a personal one, but he attributed the hostility to a political  
7 adversary. [*Ibid.*]

8 **C. Mr. James Truthfully Reported Mr. Bieber’s Threat to a Few of His**  
9 **Constituents, and Mr. Bieber Responded by Filing a Public Lawsuit Right**  
10 **Before Mr. James’ Reelection**

11 Several months later, James became aware of the fact that someone was watching  
12 his home and reporting visitors. [Complaint ¶ 18; James Dec. ¶ 13.] This was apparently  
13 related to his political office and his meetings with another elected official. [*Ibid.*] Mr.  
14 James communicated his concerns to several constituents/activists—Melissa Phelps,  
15 Anthony Rubolino, and Martina McBurney-Wheeler—in a May 2, 2020 Facebook  
16 message.<sup>5</sup> Given his office and experience in law enforcement and security, he was  
17 concerned for his family. [James Decl. ¶ 14.] On information and belief, none of those  
18 individuals are clients or prospective clients of Bieber Communications. [James Decl. ¶  
19 15.] Mr. Bieber learned of the communication and subsequently filed this *public*  
20 defamation lawsuit—which mostly focuses on rehashing the stolen valor allegations—  
21 only a few months before Mr. James’ reelection. [Complaint, *passim*; James Decl. ¶ 16.]

22 **III. THE ANTI-SLAPP LAW**

23 California Code of Civil Procedure section 425.16 safeguards free speech and  
24 petition rights by providing for quick disposal of lawsuits that chill the exercise of those  
25 rights. (*Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1042.) Under  
26 Section 425.16(b), the court must engage in a two-step process. (*Equilon Enterprises, LLC*

27 <sup>5</sup> The message said, “So you refused to tell me [who was surveilling my home] . . . Bieber  
28 threatened to kill me, and my wife shouldn’t be freaked out.” [Complaint ¶ 18; James  
Decl. ¶ 14.]

1 v. *Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) First, the court decides whether the  
2 defendant has made a threshold showing that the challenged cause of action arises from  
3 protected activity. (*Ibid.*) Defendant’s requirement is satisfied if the suit “potentially  
4 impairs the right of free speech.” (*Beilenson v. Superior Court* (1996) 44 Cal.App.4th 944,  
5 950.) And if the causes of action include allegations of both protected and unprotected  
6 activity, an anti-SLAPP motion will lie. (*Thomas v. Quintero* (2005) 126 Cal.App.4th 635,  
7 653.) Second, if the court finds that defendant’s activity is protected, the burden shifts to  
8 the plaintiff to demonstrate a probability of prevailing on the claim. (Cal. Civ. Proc.,  
9 § 425.16(b); *Equilon Enterprises, LLC, supra*, 29 Cal.4th at 67.) If the plaintiff fails to  
10 demonstrate it is likely to prevail on its claims, the claims are stricken. (*Ibid.*)

#### 11 IV. ARGUMENT

##### 12 A. Each of Mr. Bieber’s Causes of Action Is Based on a Constitutionally 13 Protected Activity

14 The anti-SLAPP statute protects the following activities, among others:

- 15 • “Any written or oral statement or writing made in connection with an issue  
16 under consideration or review by a legislative, executive, or judicial body, or any other  
17 official proceeding authorized by law;” or
- 18 • “Any other conduct in furtherance of the exercise of the constitutional right  
19 of petition or the constitutional right of free speech in connection with a public issue or an  
20 issue of public interest.” (Cal. Civ. Proc. Code § 425.16(e).)

21 Mr. James purportedly defamatory statement is protected under the anti-SLAPP  
22 statute because it was made in anticipation of litigation and, alternatively, was made in  
23 connection with a public issue.

##### 24 1. **Because Mr. Bieber’s Claims Are Based on Prelitigation** 25 **Communications, It Falls Under the Anti-SLAPP Statute**

26 Mr. Bieber’s claims are based on prelitigation communications, which are  
27 protected under the anti-SLAPP statute. The litigation privilege protects conduct even if it  
28 is “alleged to be fraudulent, perjurious, unethical, or even illegal.” (*Kashian v. Harriman*

1 (2002) 98 Cal.App.4th 892, 920; *Yan v. Sing Tao Newspapers San Francisco Ltd. et al.*  
2 (Cal. App. Sept. 25, 2008) No. A120311, 2008 WL 4359534 [granting defendant’s anti-  
3 SLAPP motion and finding that a plaintiff cannot frustrate the purposes of the anti-SLAPP  
4 statute by simply pleading an illegal act.] Importantly, application of the litigation  
5 privilege is not limited to civil lawsuits, but applies equally in criminal proceedings like  
6 those Mr. James faced. (See *People v. Toledano* (June 24, 2019) 36 Cal.App.5th 715, 728  
7 [“Thus, the litigation privilege may apply to criminal prosecutions . . . .”].) “To effectuate  
8 its vital purposes, the litigation privilege is held to be absolute in nature.” (*Silberg v.*  
9 *Anderson*, 50 Cal.3d 205, 215 (1990) (quotations and citations omitted).) The litigation  
10 privilege “applies to any communication (1) made in judicial or quasi-judicial  
11 proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the  
12 objects of the litigation; and (4) that have some connection or logical relation to the  
13 action.” (*Id.* at 212.) Application of the litigation privilege “is not limited to statements  
14 made during a trial or other proceedings, but may extend *to steps taken prior thereto*, or  
15 afterwards.” (*Action Apartment Ass’n, Inc. v. City of Santa Monica* (2007) 41 Cal.4th  
16 1232, 1241 (internal quotations omitted) (emphasis added); see also *Rusheen v. Cohen*  
17 (2006) 37 Cal.4th 1048, 1058.) “Any doubt as to whether the privilege applies is resolved  
18 in favor of applying it.” (See *Home Ins. Co. v. Zurich Ins. Co.* (2002) 96 Cal.App.4th 17,  
19 23 (citation omitted).)

20 The litigation privilege clearly applies in this case. At the time of the  
21 communication at issue in this matter, i.e., the Facebook message to Mr. James’  
22 constituents about Mr. Bieber’s threat, Mr. James was under investigation by the Orange  
23 County District Attorney’s office related to the stolen valor accusation. [James Decl. ¶¶  
24 10–11, 14.] Moreover, Mr. Bieber was the person who published the incorrect statements  
25 about Mr. James’ military service that led to the investigation, and potentially, charges.  
26 [*Id.* at ¶¶ 8, 10.] Thus, Mr. James’ statement about the threat Mr. Bieber—a person who  
27 makes his living producing political hit pieces—made to him while the District Attorney’s  
28 Office was investigating him is highly relevant to the action and subject to the litigation

1 privilege.

2 **2. Because Mr. Bieber’s Cause of Action Concerns Public Issues, It Falls**  
3 **Under the Anti-SLAPP Statute**

4 Even if somehow Mr. James’ alleged defamatory statement was not made in  
5 anticipation of litigation (it was), it is still protected under the anti-SLAPP statute because  
6 the dispute concerned public issues. Under the first prong of the anti-SLAPP analysis, “an  
7 act in furtherance of the actor’s right of petition or free speech under the United States or  
8 California Constitution in connection with a public issue” includes “*any other conduct in*  
9 *furtherance of the exercise of . . . the constitutional right of free speech in connection with*  
10 *a public issue or an issue of public interest.*” (Cal. Civ. Proc. § 425.16(e)(4) (emphasis  
11 added).) Under the anti-SLAPP statute, public interest has been broadly defined to include  
12 “private conduct that impacts a broad segment of society and/or that affects a community  
13 in a manner similar to that of a governmental entity.” (*Ruiz v. Harbor View Cmty. Ass’n*  
14 (2005) 134 Cal.App.4th 1456, 1467.) Section 425.16 specifically applies to suits involving  
15 statements made during a political campaign. (*Beilenson, supra*, 44 Cal.App.4th at 950  
16 [“The right to speak on political matters is the quintessential subject of our constitutional  
17 protections of the right of free speech.”]) “It is well settled that section 425.16 applies to  
18 actions arising from statements made in political campaigns by politicians and their  
19 supporters . . . .” *Rosenauro v. Scherer* (2001) 88 Cal. App. 4th 260, 273–74, as modified  
20 (Apr. 5, 2001) (collecting cases.) “The right to speak on political matters is the  
21 quintessential subject of our constitutional protections of the right of free speech.”  
22 (*Matson v. Dvorak* (2003) 40 Cal.App.4th 539, 548.)

23 All four of Mr. Bieber’s claims, i.e. defamation, defamation per quod, trade libel,  
24 and intentional interference with prospective economic advantage, relate to Mr. James’  
25 comment—made by a politician during a campaign. That’s fatal to Mr. Bieber’s  
26 allegations; a public official reporting a threat on his life (regardless of whether it was  
27 directed at his political life or his physical body) to constituents is undeniably a matter of  
28 public concern and protected speech under both the First Amendment and the California

1 Constitution. Thus, Mr. James easily satisfies his initial burden under the two-prong Anti-  
2 SLAPP analysis.

3 **B. Mr. Bieber Cannot Show a Probability of Success**

4 **1. Mr. Bieber Bears the Burden of Establishing His Likelihood of Success**  
5 **on the Merits**

6 Once the moving defendant shows that the complaint’s causes of action arise from  
7 protected activity—as Mr. James has done here—the burden shifts to the plaintiff to  
8 establish a probability of prevailing on his claims. (See Cal. Civ. Proc. § 425.16(b)(1).)  
9 This burden includes showing that the complaint is legally sufficient and supported by a  
10 prima facie showing of admissible facts. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 713–14.)  
11 Mr. Bieber cannot meet his burden.

12 **2. Mr. Bieber Cannot Carry His Burden**

13 Mr. Bieber sued Mr. James for defamation in the form of libel. Libel is “a false and  
14 unprivileged publication by writing . . . which exposes any person to hatred, contempt,  
15 ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a  
16 tendency to injure him in his occupation.” (Civ. Code § 45.) If no reasonable reader would  
17 perceive in a false and unprivileged publication a meaning which tended to injure the  
18 subject’s reputation in any of the enumerated respects, then there is no libel at all.  
19 (*Barnes-Hind v. Superior Court* (1986) 181 Cal.App.3d 377, 386.)

20 Mr. Bieber cannot establish defamation for several reasons. First, as noted above,  
21 the statement by Mr. James was privileged. Second, the statement was true—regardless of  
22 whether Mr. Bieber meant the comment, “We’re going to kill you,” as a political  
23 euphemism, he said the words. [James Decl. ¶ 11.] Third, the statement did not tend to  
24 injure Mr. Bieber; he is, after all, in the business of taking down politicians with “hit  
25 piece” mailers. [*Id.* at ¶ 7.] Through this lawsuit and his other actions including calling  
26 one or more of the non-profit organizations with which Mr. James volunteers, he’s doing  
27 his best to kill Mr. James politically. [*Id.* at ¶¶ 4, 6, 16.] (See *Mullins v. Brando* (1970) 13  
28 Cal.App.3d 409, 414 [Defamatory impact measured by natural and probable effect on

1 mind of average reader.].) Finally, Mr. Bieber is a limited public figure and as such, he  
2 must establish Mr. James acted with actual malice.

3 “When a defamation action is brought by a public figure, the plaintiff, in order to  
4 recover damages, must show that the defendant acted with actual malice in publishing the  
5 defamatory communication.” (*Denney v. Lawrence* (1994) 22 Cal.App.4th 927, 933.) “A  
6 person may become a public figure in several different ways. Some persons have achieved  
7 such pervasive fame or notoriety that they become public figures for all purposes and in  
8 all contexts. A person may also become a limited purpose public figure[.]” (*Id.* at p. 934)  
9 (citations and quotations omitted.) “The limited purpose public figure is an individual  
10 who voluntarily injects him or herself or is drawn into a specific public controversy,  
11 thereby becoming a public figure on a limited range of issues.” (*Ampex Corp. v. Cargle*  
12 (2005) 128 Cal.App.4th 1569, 1577.) Mr. Bieber qualifies as a limited purpose public  
13 figure because: 1) there is a public controversy—his mailers about Mr. James and the  
14 subsequent stolen valor allegations that are impacting the election; 2) Mr. Bieber sought to  
15 influence the issue by contacting the political party as well as one or more prominent  
16 nonprofit organizations, filing this public lawsuit in the middle of the election, and having  
17 his attorney give interviews to the media. [James Decl. ¶¶ 3, 6, Exh. A; Complaint ¶¶ 11,  
18 15.] (See *Copp v. Paxton* (1996) 45 Cal.App.4th 829, 845–846 [holding it is sufficient that  
19 the plaintiff attempts to thrust himself into the public eye.].) Finally, as is the case here,  
20 “the alleged defamation must have been germane to the plaintiff’s participation in the  
21 controversy.” (*Id.* at p. 846.) Thus, Mr. Bieber is a limited purpose public figure and must  
22 prove actual malice—and that he cannot do. To establish actual malice, Mr. Bieber is  
23 required to show that Mr. James made the allegedly defamatory statement with  
24 knowledge, or reckless disregard, of the falsity of the statements. (*Hassan v. Mercy*  
25 *American River Hospital* (2003) 31 Cal.4th 709, 718 [“Traditionally, malice has included  
26 not only deliberate falsehoods but also false statements made without reasonable grounds  
27 to believe them true.”].) Here, the statement was true. Because Mr. Bieber cannot  
28 establish actual malice, his claim fails as well.

1 Mr. Bieber’s other three claims—for defamation per quod, trade libel, and  
2 intentional interference with prospective economic advantage—fail for similar reasons  
3 because of their common elements.<sup>6</sup> To wit, because the statement was privileged and  
4 true, Mr. Bieber was not harmed, and Mr. Bieber cannot establish actual malice, Plaintiff  
5 cannot carry his burden on those claims either.

6 **V. CONCLUSION**

7 Defendant Gene James respectfully requests that each of Mr. Bieber’s causes of  
8 action against him be stricken and this action dismissed, and that the Court award  
9 attorney’s fees related to the preparation and filing of this motion.

10  
11 Dated: September 8, 2020

SNELL & WILMER L.L.P.

12  
13 By: 

14 Christy D. Joseph  
15 Brett W. Johnson  
16 Kevin M. Brown  
17 Attorneys for Gene James

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27 \_\_\_\_\_  
28 <sup>6</sup> Mr. Bieber’s claim for intentional interference with prospective economic advantage fails for other reasons, too—there is no evidence of prospective economic relationships that were disrupted, Mr. James’ knowledge of same, or a causal link. [James Decl. ¶ 15.]

**PROOF OF SERVICE**

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 600 Anton Boulevard, Suite 1400, Costa Mesa, CA 92626-7689.

On September 8, 2020, I served, in the manner indicated below, the foregoing document(s) described as **DEFENDANT GENE JAMES’ NOTICE OF MOTION AND SPECIAL MOTION TO STRIKE PLAINTIFF JAMES BIEBER’S COMPLAINT PURSUANT TO CAL. CIV. PROC. § 425.16 (ANTI-SLAPP); MEMORANDUM OF POINTS AND AUTHORITIES** on the interested parties in this action by placing true copies thereof, enclosed in sealed envelopes, at Costa Mesa, addressed as follows:

*See the attached Service List.*

- BY REGULAR MAIL: I caused such envelopes to be deposited in the United States mail at Costa Mesa, California, with postage thereon fully prepaid. I am readily familiar with the firm’s practice of collection and processing correspondence for mailing. It is deposited with the United States Postal Service each day and that practice was followed in the ordinary course of business for the service herein attested to (C.C.P. § 1013(a)).
- BY EMAIL: I electronically transmitted via email the above listed document(s) to the email address(es) set forth on the attached Service List on this date.
- BY FACSIMILE: (C.C.P. § 1013(e)(f)).
- BY OVERNITE/FEDERAL EXPRESS: I caused such envelopes to be delivered by courier, with next day service, to the offices of the addressees. (C.C.P. § 1013I(d)). *[As indicated on the attached Service List.]*
- BY PERSONAL SERVICE: I caused such envelopes to be delivered by hand to the offices of the addressees. (C.C.P. § 1011(a)(b)). *[As indicated on the attached Service List.]*

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on September 8, 2020, at Costa Mesa, California.

  
Sylvia Armienta

**Snell & Wilmer**  
LLP  
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<b>SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE</b> STREET ADDRESS: 700 W. Civic Center Drive MAILING ADDRESS: 700 W. Civic Center Drive CITY AND ZIP CODE: Santa Ana CA 92701 BRANCH NAME: Central Justice Center	<i>FOR COURT USE ONLY</i>
SHORT TITLE: Bieber vs. James	
<b>NOTICE OF CONFIRMATION OF ELECTRONIC FILING</b>	CASE NUMBER: 30-2020-01145593-CU-DF-CJC

The Electronic Filing described by the below summary data was reviewed and accepted by the Superior Court of California, County of Orange. In order to process the filing, the fee shown was assessed.

**Electronic Filing Summary Data**

Electronically Submitted By: Gene James  
On Behalf of: Gene James; CCMS ID: 78886517  
Transaction Number: 41112624  
Court Received Date: 09/08/2020  
Court Received Time: 03:55:51 PM  
Filed Date: 09/08/2020  
Filed Time: 03:55 PM  
Fee Amount Assessed: \$60.00  
Case Number: 30-2020-01145593-CU-DF-CJC  
Case Title: Bieber vs. James  
Location: Central Justice Center  
Case Type: Defamation  
Case Category: Civil - Unlimited  
Jurisdictional Amount: > 25000

Case Title:

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**Documents Electronically Filed/Received**

Motion for SLAPP

**Status**

Accepted

**Court Generated Documents**

Payment Receipt

**Comments**

**Submitter's Comments:**

**Clerk's Comments:**

**Events Scheduled**

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Motion for SLAPP

**Date**

11/30/2020

**Time**

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**Department**

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