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9 WILLIAM GRANT, JON VAN CLEAVE,  
10 JAMES NETZER AND WILLIAM WHITFORD,  
11 a.k.a. BILLY WHITFORD

12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**  
13 **FOR THE COUNTY OF ORANGE**

14 BRUCE IBBETSON, an individual and DONNA )  
15 WARWICK, an individual, derivatively on behalf )  
16 of NEWPORT AQUATIC CENTER, a California )  
17 domestic non-profit public benefit corporation, )

18 Plaintiff,

19 v.

20 DR. WILLIAM GRANT, a.k.a. DR. BILL )  
21 GRANT, an individual; JON VAN CLEAVE, an )  
22 individual; JAMES NETZER, an individual; )  
23 WILLIAM WHITFORD, a.k.a. BILLY )  
24 WHITFORD, an individual; MALIA HOHL, an )  
25 individual; KELLY THOMPSON, an individual; )  
26 JOSE JIMENEZ, an individual; MICHAEL )  
27 SCOTT, an individual; JOHN PUAKEA, an )  
28 individual; XAVIER BECERRA, ATTORNEY )  
GENERAL OF THE STATE OF CALIFORNIA, )  
as an Indispensable Party; and DOES 1 through )  
50, inclusive,

Defendants.

Case No. 30-2017-00958851-CU-FR  
-CJC

Judge: Nathan Scott

MEMORANDUM OF POINTS AND  
AUTHORITIES IN REPLY TO THE  
PLAINTIFFS' OPPOSITION TO  
THE ANTI-SLAPP MOTION TO  
STRIKE THE COMPLAINT

DATE: JULY 9, 2018  
TIME: 2:00 p.m.  
DEPARTMENT: C-12

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1 Defendants William Grant, Jon Van Cleave, James Netzer and William Whitford (the  
2 “Defendants”) submit this Memorandum in reply to the Opposition filed by plaintiffs Bruce Ibbetson  
3 and Donna Warwick (the “Plaintiffs”) to the Defendants’ motion pursuant to Code of Civil  
4 Procedure section 425.16.

## 5 I. INTRODUCTION

6 Both sides in this motion agree that in an anti-SLAPP motion there are two steps for this  
7 Court to consider. Both sides agree that in the first step, the Defendants have the burden of showing  
8 that the causes of action in the original Complaint<sup>1</sup> are ones that arise from protected speech or the  
9 right to petition the government. It is evident from the paper-thin effort put forward by the Plaintiffs  
10 to oppose the motion that the Plaintiffs believe that their hope lies in the second step rather than the  
11 first step.

## 12 II. ARGUMENT

### 13 A. THE PLAINTIFFS FAILED TO COUNTER THE EVIDENCE ADDUCED IN 14 SUPPORT OF THE MOTION IN THE FIRST STEP.

#### 15 1. *The Plaintiffs Did Not Submit Opposing Affidavits in the First Step.*

16 In an anti-SLAPP motion “the court shall consider the pleadings, and supporting and  
17 *opposing affidavits* stating the facts upon which the liability or defense is based.” Code of Civil  
18 Procedure section 425.16(a) (emphasis added). Here, the “opposing affidavits” submitted by Pat  
19 Rolfes and Christine Emmel do not contain any facts that relate to the first step of the anti-SLAPP  
20 motion. Those declarations do not, therefore, contradict any of the facts established by the  
21 defendants in support of their motion. Those declarations also do not put forth new facts on the  
22 subject matter of whether the motion should be granted or not pursuant to the first step. Instead, the  
23 Plaintiffs put the two declarations forward in a roll-of-the-dice gamble that they would suffice to

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24  
25 <sup>1</sup> In this Court’s ruling on March 26, 2018, in which the Court denied the Plaintiffs’  
26 request for the appointment of a receiver, the Court left on calendar the hearing on the Defendants’  
27 anti-SLAPP motion. In that ruling the Court said: “Defendants’ anti-SLAPP motion to strike the  
28 initial complaint remains on calendar for 6/11/18. (See *Salma v. Capon* (2008) 161 Cal. App. 4<sup>th</sup>  
127, 1294-1295.) If any claim in the initial complaint is stricken, then striking any amendment to  
that claim will be “automatic.” (*Id.* at p. 1294.)” Thus, references to the Complaint are references  
to the original Complaint rather than the first amended complaint.

1 carry the Plaintiffs' burden under the second step of the anti-SLAPP motion. With respect to the first  
2 step, the Plaintiffs limit themselves, therefore, to their objections to the defendants' declarations and  
3 their two pages of argument as the means of opposing the first step of the Defendants' anti-SLAPP  
4 motion. As illustrated below, that "effort" fails to negate the Defendants' satisfaction of the first  
5 step.

6 **2. The Plaintiffs Misstate the Nature of Section 425.16(b)(1).**

7 In their first argument, the plaintiffs assert that the defendants have the initial burden to show  
8 that "the plaintiffs' challenged claims arise from the defendant's constitutionally protected  
9 petitioning or free speech activities with a public issue." See Plaintiffs' Memorandum p. 6:17-19.  
10 That is not the formulation.

11 Code of Civil Procedure section 425.16(b)(1) states the issue in different terms and provides  
12 that a "cause of action against a person" is subject to a special motion to strike if it is one "arising  
13 from *any act* of that person *in furtherance of* the person's right of petition or free speech under the  
14 United States Constitution or the California Constitution in connection with a public issue . . . ."  
15 The plaintiffs effectively leave the important part of "any act of that person in furtherance of the  
16 person's right of petition or free speech" out of their argument. Not only do the plaintiffs leave it  
17 out of their first argument, they leave it out of the brief two pages they devote to this crucial part of  
18 the statute.

19 **3. The Plaintiffs Admitted and Conceded in Their Opposition That the Issues**  
20 **Were Public Issues and Were Debated in Public Fora.**

21 The Plaintiffs do not contest the showing made by the Defendants that the issues they  
22 identified as public issues were not public issues. In fact, the Plaintiffs concede that the issues have  
23 the public nature to them that the Defendants claimed that the issues had by contending that  
24 "Defendants focus almost exclusively on establishing that *Plaintiffs* have exercised *Plaintiffs'* free  
25 speech rights about a public issue." See Opposition at p. 7:8-9 (some emphasis in original, some  
26 added). The Plaintiffs' related statements make the same point, that although the debate in public  
27 fora involved issues that were of a public nature, the Defendants did not inaugurate the public debate  
28 but that the Plaintiffs were the ones who started the public debate:

1 For example, Defendants focus not on the Defendants' exercise of their own free  
2 speech rights, but rather on the "plaintiffs' public statements in the NAC public meetings and  
3 the assertion of issues with and *the public debate about those issues* before the City of  
4 Newport Beach. See Motion at I, D. While Defendants spill much ink to bolster the notion  
5 that Plaintiffs' statements *concerned public issues*, the contention is irrelevant to the  
6 Anti-SLAPP analysis. (Emphasis added).

7 There it is!

8 These statements represent admissions and concessions that (1) the issues were public issues  
9 exactly like the Defendants contended they were, and (2) that the debate about those public issues  
10 actually occurred in the meetings that were public in their nature and before the City of Newport  
11 Beach. Had the Plaintiffs been content to gain control of the NAC only through the discussions  
12 inside the board of directors room, there may not ever have been a basis for this motion. However,  
13 because the Plaintiffs took the debate over whether their accusations were true or false "into the  
14 streets" – so to speak – the Plaintiffs turned every one of their false accusations into "public issues"  
15 that the Plaintiffs hoped to win in the public arenas in which they attempted to win those debates.

16 It is arguably on this single point (effectively on one page of the Plaintiffs' Opposition) that  
17 the Plaintiffs base their entire hope of defeating the Defendant' showing under the first step, that is  
18 it was the Plaintiffs who exercised their free speech and petition rights in the public arenas, but that  
19 the Defendants did not *start* that public debate. Opposition at pp. 7:7-8:7. Despite the Plaintiffs'  
20 admissions and concessions about the public nature of the debate about the issues that became public  
21 issues debated in the public fora, the Plaintiffs surprisingly add that the Defendants' involvement in  
22 those debates in the public fora of the meetings and before the City of Newport Beach is "irrelevant."  
23 There are three reasons why such arguments about who initiates the exercise of the rights of free  
24 speech or petition are fatal to the Plaintiffs.

25 First, section 425.16(b)(1) contains no such limitation about who starts the debate. Second,  
26 the statute is instead required – by the statute itself – to be read broadly because the statute states"  
27 "shall be construed broadly" by the Court. *Id.* at section 425.16(a). Third, the statute's reference  
28 to "any act in furtherance of" are words that, when construed broadly, encompass acts by any person

1 in an innumerable variety of public contexts – too many for the Legislature to have attempted to  
2 describe – in which the exercise of free speech and petition rights becomes the process by which  
3 others seek to resolve the debate about the public nature of the issues. Whether section 425.16(b)(1)  
4 applies or not is, therefore, not determined by whether a defendant starts the public debate or is  
5 drawn into it. Section 425.16(b)(1) applies if the defendant engages in *any act* in furtherance of the  
6 rights of free speech or petition in the public fora where public issues are debated. Therefore, the  
7 “defense” that the Plaintiffs started the public debate is no defense at all.

8 **4. *The Plaintiffs Mischaracterized the Extensive Nature of the Evidence and***  
9 ***Also Ignored Other Vital Evidence That Satisfies the First Step.***

10 Despite their admissions and concessions that the issues were public issues debated in public  
11 fora, in their next superficial argument, the plaintiffs assert that, “The Motion’s reference to  
12 Defendants’ protected activities are limited to: (1) a single letter written by a single defendant to the  
13 City of Newport Beach about matters not at issue in the litigation, and (2) alleged ‘debates and  
14 discussions that took place *in the public NAC meetings.*’ ” Opposition p. 7:15-18 (emphasis added).  
15 The Plaintiffs effectively thereafter repeat a mantra that the Plaintiffs’ claims arise solely from the  
16 alleged wrongful conduct and not from the exercise of free speech by attempting to minimize the  
17 evidence that was actually adduced about the publicizing of their criticisms in the fora they admit  
18 and concede were public fora. *Id.* at 7:18-8:7.

19 The Plaintiffs’ arguments are superficial and wrong because the arguments (1) ignores the  
20 admissions made by the Plaintiffs about the public nature of the NAC meetings and the petition to  
21 the City of Newport Beach, (2) inaccurately mischaracterizes the nature and extent of the letter, *all*  
22 *of the other evidence and documents* that were sent by the plaintiffs with the letter to the City of  
23 Newport Beach, and the countless issues included in those documents which the Plaintiffs admit and  
24 concede were public issues, all in a false light, (3) inaccurately mischaracterizes the nature and extent  
25 of what was debated in the NAC meetings that the Plaintiffs also admit and concede were public  
26 issues and public meetings, all in a false light, and (4) completely ignores the evidence about the  
27 additional public debate about whether the NAC should be turned into a voting membership entity.

28 ///



1                                   **a.        *Superficiality and Waiver.***

2           The “argument” put forward by the plaintiffs is so superficial that it should be deemed to  
3 have been waived by the plaintiffs. Cf. *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.  
4 App. 4th 939, 956. The Plaintiffs exert no effort to disprove the actual relationship between the  
5 issues debated in the public fora and the issues framed by the allegations in the complaint. As  
6 illustrated below, there is a correlation between such issues that well satisfies the “arising from”  
7 standard.

8                                   **b.        *The Principal Thrust or Gravamen of Each Cause of Action Is For***  
9                                   ***the Plaintiffs to Acquire Control of the NAC.***

10                                   **(1)     *Anti-SLAPP Law.***

11           In an action such as this one, it is necessary to correctly answer the question about what the  
12 principal thrust or gravamen is of the cause of action challenged by the anti-SLAPP motion. *Okorie*  
13 *v. Los Angeles Unified School Dist.* (2017) 34 Cal. App. 5th 574, 586-587 (“In determining whether  
14 a cause of action is based on protected activity, we ‘examine the *principal thrust* or *gravamen* of a  
15 plaintiff’s cause of action to determine whether the anti-SLAPP statute applies.’”) (emphasis in  
16 original). The principal thrust or gravamen is “ ‘assess[ed] . . . by identifying “[t]he allegedly  
17 wrongful and injury-producing *conduct* . . . that provides the foundation for the claim.’ ”). *Id.* at  
18 587 (emphasis added).

19           “When relief is sought based on allegations of both protected and unprotected  
20 *activity*, the unprotected *activity* is disregarded at [the first] stage. If the court determines  
21 that relief is sought based on allegations arising from *activity* protected by the statute, the  
22 second step is reached.” (Citation.) However, “if the allegations of protected *activity* are only  
23 incidental to a cause of action based essentially on nonprotected *activity*, the mere mention  
24 of the protected *activity* does not subject the cause of action to an anti-SLAPP motion.”  
25 (Citations.) A claim based on protected *activity* is incidental or collateral if it “merely  
26 provide[s] context, without supporting a claim for recovery.” (Citation.)

27           Courts have held that a “*mixed cause of action*”—that is, one based on both protected  
28 and unprotected *activity*—“is subject to section 425.16 if at least one of the underlying acts  
is protected *conduct*, unless the allegations of protected conduct are merely incidental to the  
unprotected *activity*.” (Citation.) However, in making this inquiry, courts have generally  
gone beyond determining the mere existence of one claim of protected *activity*; instead, they  
look to see whether the essence or “bulk” of the cause of action is based on protected  
*activity*. (Citation.) For example, . . . [another court] overturned the trial court’s ruling that  
the complaint arose from protected *activity*, holding that the anti-SLAPP protections did not  
apply because the “overall thrust” of the complaint was based on unprotected *activity* and the  
protected *activity*—pursuit of government permits—was collateral to the parties’ dispute.

1 Similarly, . . . [another court] affirmed the denial of the defendant's anti-SLAPP motion  
2 because the "gravamen" of the plaintiff's complaint was not the defendant's protected  
3 *conduct*; the defendant's petitioning *activity* was "'only incidental' to a business dispute  
4 based on nonprotected *activity*."

5 In short, "whether a cause of action is subject to a motion to strike under the SLAPP  
6 statute turns on whether the gravamen of the cause of action *targets protected activity*.  
7 [Citation.] If liability is not based on protected *activity*, the cause of action does not target  
8 the protected *activity* and is therefore not subject to the SLAPP statute. [Citations.] ... [¶]  
9 Where, as here, a cause of action is based on both protected *activity* and unprotected *activity*,  
10 it is subject to section 425.16 "'unless the protected *conduct* is 'merely incidental' to the  
11 unprotected *conduct*.'" (Citation.) In other words, "a plaintiff cannot frustrate the purposes  
12 of the SLAPP statute through a pleading tactic of combining allegations of protected and  
13 nonprotected *activity* under the label of one 'cause of action.'" 14 Cal. App. 5<sup>th</sup> at 587-588  
14 (emphasis added).

15 It is readily apparent from the number of times and the context in which the words "activity"  
16 and "conduct" are used that they are not simply interchangeable, but that the activity/conduct is to  
17 be viewed in a way that if any part of the activity/conduct is capable of being treated as embracing  
18 the rights of free speech or petition, then the Court is to proceed to the second step in the anti-SLAPP  
19 motion. The Defendants contend that the primary thrust or gravamen of each cause of action has  
20 three parts to it in this case: (1) the inability of the Plaintiffs to sue derivatively on behalf of the  
21 NAC, (2) the effects of the business judgment rule, and (3) the Plaintiffs' efforts to obtain control  
22 of the NAC. All three parts are interrelated in the context of this anti-SLAPP motion because the  
23 "fight" from which the Plaintiffs' alleged claims arose was not waged in the NAC board room, the  
24 fight was waged in the "public streets" where the Defendants exercised their free speech and petition  
25 rights to defeat that fight.

26 **(2) *The Primary Thrust or Gravamen Part 1: The Plaintiffs'***  
27 ***Failure to Satisfy the Requirements for a Derivative Action***  
28 ***Also Serves to Demonstrate that the Primary Thrust or***  
***Gravamen Was to "Litigate" the Issues in the Public Fora.***

29 In support of their motion the Defendants demonstrated the following facts:

30 4.1 With respect to the complaint filed by the plaintiffs, at no time prior to the  
31 filing of the plaintiffs' lawsuit did the plaintiffs seek to secure from the board of directors of  
32 the NAC that the NAC (1) file any complaints against any of the defendants named in the  
33 complaint that the plaintiffs filed, or (2) pursue any of the causes of action, remedies or other

1 actions that the plaintiffs desire that the Court take in their complaint.

2 4.2 With respect to the complaint filed by the plaintiffs, at no time prior to the  
3 filing of the plaintiffs' lawsuit did the plaintiffs inform the NAC or the board of directors in  
4 writing, of the ultimate facts of each cause of action against each defendant in the complaint.

5 4.3 With respect to the complaint filed by the plaintiffs, at no time prior to the  
6 filing of the plaintiffs' lawsuit did the plaintiffs provide a copy of the complaint to the board  
7 of directors of the NAC.

8 See Van Cleave Declaration, ¶¶ 4, 4.1, 4.2, 4.3; Netzer Declaration, ¶¶ 4, 4.1, 4.2, 4.3; Grant  
9 Declaration, ¶¶ 4, 4.1, 4.2, 4.3.

10 The significance of this evidence is that (1) the Plaintiffs failed to disprove such facts, and  
11 (2) such facts establish that the Plaintiffs have failed to allege the facts that are necessary on which  
12 to prosecute a derivative action. The Plaintiffs purport to sue derivatively on behalf of the NAC.  
13 See Complaint, p. 2:1-2. In a derivative action involving a nonprofit public benefit corporation, it  
14 is necessary that the Plaintiffs allege facts to satisfy certain requirements. Corporations Code section  
15 5710(b)(1) and (2). One of the requirements is framed in the alternative: a plaintiff must "The  
16 plaintiff alleges in the complaint with particularity plaintiff's efforts to secure from the board such  
17 action as plaintiff desires, or the reasons for not making such effort, and alleges further that plaintiff  
18 has either informed the corporation or the board in writing of the ultimate facts of each cause of  
19 action against each defendant or delivered to the corporation or the board a true copy of the  
20 complaint which plaintiff proposes to file." *Id.* at 5710(b)(2). It is evident from paragraphs 35 and  
21 36 of the Complaint that the Plaintiffs did not allege with particularity the "efforts to secure from the  
22 board such action as plaintiff desires" or that the Plaintiffs "informed the corporation or the board  
23 in writing of the ultimate facts of each cause of action against each defendant or delivered to the  
24 corporation or the board a true copy of the complaint which plaintiff proposes to file." The  
25 plaintiffs allege instead they were excused from such requirements. Complaint, ¶¶ 35, 36.

26 The evidence set forth in paragraphs 4, 4.1, 4.2 and 4.3 of the Van Cleave, Grant and Netzer  
27 Declarations is significant for yet another reason pertinent to this motion. As illustrated above, the  
28 plaintiffs admitted and conceded that the debates and discussion that took place regarding all of the

1 subjects referred to in the Complaint were in the public sessions of the board meetings and were also  
2 presented to the City of Newport Beach in the form of the documents that they sent to the City. Van  
3 Cleave Declaration, ¶¶ 24 and 33.3 and Exhibits 10, 11, 12 and 14. The fact that the debates and  
4 discussions regarding the issues implicated by all of the documents were “litigated” in the public  
5 sessions of the meetings and before the City refutes the Plaintiffs’ argument that only one letter was  
6 involved in those discussions and debates.

7 **(3) The Primary Thrust or Gravamen Part 2: The Business**  
8 **Judgment Rule Applies to the Activity/Conduct to Be**  
9 **Evaluated.**

10 Because the activities/conduct of the Defendants that are the “targets” of the Plaintiffs’  
11 allegations implicate the innumerable business decisions made by the Defendants in how the affairs  
12 of the NAC have been operated, Defendants contend that the Court must consider how the business  
13 judgment rule affects the targets of the allegations in the first step analysis in this anti-SLAPP  
14 motion. “The business judgment rule sets up a presumption that directors’ decisions are made in  
15 good faith and are based upon sound and informed business judgment.” *Lee v. Interinsurance*  
16 *Exchange* (1996) 50 Cal. App. 4th 694, 715 “ “ A hallmark of the business judgment rule is that  
17 a court will not substitute its judgment for that of the board if the latter’s decision *can be ‘attributed*  
18 *to any rational business purpose.’ ” ” *Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal. App.  
19 4th 1020, 1045 (emphasis added).*

20 The business judgment rule is also “process oriented.” *Hill v. State Farm Mutual Automobile*  
21 *Inc. Co.* (2008) 166 Cal. App. 4th 1438, 1492. (“ ‘[T]he business judgment rule is ‘process  
22 oriented.’ ”). What this means is that “compliance with a director’s duty of care can never  
23 appropriately be judicially determined by reference to the *content of the board decision . . . apart*  
24 *from consideration of the good faith or rationality of the process employed.” Id.* Therefore, the  
25 business judgment rule encompasses many other aspects of business activity/conduct and can cover  
26 a long period of time. The business judgment rule applies not only to the business decisions  
27 involved in the activity/conduct targeted by a plaintiff, it also applies to the investigation of past  
28 activity/conduct and to the decision to not file a suit regarding past activity/conduct. *Findley v.*

1 *Garret* (1952) 109 Cal. App. 2d 166, 177 (“It was a question of business whether the transactions  
2 over a 12-year period *should be investigated and prosecuted*. Directors have the same discretion  
3 with respect to the prosecution of claims on behalf of the corporation as in other business matters.”).

4 In the claims asserted by the Plaintiffs, the plaintiffs criticize not only the decisions made  
5 regarding of the NAC funds are expended, as one example,<sup>2</sup> the allegations also implicate the  
6 activities and conduct by the Defendants involving the investigations of the claims, the resistance  
7 to, discussions and debates about, and the conclusions reached to refuse to take action on the  
8 plaintiffs’ criticisms.<sup>3</sup> Such investigations, resistance, discussions, debate and conclusions did not  
9 occur in a communicative vacuum but were instead a material part of the “process oriented” nature  
10 of the business judgment rule in the “public streets” where the Plaintiffs chose to litigate those  
11 criticisms. It was because of the activities/conduct put forward to investigate, resist, debate, discuss,  
12 and conclude that the criticisms had no merit that the Defendants defeated the Plaintiffs’ efforts to  
13 litigate their criticisms in the “public streets.” How do we know that the Plaintiffs failed to succeed  
14 in their public fight? The Plaintiffs filed this action to continue *that same fight*.

15 Thus, the primary thrust or gravamen of the “fight” over the allegations contained in the  
16 Complaint was not waged in the NAC executive board room, it was aired out in public where the  
17

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18 <sup>2</sup> The chief example of this concerns the Plaintiffs’ allegation in paragraph 25 in the  
19 Complaint that there was a “Loss, theft, or misappropriation of at least \$227,000 per an independent,  
20 third-party forensic analysis from Hanzich & Company, dated June 1, 2017, of funds donated or paid  
21 to the Junior Rowing Program; / . . .” First, the Hanzich Report is not an audit, contains no such  
22 statement, and was rescinded by Hanzich; the Plaintiff’s allegation is one of several blatantly false  
23 allegations contained in the Complaint. Second, how the funds are accounted for and expended are  
24 within the wide ambit of the discretion of the Defendants. Whitford Declaration, ¶ 7.1 (“The funds  
of the NAC are not being spent in any manner that has not been authorized or in any manner that is  
disallowed. The NAC has business expenses to pay and it timely pays its business expenses in the  
ordinary course of business. The accusations made by Mr. Ibbetson and Ms. Warwick also represent  
nothing more than a disagreement by them with the business judgments that have been exercised by  
all of the defendants employed by or working for the NAC to pay for reasonable business expenses  
of the NAC.”); ¶ 7.2.

25 <sup>3</sup> See Complaint, ¶ 35; Van Cleave Declaration, ¶ 35 (“During the same period of time  
26 I conducted an extensive investigation into the accusations and other statements contained in those  
27 documents, exactly as recommended in the Hanzich Preliminary Report and was unable to verify that  
28 that no valid grounds existed for the removal of William Whitford from his position as the Executive  
Director of the NAC.”); Netzer Declaration, ¶¶ 4, 4.1, 4.2 and 4.3; Grant Declaration, ¶¶ 4, 4.1, 4.2  
and 4.3.

1 Plaintiffs failed to achieve in those meetings that which they seek to achieve in this action because  
2 they were investigated, discussed, debated and resisted over the course of time from June through  
3 October 2017, and determined to lack merit. Van Cleave Declaration, ¶ 35. *Id.* In the period of  
4 time from August to November 2017, the Plaintiffs participated in another group to attempt to force  
5 a change in the bylaws again to no avail. *Id.* at ¶¶ 40-42 and Exhibit 20. In the period of time from  
6 June to at least August or September, 2017, the Plaintiffs also attempted to petition the City of  
7 Newport Beach with all of the same criticisms contained in the rescinded Hanzich Preliminary  
8 Report and the retracted Parent Group Letter and Power Point document, which were also  
9 investigated, discussed, debated and resisted by the Defendants. The Court may, therefore, safely  
10 determine that the Defendants satisfied their burden of demonstrating that the Plaintiffs' causes of  
11 action arose from the Plaintiffs failed efforts which were defeated by activity/conduct protected by  
12 the business judgment rule.

13 **(4) *The Primary Thrust or Gravamen Part 3: To Acquire***  
14 ***Control of the NAC.***

15 There is a third aspect of the primary thrust or gravamen of the Plaintiffs' claims that merits  
16 consideration by the Court. The underbelly of the Plaintiffs' allegations is their purpose of acquiring  
17 control of the NAC. In a very real sense, the primary thrust or gravamen of the allegations is to  
18 operate the NAC for the exclusive benefit of the Junior Rowing Program with whom the Plaintiffs  
19 have aligned themselves.

20 The Defendants adduced substantial evidence in support of their motion that demonstrates  
21 that the Plaintiffs have exerted a variety of efforts to acquire control of the NAC. Van Cleave  
22 Declaration, ¶¶ 31, 33, 33.1, 33.2, 33.3, 33.4 and 33.5; Grant Declaration, ¶ 5; Whitford Declaration  
23 ¶¶ 5, 6, 6.1, 6.2, 6.3 and 6.4, 7, 7.1 and 7.2. The Plaintiffs offered no evidence to refute the evidence  
24 that they have attempted to gain control of the NAC and are continuing to do so. For years, plaintiff  
25 Bruce Ibbetson has attempted to acquire control of the NAC to himself and each attempt has failed.

1 He has tried to “buy” it,<sup>4</sup> he, together with Donna Warwick, has tried to gain control of the NAC by  
2 applying pressure through the self-appointed “Junior Rowing Parent Group,”<sup>5</sup> and he and Donna  
3 Warwick joined another group of people who called for a transformation of the NAC into a voting  
4 member entity.<sup>6</sup>

5 The Plaintiffs’ most outrageous effort to gain control of the NAC involved the attempt to  
6 sabotage the NAC by asking the City of Newport Beach to cancel the lease with the NAC so that  
7 “the supporters and many original NAC Founders” with whom the Plaintiffs affiliate themselves  
8 “remain ready to reengage if asked, and have substantial capacity to reorganize the Facility and  
9 decrease the load on the Facility and neighborhood, without eliminating or harming any users or  
10 public programs.” Van Cleave Declaration, ¶ 33.3 and Exhibit 14. After realizing that these efforts  
11 to acquire control of the NAC failed, the Plaintiffs filed this action in which they asked this Court  
12 to appoint a receiver to take control of the NAC away from the board of directors. Whitford  
13

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14 <sup>4</sup> Plaintiff Bruce Ibbetson made offers to arrange for money to be donated to the NAC  
15 on the condition that he be made president of the NAC. Van Cleave Declaration, ¶¶ 33.1 and 33.2.

16 <sup>5</sup> On September 30, 2016, the Plaintiffs and two other persons (Scott Richter and  
17 Caroline Taylor) who referred to themselves as the “NAC Junior Rowing Parent Group” (the  
18 “Self-Appointed Parent Group”), hired Hanzich & Company (“Hanzich”), who are certified public  
19 accountants, to analyze some NAC records. See the Plaintiffs’ Complaint, ¶ 26, lines 23-25; Van  
20 Cleave Declaration, ¶¶ 24-28 and Exhibit 10 attached thereto. Pursuant to that engagement, Hanzich  
21 prepared a preliminary report (which the Plaintiffs have falsely described as an audit) (the “Hanzich  
22 Preliminary Report”). Van Cleave Declaration, ¶ 26 and Exhibit 10 attached thereto. As part of the  
23 Self-Appointed Parent Group, the Plaintiffs then caused a letter dated June 16, 2017 to be given to  
24 the NAC board of directors (“Parent Group Letter”) expressing many criticisms, some of which are  
25 the basis for the allegations contained in the complaint. Van Cleave Declaration, ¶ 26, and Exhibit  
26 11 attached thereto. The Parent Group Letter states: “Board members Bruce Ibbetson and Donna  
27 Warwick, along with NAC patrons, sponsored and paid for an independent audit of the NAC  
28 financial records, which was performed by Hanzich & Company, Inc., Certified Public Accountants  
(‘Audit’).” At the same time the Hanzich Preliminary Report and the Parent Group Letter were  
given to the NAC board of directors, the Self-Appointed Parent Group also caused a lengthy  
document to be delivered to the NAC which was described in the Parent Group Letter as the “Jr  
Rowing Parent Group June 2017 Power Point presentation.” Van Cleave Declaration, ¶ 24 and  
Exhibit 11, page 3. The Parent Group Letter threatened to further publicize all three documents:

We would like to continue helping the NAC move forward as an integral part of the  
community. To improve ease of communication of these large files we will soon be posting  
the Audit, Jr Rowing Parent Group June 2017 PowerPoint presentation and this letter to a  
registered website. Van Cleave Declaration, ¶ 24 and Exhibit 11, page 3.

<sup>6</sup> Van Cleave Declaration, ¶¶ 40, 41 and 42 and Exhibit 20.

1 Declaration, ¶¶ 7, 7.1 and 7.2. Within the Complaint, the Plaintiffs seek to gain control of the NAC  
2 in their seventh (for the appointment of a receiver), eighth (to remove Van Cleave, Netzer and Grant  
3 as directors), ninth (to remove Whitford) and tenth (to compel the NAC to adopt new bylaws) causes  
4 of action. The first through sixth causes of action are also aimed at gaining control of the NAC  
5 because of the false nature and grave nature of the allegations made in those causes of action to  
6 frighten all defendants with the baseless allegations contained in those causes of action.

7 Thus, the principal thrust or gravamen of each cause of action is also based on  
8 activity/conduct by the Defendants to resist, oppose and defend against the Plaintiffs' efforts to  
9 acquire control of the NAC through the many ways they have attempted to gain that control.

10 *c. The Defendants Established Enough Evidence to Trigger an*  
11 *Evaluation of the Second Step.*

12 In conclusion, the Defendants established substantial evidence to support their burden of  
13 proving that each cause of action arises, in one way or another, from at least one activity and conduct  
14 of the Defendants consisting of their efforts to present the results of their investigation and to discuss  
15 and debate why they resisted and concluded that the criticisms contained in the rescinded Hanzich  
16 Preliminary Report and the retracted Parent Group Letter and Power Point document has no merit  
17 in the meetings and the petition to the City of Newport Beach that the Plaintiffs admit and concede  
18 were public discussions and debates in public fora.

19 **B. THE PLAINTIFFS FAILED TO ESTABLISH THAT THEY HAVE A**  
20 **PROBABILITY OF PREVAILING ON THE MERITS.**

21 *1. Standing.*

22 As the Plaintiffs concede, in order to satisfy the second step, the Plaintiffs must provide a “  
23 ‘sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted  
24 by the plaintiff[s] is credited.’ ” Opposition, p. 8:15-17. The Plaintiffs concede that the current  
25 bylaws “do not allow any members to vote.” Opposition, p. 9:7, 12-13. They contend that such  
26 bylaws are invalid. *Id.* However, they supply no facts to support the argument and that failure is  
27 fatal to the second step. Every “argument” supplied in the Opposition is devoid of any reference to  
28 any fact to support the argument that the Plaintiffs have standing. Opposition, pp. 9:3-10:14. The



1 Declarations of Christine Emmel and Patrick Rolfes do not have a single statement of facts in them  
2 to substantiate the unsupported argument that the bylaws are invalid. Therefore, this Court may  
3 safely conclude that the Plaintiffs lack standing to prosecute this action and dismiss the entire case  
4 pursuant to the Defendants' motion.

5 **2. *The Hanzich Report Was Rescinded and Hanzich Expressly Denounced***  
6 ***Any Inference of Wrongdoing.***

7 In their next argument for probability of prevailing, the Plaintiffs appeal to the Hanzich  
8 Preliminary Report. Opposition, pp. 10-23-11:6. However, the Defendants adduced evidence that  
9 the Hanzich Preliminary Report was rescinded. Van Cleave Declaration, ¶ 29, and Exhibit 13. In  
10 addition, as Hanzich stated in its rescission:

11 “The report provided to you indicates that further inquiry with employees and an  
12 analysis of additional financial records should be completed before providing the Board with  
13 a final report. Based upon my preliminary report, *I have not made a determination*  
14 *regarding the involvement of any NAC employee with respect to potential misconduct.*

15 Regrettably, the Board can no longer rely on my report as the underlying evidence  
16 and conclusions were compromised due to the unauthorized disclosure.”

17 Van Cleave Declaration, ¶ 29, and Exhibit 13 (Emphasis added).

18 The plaintiffs did not refute the evidence supplied by the Defendants that the Hanzich report  
19 was rescinded in the manner that it was and the effort to breath life into a dead preliminary document  
20 without any factual support is at a minimum disingenuous.

21 **3. *The Court Should Sustain the Objections to the Declarations of Christine***  
22 ***Emmel and Patrick Rolfes.***

23 Concurrently herewith, the Defendants have filed objections to the declarations of Christine  
24 Emmel and Patrick Rolfes. Should the Court sustain such objections, there is no basis for  
25 concluding that the Plaintiffs satisfied the second step. The Court should sustain the objections to  
26 such declarations because they do not supply evidence of any misconduct. Neither one qualified  
27 themselves as having personal knowledge of any “fact’ which they attempted to testify. Moreover,  
28 the nature of the financial matters to which they attempted to testify crosses the line between lay

1 opinions and expert opinions and neither of them established that they were experts about how the  
2 NAC's accounting deviates from any standard applicable to nonprofit public benefit corporations.  
3 Hence, the entirety of their opinions and arguments about each category that they attempt to treat as  
4 misconduct, fails as a matter of law.

5 **III. CONCLUSION**

6 Defendants request that this Court grant this motion and strike every cause of action in the  
7 complaint and strike the entire complaint pursuant to Code of Civil Procedure section 425.16. The  
8 Defendants also request that the Court determine that they are *entitled* to recover their attorney fees  
9 and costs pursuant to Code of Civil Procedure section 425.16(c)(1). The Defendants will file a  
10 motion for the recovery of such fees and costs following the Court's order granting the motion.

11 *American Humane Assn. v. Los Angeles Times Communications* (2001) 92 Cal. App. 4<sup>th</sup> 1095, 1103.

12 Dated: June 29, 2018



13 \_\_\_\_\_  
14 David B. Dimitruk, attorney for defendants William  
15 Grant, Jon Van Cleave, James Netzer and William  
16 Whitford

1 PROOF OF SERVICE

2 Ibbetson, etc. v. Grant, et al.  
3 Orange County Superior Court Case Number 30-2017-00958851-CU-FR-CJC


4 STATE OF CALIFORNIA, COUNTY OF ORANGE

5 I am an active member of the State Bar of California. I am over the age of eighteen years and not  
6 a party to the action. My business address is 5 Corporate Park, Suite 220, Irvine, California 92606.  
7 On June 29, 2018 I served the document entitled MEMORANDUM OF POINTS AND  
8 AUTHORITIES IN REPLY TO THE PLAINTIFFS' OPPOSITION TO THE ANTI-SLAPP  
9 MOTION TO STRIKE THE COMPLAINT on the interested parties in said action by serving it  
10 electronically through OneLegal to the following persons:

11 12 13 14 15 16 17 18	George L. Hampton IV, HAMPTONHOLLEY LLP, 2101 East Coast Highway, Suite 100, Corona del Mar, California 92625 (Attorneys for the plaintiffs)  sellis@hhlawyers.com merlinger@hhlawyers.com bgoodwin@hamptonholley.com	Xavier Becerra (Attorney General of California), Tania Ibanez (Senior Assistant Attorney General), James M. Toma (Supervising Deputy Attorney General Caroline K. Hughes (Deputy Attorney General), 300 South Spring Street, Suite 1702 Los Angeles, CA 90013  teresa.depaz@doj.ca.gov caroline.hughes@doj.ca.gov
19 20 21 22 23 24 25 26 27 28	Catherine J. Weinberg, Esq., Buckner, Robinson & Mirkovich, 3146 Redhill Avenue, Suite 200, Costa Mesa, California 92626 (Attorneys for defendants Malia Hohl, Kelly Thompson, Jose Jimenez and Maika Scott)  cweinberg@bamlaw.com	Theodore Senet, Esq., Gibbs Giden Locher Turner Senet & Wittbrodt LLP, 1880 Century Park East, 12th Floor, Los Angeles, California 90067 (Attorney for defendant Johnny Puakea)  tsenet@gibbsgiden.com

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

23 EXECUTED on June 29, 2018 at Irvine, California.

24   
25 \_\_\_\_\_  
26 David B. Dimitruk