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Bar #: 185736
FILED
LOS ANGELES SUPERIOR COURT

OCT 29 2008

JOHN A. BLANKE, CLERK

BY GLORIETTA ROBINSON, DEPUTY

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

9 **JON CARPENTER,**
10 **Plaintiff,**

11 v.

12 **SUN REAL ESTATE INVESTMENTS, LLC,**
13 **HYE PHARMACY, INC.; EL NUEVO SAN**
14 **SALVADORE; VILLALOBOS MARKET;**
15 **CHECK CASHING; and DOES 1 through 10,**
16 **inclusive**

Cross-Defendants.

17 **HYE PHARMACY, INC,**
18 **Cross-Complainant,**
19 **VS.**

20 **JON CARPENTER, an Individual;**
21 **THEODORE PINNOCK, an Individual;**
22 **PINNOCK & WAKEFIELD, APC, A**
23 **California Corporation; and ROES 1 through**
24 **100, inclusive,**
25 **Cross-Defendants.**

26 ///

27 ///

28 ///

Case No.: BC390789

**REPLY MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF
CROSS-DEFENDANTS' SLAPP
MOTION**

[CA CCP § 425.16]

Date: November 5, 2008

Time: 8:30 AM

Department 47

Judge Aurelio Munoz

Stanley Mosk Courthouse
111 North Hill Street, Los Angeles, CA
90012

BY FAX

1 Cross-Defendants JON CARPENTER, THEODORE A. PINNOCK, and PINNOCK &
2 WAKEFIELD, A.P.C, (hereinafter collectively referred to as "CARPENTER", "PINNOCK", or
3 "CROSS-DEFENDANTS") respectfully submit this Reply Memorandum Of Points and Authority
4 In Support of Cross-Defendants Anti-SLAPP motion. In their reply the Cross-Defendants have
5 concurrently filed an Objections to Evidence Submitted By Pharmacy, and a Declaration of
6 Theodore A. Pinnock In Support Of Cross-Defendants' Reply In Support Of Special Motion To
7 Strike First Amended Cross-Complaint As A SLAPP Lawsuit. The bulk of the paper submitted in
8 support of Pharmacy's P&A is mainly recycled pleadings already filed in the present case.
9 Obviously, Pharmacy wants to create the appearance of a lot of support for their opposition.
10 However, despite the bulk of paper submitted in opposition to Cross-Defendants' Motion To
11 Strike, there is no substance contained therein.

12 Initially, Cross-Complainant Pharmacy failed to timely serve their opposition papers on
13 Cross-Defendants and have substantially prejudiced Cross-Defendants in preparing their reply. The
14 opposition documents were supposed to be filed and served nine court days prior to the hearing on
15 November 5, 2007. CCP section 1005. Their deadline for service of the opposition paperwork was
16 Thursday October 23, 2008. However, Cross-Complainant Pharmacy effectively served their
17 opposition papers on Saturday October 25, 2008. See Pinnock Declaration. Pharmacy express
18 overnighted mail service deposited in the mail on October 23, 2008 constituted effective service as
19 of Saturday October 25, 2008 as opposed to the deadline of October 23, 2008 for filing and serving
20 their opposition. Cross-Defendants never agreed to accept service via fax and only one of the
21 documents was actually received via fax. Pharmacy has acted in bad faith. Any proof of service to
22 the contrary is false. Cross-Defendants can not seek ex-parte relief for an extension of time since
23 Cross-Defendants do not have time to prepare ex-parte paperwork prior to the expiration of the
24 time to file the present reply.

25 All of Cross-Complainant Pharmacy's present alleged claims in Pharmacy's FACC are
26 subject to the SLAPP statute and their allegations only concern Cross-Defendants protected activity
27 of petitioning the courts. Cross-Complainant Pharmacy's desperate attempts to elevate their cross-
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1 complaint in a failed attempt to inflate their alleged civil claims to now allege criminal behavior on
2 the part of Cross-Defendants is non-availing as their FACC still fails as shown below.

3 **I. ABANDONEMENT OF CLAIMS BY PHARMACY**

4 Cross-Complainant Pharmacy has essentially abandoned their Claim Three - abuse of
5 process claim in their opposition. Nowhere in their opposition does Pharmacy discuss why this
6 claim should not be struck as a SLAPP claim pursuant to Cross-Defendants moving papers. (See
7 Motion, pg 13). The Abuse Of Process claim is not even mentioned in the Pharmacy's opposition
8 paperwork. (See Opposition generally). Since Pharmacy has failed to support this Abuse Of
9 Process claim in their opposition, Pharmacy has conceded this Abuse Of Process claim cannot
10 survive the SLAPP statute and should be struck. Additionally, Pharmacy has abandoned its Civil
11 Conspiracy claims, Claims Two and Four of their Cross-Complaint. Pharmacy has failed to
12 address the basis for striking these civil conspiracy causes of action as set forth in Carpenter and
13 Pinnock's moving papers. (See Motion). Pharmacy's failure to obtain leave of court to allege civil
14 conspiracy claims prior to filing the FACC is fatal to these claims. CA Civil Code Section
15 1714.10(a) and (b). (See Motion, pgs 13-14). Pharmacy has conceded these conspiracy claims fail
16 by Pharmacy's failure to demonstrate that these claims are not subject to the SLAPP statute,
17 Pharmacy's failure to comply with CA Civil Code Section 1714.10(a) and (b) - (See Motion pgs
18 13-14), and Pharmacy failure to demonstrate they will prevail on these two civil conspiracy claims.
19 As a result of Pharmacy's abandonment of these claims, the focus now shifts to Pharmacy's only
20 remaining claim of an alleged violation of the Business & Professions Code section 17200. This
21 claims fails as well for the reasons set forth below.

22 **II. ALLEGED VIOLATION OF B&P 17200 IS A SLAPP CLAIM**

23 Pharmacy attempts to mislead this court into somehow inflating an alleged civil claim into a
24 criminal claim in the futile attempt to evade application of the SLAPP statute and the absolute
25 litigation privilege under CA civil code section 47(b). Pharmacy's FACC alleges a civil violation
26 of Business & Professions Code section 17200. (See FACC). Despite the exhortations and smoke
27 and fury of Pharmacy's defense counsel, as a matter of law this alleged claim was and remains a
28

1 civil claim and as demonstrated below, this claim is subject to the SLAPP statute and should be
2 struck with prejudice.

3 In quick review, Plaintiff Carpenter's filing the original and amended complaint is a
4 protected activity of petitioning the courts for redress of a violation of a civil right. A recent federal
5 Ninth Circuit Court decision stated:

6 ". . . where a disabled person has Article III standing to bring a claim for injunctive
7 relief under the ADA because of at least one alleged statutory violation of which
8 he or she has knowledge and which deters access to, or full use and enjoyment of,
9 a place of public accommodation, he or she may conduct discovery to determine
10 what, if any, other barriers affecting his or her disability existed at the time he or
11 she brought the claim. The list of barriers would then in total constitute the
12 factual underpinnings of a single legal injury, namely, the failure to remove
13 architectural barriers in violation of the ADA, which failure harmed the disabled
14 person by deterring that disabled person from visiting a facility that otherwise
15 would have been visited at a definite future time..." Doran v. 7-Eleven, Inc., 524
16 F3d 1034, 1043-1044 (9th Cir., 2008)

17 The 9th Circuit went on to hold specifically, "We hold that Doran has standing to
18 sue for injunctive relief for all barriers in the North Harbor 7-Eleven store related to his
19 specific disability, including those identified in his expert's site inspections." Doran, 524
20 F3d at 1047 (9th Cir., 2008). The ADA has been incorporated in whole in CA Civil Code
21 Sections 51 (f), 54(c), and 54(a)(3), and 54(d). Hence, Cross-Defendants actions in filing
22 the original complaint and the first amended complaint are protected activities. As to
23 Plaintiffs who file multiple ADA lawsuits a very recent federal 9th Circuit decision stated
24 "[a]s a result, most ADA suits are brought by a small number of private plaintiffs who
25 view themselves as champions of the disabled. . . . For the ADA to yield its promise of
26 equal access for the disabled, it may indeed be necessary and desirable for committed
27 individuals to bring serial litigation advancing the time when public accommodations will
28 be compliant with the ADA." DiLil v Best Western Encina, 538 F.3d 1038, 1040 (9th Cir,
August 2008) [citing Molski v. Evergreen Dynasty Corp., 500 F.3d 1047, 1062 (9th Cir.
2007)].

1 A B&P Code section 17200 claim is subject to the SLAPP statute if it meets the qualifying
2 requirements that the alleged claim arises from the protected rights of free speech and the freedom
3 to petition the courts. *Bernardo v Planned Parenthood*, (2004) 115 Cal. App. 4th 322 [[t]he anti-
4 SLAPP statute 'is California's response to the problems created by meritless lawsuits brought to
5 harass those who have exercised these rights.']. In the present case, Pharmacy filed the original
6 Cross-Complaint which named only Plaintiff Carpenter as a cross-defendant in retaliation for
7 Plaintiff Carpenter's original complaint. After Defendant/Cross-Complainant Pharmacy learned
8 that Plaintiff Carpenter had filed a First Amended Complaint that amended the original complaint
9 to add additional detail concerning the failure to provide equal access at their facilities, then
10 Pharmacy filed their First Amended Complaint and named the additional cross-defendants attorney
11 Theodore Pinnock and Pinnock & Wakefield, APC who are current legal counsel to Plaintiff/Cross-
12 Defendant Carpenter. Cross-Complaint Pharmacy filed their cross-complaints in retaliation for
13 Cross-Defendants exercising their rights, exactly the animus the drafters of the SLAPP statute
14 sought to deter by preventing harassment of those who have exercised these rights.

15 In its FACC, Cross-Complainant Pharmacy alleged a claim against Cross-Defendants for a civil
16 violation of B&P Section 17200. As a matter of law, Cross-Complainant Pharmacy fails to have
17 individual standing to bring a claim under B&P Section 17200. In order for individual standing
18 under 17200, the Cross-Complainant must satisfy the individual standing requirements under B&P
19 Section 17204. The California Supreme Court stated to establish individual standing under 17204,
20 the person must have "...suffered injury in fact and has lost money or property as a result of the
21 unfair competition." *Californians For Disability Rights v Mervyn's, LLC* (2006) 39 Cal. 4th 223;
22 138 P.3d 207. [citing B&P Section 17204]. Thus, individual standing under section 17200 claim
23 requires that Pharmacy have suffered injury in fact and lost money or property as a result of Cross-
24 Defendants allegedly unfair competition. Cross-Defendants Carpenter raised this standing matter
25 in their moving papers. (See motion). Cross-Complainant Pharmacy fails to address its lack of
26 standing in their opposition. (See Opposition generally pgs 1-14). Pharmacy fails to state any facts
27 that Pharmacy has suffered injury in fact. Additionally, Pharmacy failed to identify any money or
28 property lost by Pharmacy in their opposition as a causal result of the activities alleged against

1 Cross-Defendants . At best, Pharmacy raises the issue that taxpayers in general allegedly may have
2 lost money but this does not supply injury in fact or that Pharmacy lost money or property as a
3 direct result of the alleged activities of the Cross-Defendants even if these alleged activities were
4 true, which Cross-Defendants deny.

5 Cross-Complainant Pharmacy also fails to establish that they have standing to sue on behalf of
6 the general public as they allege for the first time in their opposition. First, Pharmacy failed to raise
7 this claim in their FACC. A review of the Pharmacy's First Amended Cross-Complaint fails to
8 disclose any allegation that they are bringing their cross-complaint on behalf of the general public.
9 See FACC generally. Cross-Complainant cannot now allege new matter outside the FACC. A
10 plaintiff cannot avoid an anti-SLAPP motion by amending the complaint prior to the hearing on the
11 motion. *Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.*, 122 Cal.App.4th 1049, 1055
12 (2004) ; See also *Simmons v. Allstate Ins. Co.*, 92 Cal.App.4th 1068, 1073 (2001). Additionally,
13 even assuming arguendo that Cross-Complainant does allege bringing this action on behalf of the
14 general public in its FACC, Pharmacy fails to meet the requirements to pursue this action on behalf
15 of the general public. Any person may pursue representative claims or relief on behalf of others
16 only if the claimant meets the standing requirements of Section 17204 and complies with *Section*
17 *382 of the Code of Civil Procedure. Californians For Disability Rights v Mervyn 's,LLC (2006) 39*
18 *Cal. 4th 223; 138 P.3d 207.* [citing B&P Section 17203]. However, Cross-Complainant Pharmacy
19 fails to have standing under 17204 since it fails to establish it has suffered injury in fact and
20 Pharmacy also failed to establish that it lost money or property as a result of the alleged activity.
21 Additionally, Pharmacy fails to put forth support in its FACC or Opposition that it complies with
22 the requirement of CCP section 382 as required. This section requires Pharmacy to establish that it
23 has standing to bring this action as a class action. Since Pharmacy fails to have standing to assert
24 an action on behalf of the general public, Pharmacy can not avoid the SLAPP statute via CCP
25 section 425.17 via its contrived arguments. Finally, Pharmacy does seek relief greater than the
26 general public since Pharmacy seeks to escape its liability on Plaintiff Carpenter's complaint for
27 Pharmacy's failure to provide equal access.
28

1 All the disputed activities alleged by Cross-Complainant Pharmacy against Cross-
2 Defendants arise under Cross-Defendants' rights of free speech and right to petition the courts.
3 Cross-Complainant Pharmacy attempts to evade this reality by attempting to bootstrap its
4 allegations by stating without any foundation that Cross-Defendants are engaged in illegal activity.
5 Cross-Defendants Carpenter, Pinnock, and Pinnock & Wakefield categorically deny these
6 allegations by Pharmacy of criminal activity including but not limited to grand theft, extortion,
7 barratry, solicitation of runners and cappers, knowingly contacting parties represented by lawyers,
8 and conspiracy. (See Opposition). (Decl Pinnock, para 7). Cross-Defendants believe they have
9 complied with the requirements of the fee waiver program. Through repetition and hearsay,
10 Pharmacy attempts to lull this court into believing its bare assertions of alleged criminal activity by
11 Cross-Defendants. Cross-Complainant cites to two cases and both are easily distinguishable from
12 the present matter. It was held by the California Supreme Court that arising under free speech and
13 right to petition the courts does not include invalid uses of these right to include certain criminal
14 activities from being shielded by the SLAPP statute. See *Flatley v Mauro* (2006) 39 Cal. 4th 299.
15 See also *Paul For Council v Hanyecz* (2006) 85 Cal. App. 4th 1356 [overruled in part by *Flatley*].
16 However, both of these cases are easily distinguishable from the present case. In *Paul For Council*,
17 the moving party had a prior determination by the Fair Political Practices Commission that the
18 moving parties' activities constituted illegal money laundering and the moving party had been
19 found guilty and fined for those activities as a direct result. (See discussion *Paul For Council* at
20 1362-1363]. Additionally, the moving party admitted these criminal activities. In *Paul For*
21 *Council*, the moving party had already been afforded their due process and equal protection rights
22 guaranteed under the Fifth and Fourteenth Amendments to the U.S. Constitution and their due
23 process rights under California law after being accused of criminal activity and had been adjudged
24 guilty of the offense. In the present case, Cross-Defendants Carpenter, Pinnock, and Pinnock &
25 Wakefield vehemently deny Pharmacy's allegations of criminal activity and assert their rights to
26 due process and equal protection of the laws of both the United States and State of California
27 constitutions. Additionally, even assuming arguendo the allegations of Pharmacy, no prior
28 determination of guilt by competent authority has been found against Cross-Defendants. Cross-

1 Complainant Pharmacy cannot by mere allegation and wishful thinking strip these present Cross-
2 Defendants of their rights to due process and equal protection of the laws of both the United States
3 and State of California constitutions and have these Cross-Defendants found to be guilty of
4 criminal offenses on their mere allegations of civil wrong. It is outrageous. *Flately* is also easily
5 distinguished from the present matter. In *Flately*, the court found as a matter of law that the
6 moving party had engaged in criminal activity because the moving party made admissions to the
7 same in its moving papers. *Flately v Mauro* (2006) 39 Cal. 4th 299, 320 [concluding that when
8 the defendant concedes, or the evidence conclusively establishes, that the asserted protected speech
9 or petition activity was illegal as a matter of law, the defendant is precluded from using the anti-
10 SLAPP statute to strike the plaintiff's action]. In *Flately*, the moving party admitted to the use of
11 **threats of instituting criminal process** against the Plaintiff/non-moving party. The court found
12 these admissions of using threats of criminal process in conjunction with the demand for money in
13 exchange for not instituting criminal process against the non-moving party as criminal extortion as
14 a matter of law. However, in the present case, Cross-Defendants deny having ever threatened
15 instituting criminal prosecution in exchange for money against Cross-Complainant Pharmacy or
16 any other defendant. Cross-Defendants know that criminal prosecution for a violation of the
17 federal ADA or CA Civil Code is not provided for by statute, only civil remedies are available.
18 Cross-Defendants have only attempted to resolve civil claims under both federal and state causes of
19 action in the present action against Pharmacy and in any of the actions listed by Pharmacy
20 involving Plaintiff Carpenter. Cross-Defendant asserts that resolution of civil claims via
21 negotiation through demand letters historically has been approved by the courts as encouraging
22 informal resolution prior to fully engaging the judicial resources of the court in each civil matter.
23 Past decisions by the California Supreme Court and California courts of appeal have upheld that
24 both pre-litigation letters attempting resolution of civil claims as well as demand letters following
25 filing of a complaint are protected activities that are covered by the SLAPP statute. See *Dove*
26 *Audio v Rosenfeld, Meyer & Susman* 47 Cal.App.4th 777, 784 (1995) [letters soliciting support for
27 administrative complaint as "communications preparatory to or in anticipation of the bringing of an
28 action"]. See also *Briggs, supra*, 19 Cal.4th at 110, 1114-1115 [CCP § 425.16 covers statements

1 relating to a judicial or official proceedings]; *Dowling v Zimmerman*, 85 Cal.App.4th 1400, 1420
2 (2001) [CCP § 425.16 protects letter regarding pending lawsuit]; *Wilcox, supra* 27 Cal.App.4th at
3 821-822 [CCP § 425.16 protects letters soliciting financial support for lawsuit]; *eCash*
4 *Technologies v Guagliardo*, 127 F.Supp.2d 1069,1077, 1083-1084 (C.D. Cal 2000) [CCP § 425.16
5 protects letter discussing pending litigation]; *Rusheen v Cohen*, (2006) 37 Cal. 4th 1048 [the
6 litigation privilege extends to those noncommunicative actions which are necessarily related to the
7 communicative act]. Cross-Defendants desire to be clear that Cross-Defendants believe that in every
8 case that Pharmacy lists in its opposition, Cross-Defendants have only communicated with the
9 parties or their representatives after a civil complaint was filed in the matter. (Decl Pinnock).

10 The Governor of California recently signed into law that is to take effect in January 2009, a
11 new CA Civil Code section 55.3 which by its express terms contemplates monetary demands to
12 resolve civil claims exactly like those at issue in the present case. The pertinent sections are set
13 forth below:

14 "SEC. 2. Section 55.3 is added to the Civil Code, to read:

15 55.3. (a) For purposes of this section, the following shall apply:

16 (1) "Complaint" means a civil complaint that is filed or is to be filed with a court and is
17 sent to or served upon a defendant on the basis of one or more construction-related
18 accessibility claims, as defined in this section.

19 (2) "Demand for money" means a written document that is provided to a building owner
20 or tenant, or an agent or employee of a building owner or tenant, that contains a request for
21 money on the basis of one or more construction-related accessibility claims, as defined in
22 paragraph (3).

23 (3) "Construction-related accessibility claim" means any claim of a violation of any
24 construction-related accessibility standard, as defined by paragraph (6) of subdivision (a)
25 of Section 55.52, with respect to a place of public accommodation. "Construction-related
26 accessibility claim" does not include a claim of interference with housing within the
27 meaning of paragraph (2) of subdivision (b) of Section 54.1, or any claim of interference
28 caused by something other than the construction-related accessibility condition of the
property, including, but not limited to, the conduct of any person.

(b) An attorney shall provide a written advisory with each demand for money or
complaint sent to or served by him or her upon a defendant, in the form described in
subdivision (c), and on a page or pages that are separate and clearly distinguishable from
the demand for money or complaint, as follows:..."

The full text of the new law is attached to the Declaration of Theodore Pinnock. (Decl Pinnock
Exhibit A). Cross-Complainant attempts to inflate Cross-Defendants attempts to resolve Plaintiff

1 Carpenters CA Civil Claims against Pharmacy and other defendants into some type of alleged
2 criminal activity is given no support in the new legislation. This new section specifically
3 contemplates "Demand for Money" in either pre-filing of a complaint or post-filing. See 55.3(a)(1)
4 - [("Complaint" means a civil complaint that is filed or is to be filed with a court and is sent to or
5 served upon a defendant...)]. Cross-Defendants assert that the California legislature and
6 Governor would certainly be surprised by Pharmacy's allegations that they are essentially aiding
7 and abetting criminal extortion. Cross-Defendants will be grateful to comply with the new law
8 because they no longer will have to endure these meritless accusations of criminal activity as put
9 forth by Pharmacy and other defendants. Similarly, as a matter of law, on close inspection of
10 Pharmacy's allegations of other allegations of criminal activity by Cross-Defendants, these other
11 allegations also fail to find any evidentiary support. Cross-Defendants categorically deny and have
12 not engaged in the criminal activity of grand theft, barratry, solicitation of runners and cappers,
13 knowingly contacting parties represented by lawyers, and conspiracy. Cross-Defendants
14 respectfully assert that none of these wrongfully alleged criminal activities can be determined as a
15 matter of law. Pharmacy's section 17200 claim remains a civil claim. As a result, the litigation
16 privilege of Civil Code section 47(b) applies in the present action and the communications and
17 conduct thereto are absolutely privileged.

18 Counsel for Pharmacy contends that Cross-Defendants have knowingly contacted her
19 clients. (Yu Declaration). However, it is obvious that the timing of the communications indicate
20 that the communications simply crossed in the mail. Cross-Defendants have no control over how
21 rapidly the US Postal service conducts delivery of the mail. Additionally, Pinnock has never asked
22 the LA County Attorney to criminally prosecute anyone. On behalf of his client, Pinnock only
23 urged the district attorney to investigate the denial by the Defendants of his client's civil rights.
24 The federal ADA permits the enforcement of the ADA through public official enforcement.
25 Pinnock's letter was only intended to establish that these public officials would do no investigation
26 and not enforce his client's civil rights. As a result, his client could demonstrate that the private
27 enforcement provisions of the ADA were necessary to enforce his client's civil rights since the
28 government authorities would do nothing to help. Specifically, Cross-Defendants deny that they

1 have ever demanded money for instituting or not instituting criminal process. Concurrently with
2 this reply, Cross-Defendants filed a separate document entitled Objections To Evidence Submitted
3 By Pharmacy. Cross-Defendant Pinnock rejects the false contention by Pharmacy in its Special
4 Request for Judicial Notice that Pinnock committed perjury since the statement made by Pinnock
5 that he has not sent a pre-litigation letter in some time remains true. Exhibit 2 of the Special
6 Request contains a letter dated September 22, 2008 to Ro involving case number BC398094. The
7 complaint in that matter was filed September 12, 2008. Hence, the complaint was filed 10 days
8 prior to the date of the letter. Hence this letter is not a pre-litigation letter but one sent after
9 litigation had commenced.

10 Cross-Defendants shall welcome any guidance the court may suggest to prevent these
11 baseless accusations by defendants from occurring in other pending litigation that may
12 unnecessarily impede or consume the judicial resources of this court. It has been difficult to
13 address the number of hyper inflated issues raised by Pharmacy's shotgun opposition in a reply
14 brief limited to 10 pages especially since Pharmacy served their opposition late after their deadline.
15 If the court believes further briefing would be helpful, Cross-Defendants could supplement its reply
16 brief.

17 III. CONCLUSION

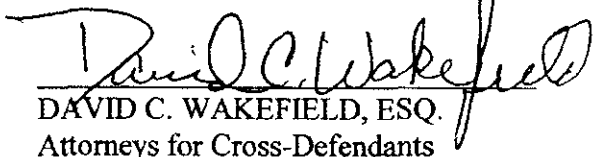
18 For the reasons stated above, Cross-Defendants have shown that Pharmacy's shotgun
19 lawsuit against Cross-Defendants is a SLAPP lawsuit as defined by CA CCP § 425.16. As a
20 matter of law, Cross-Complainant has not met its burden to demonstrate a probability of prevailing
21 on any of the causes of action contained within its FACC. This court should dismiss with prejudice
22 this Cross-Complaint and all the causes of action contained therein without leave to amend.

23 Respectfully submitted:

24
25 Dated: October 29, 2008

By:

PINNOCK & WAKEFIELD, APC


26
27 DAVID C. WAKEFIELD, ESQ.
Attorneys for Cross-Defendants