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LOS ANGELES SUPERIOR COURT

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

JON CARPENTER,

Plaintiff,

Case No.: BC390789

v.

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
CROSS-DEFENDANTS' SPECIAL
MOTION TO STRIKE CROSS-
COMPLAINANT HYE PHARMACY'S
FIRST AMENDED CROSS-
COMPLAINT AS A SLAPP LAWSUIT**

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

Cross-Defendants.

[CA CCP § 425.16]

BY FAX

**HYE PHARMACY, INC,
Cross-Complainant,**

Date: November 5, 2008

Time: 8:30 AM

Department 47

Judge Aurelio Munoz

VS.

**JON CARPENTER, an Individual;
THEODORE PINNOCK, an Individual;
PINNOCK & WAKEFIELD, APC, A
California Corporation; and ROES 1 through
100, inclusive,**

Cross-Defendants.

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

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Case# BC390789

I. INTRODUCTION

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2 Cross-Defendants JON CARPENTER, THEODORE A. PINNOCK, and PINNOCK &
3 WAKEFIELD, A.P.C, (hereinafter collectively referred to as "CARPENTER", "PINNOCK", or
4 "CROSS-DEFENDANTS") respectfully submit this Special Motion to Strike The First Amended
5 Cross-Complaint of Cross-Complainant HYE PHARMACY, INC. (hereinafter referred to as
6 "PHARMACY" or "Cross-Complainant") As A SLAPP Lawsuit ("Strategic Lawsuit Against
7 Public Participation"). The present motion consists of the Notice of Special Motion And Special
8 Motion to Strike The First Amended Cross-Complaint of Cross-Complainant HYE PHARMACY,
9 INC, Memorandum Of Points And Authorities In Support Of Cross-Defendants' Special Motion To
10 Strike Cross-Complainant Hye Pharmacy's First Amended Cross-Complaint As A SLAPP Lawsuit,
11 the Declaration of Theodore Pinnock, and the Declaration of Jon Carpenter in support thereof.
12 Cross-Defendants' present motion is the second motion in response to the First Amended Cross-
13 Complaint. Cross-Defendants Theodore Pinnock and Pinnock & Wakefield have concurrently
14 filed a Demurrer scheduled to be heard on November 24, 2008 at 8:30 AM.

15 Plaintiff Jon Carpenter filed an original complaint May 15, 2008. On August 14, 2008,
16 Plaintiff Jon Carpenter filed his First Amended Complaint. On August 15, 2008, Cross-
17 Complainant Hye Pharmacy filed its original Cross-Complaint naming only plaintiff Jon Carpenter
18 as a Cross-Defendant. On August 21, 2008 after being notified of the filing of Plaintiff's First
19 Amended Complaint, Cross-Complainant Hye Pharmacy, Inc filed a First Amended Cross-
20 Complaint ("FACC") against Jon Carpenter and additional Cross-Defendants THEODORE A.
21 PINNOCK and PINNOCK & WAKEFIELD, A.P.C., the attorneys for plaintiff Jon Carpenter. The
22 FACC asserts a number of meritless California claims. Cross-Complainant Pharmacy's First Cause
23 of Action is "Unfair And Fraudulent Business Practices", its Second Cause of Action is
24 "Conspiracy To Commit Unfair And Fraudulent Business Practices", its Third Cause of Action is
25 "Abuse Of Process", and the Fourth Cause of Action is "Conspiracy To Commit Abuse Of
26 Process". Pursuant to CA CCP § 425.16, Cross-Defendants brings their present special motion to
27 strike all Cross-Complainant Pharmacy's causes of action (Causes of Action 1 through 4) and the
28

1 cross-Complaint in its entirety. The court should grant Cross-Defendants' present motion for the
2 reasons set forth below.

3 **II. STANDARD OF REVIEW**

4 In order to eliminate SLAPP lawsuits, the California legislature created a two step process
5 that may be employed by Cross-Defendants to protect their First Amendment rights to free speech
6 and the right to petition. This two step process is embodied in the *California Civil Procedure Code*
7 *§ 425.16. CA CCP § 425.16.* First, Cross-Defendants as the moving party in a special motion to
8 strike must show that the subject lawsuit challenges the constitutional rights of free speech and
9 right to petition pursuant to First Amendment to U.S. Constitution or California constitutions.
10 Second, if the court determines that the lawsuit does infringe on said rights of Cross-Defendants,
11 the burden shifts to the Cross-Complainant to show they have a "probability" that they will prevail
12 on the merits. *U.S. v Lockheed Missiles & Space Company, Inc, 190 F.3d 963 (9th Cir 1999).*
13 *DuPont Merck Pharm. Co v Superior Court, 78 Cal.App.4th 562, 567 (2000).* The Plaintiff must
14 show that the complaint is both legally sufficient and supported by a prima facie showing of Facts
15 to sustain a favorable judgment if the evidence submitted by the plaintiff is credited. *Id.*

16 The *U.S. v Lockheed* court went on to state:

17 "California's Anti-SLAPP law, *Cal. Civ. Proc. Code § 425.16* was passed in
18 January 1993 in response to the legislature's concern about civil actions aimed at
19 private citizens to deter or punish them for exercising their political or legal rights.
20 *Wilcox v. Superior Court, 27 Cal. App. 4th 809(1994), 33 Cal. Rptr. 2d 446 (1994).*
21 n8 The hallmark of a SLAPP suit is that it lacks merit, and is brought with the
22 goals of obtaining an economic advantage over a citizen party by increasing the cost
23 of litigation to the point that the citizen party's case will be weakened or abandoned,
24 and of deterring future litigation. *27 Cal. App. 4th at 816, 33 Cal. Rptr. 2d at 450.*
25 The *Wilcox* decision goes on to observe that "because winning is not a SLAPP
26 plaintiff's primary motivation, Cross-Defendants' traditional safeguards against
27 meritless actions, (suits for malicious prosecution and abuse of process, and
28 requests for sanctions) are inadequate to counter SLAPPs." *27 Cal. App. 4th at 817,*
33 Cal. Rptr. 2d at 450. Therefore, the California legislature looked for procedural
and substantive remedies for the prompt exposure, dismissal, and discouragement
of SLAPP suits. *Id.*

U.S. v Lockheed at 970-971 [emphasis added].

1 The prevailing party on a special motion to strike is entitled to attorney's fees and costs to
2 compensate them for the expense of responding to the SLAPP suit and the motion. *U.S. v Lockheed*
3 *at 970-971* [citing CCP § 425.16(c); n10 *Robertson v. Rodriguez*, 36 Cal. App. 4th 347, 362, 42
4 *Cal. Rptr. 2d 464 (1995)*]. See also *Rusheen v Cohen*, (2006) 37 Cal. 4th 1048. Additionally, CCP
5 § 425.16 is to be construed broadly since this section merely establishes a judicial procedure that
6 permits the prompt dismissal of meritless litigation. *Briggs v Eden Council For Hope And*
7 *Opportunity*, 19 Cal.App.4th 1106, 1119; *Shekhter v. Financial Indem. Co.*, 89 Cal.App.4th 141
8 (2001). In response to the "disturbing increase" in meritless lawsuits brought to "chill the valid
9 exercise of the constitutional rights of freedom of speech and petition for the redress of
10 grievances", the Legislature overwhelmingly enacted California's anti-SLAPP law, CCP § 425.16,
11 to protect against these SLAPPs.¹ The California legislature directed the courts to presume
12 lawsuits challenging speech are brought to chill First Amendment rights. *Fox Searchlight Pictures,*
13 *Inc. v Paladino*, 89 Cal.App.4th 294 (2001). The anti-SLAPP law was enacted to facilitate "a fast
14 and inexpensive dismissal of SLAPPs" *Wilcox v Superior Court*, 27 Cal.App.4th 809, 823 (1994).
15 Such speedy dismissal also serves the ends of judicial economy, by reducing the time and resources
16 that courts and litigants must spend on meritless SLAPPs.

17 III. ARGUMENT

18 Cross-Defendants Carpenter and Pinnock demonstrate below that the present lawsuit
19 challenges Cross-Defendants' constitutional rights of free speech and right to petition pursuant to
20 the First Amendment to the U.S. Constitution or California constitution. As a result, Cross-
21 Complainant Pharmacy's present lawsuit is nothing more that a SLAPP lawsuit brought to chill
22 Cross-Defendants' constitutional rights of free speech and right to petition pursuant to the First
23

24 ¹ CCP § 425.16(a) provides: "The Legislature finds and declares that there has been a disturbing
25 increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of
26 freedom of speech and petition for the redress of grievances. The Legislature finds and declares that
27 it is in the public interest to encourage continued participation in matters of public significance, and
28 that this participation should not be chilled through abuse of the judicial process. To this end, this
section shall be construed broadly."

1 Amendment to the U.S. Constitution and/or the California constitution. On August 22, 2007,
 2 Cross-Complainant mail served their present First Amended Cross-Complaint asserting said
 3 meritless California claims. A motion pursuant to CCP § 425.16 should be brought within 60 days
 4 of filing the present complaint. *Yu v. Signet Bank/Virginia*, 103 Cal.App.4th 298, 314 (2002) [citing
 5 *Globetrotter Software v. Elan Computer Group*, 63 F. Supp. 2d 1127, 1129 (N.D.Cal. 1999); *Lam*
 6 *v. Ngo*, 91 Cal. App. 4th 832, 840-842 (2001) . The sixty day period runs from service of the most
 7 recent complaint rather than the original complaint]. *Lam v. Ngo*, 91 Cal. App. 4th 832, 840-842
 8 (2001). Cross-Defendants present anti-SLAPP motion is timely brought. Cross-Complainant
 9 Pharmacy has the burden that it must show that the complaint is both legally sufficient and
 10 supported by a prima facie showing of facts to sustain a favorable judgment if the evidence
 11 submitted by the Cross-Complainant is credited. Cross-Defendants assert that Pharmacy is unable
 12 to meet its burden to demonstrate it has a "probability" that it will prevail on the merits.

13 **A. Allegations Of Pharmacy In First Amended Cross-Complaint Violate SLAPP Statute**

14 Cross-Defendants can easily demonstrate that Cross-Complainant Pharmacy's present
 15 claims arise from Cross-Defendants protected activity. Carpenter and Pinnock asserts that Cross-
 16 Complainant's meritless claims arise from Cross-Defendants' protected exercise of free speech and
 17 right to petition related activity involving an issue of public interest.

18 The type of speech or conduct protected by the anti-SLAPP statute are:

19 (e) As used in this section, "act in furtherance of a person's right of petition or free
 20 speech under the United States or California Constitution in connection with a
 21 public issue" includes: (1) any written or oral statement or writing made before a
 22 legislative, executive, or judicial proceeding, or any other official proceeding
 23 authorized by law; (2) any written or oral statement or writing made in connection
 24 with an issue under consideration or review by a legislative, executive, or judicial
 25 body, or any other official proceeding authorized by law; (3) any written or oral
 26 statement or writing made in a place open to the public or a public forum in
 27 connection with an issue of public interest; (4) or any other conduct in furtherance
 28 of the exercise of the constitutional right of petition or the constitutional right of
 free speech in connection with a public issue or an issue of public interest.

CCP § 425.16(e), [Deerings 2006]

The categories enumerated in CCP § 425.16, subd. (e), are not all inclusive. The enumeration of
 acts protected is preceded by the word "includes," which implies that other unmentioned acts are

1 also protected under the statute. *Averill v Superior Court*, 42 Cal App 4th 1170, 50 Cal Rptr 2d 62
 2 (1996, 4th Dist).

3 Specifically, Pinnock asserts that the activities alleged in the complaint are protected under
 4 CCP § 425.16(e)(1,2,3,4). (Decl Pinnock). Cross-Complainant allegations are based entirely on
 5 protected speech and communications by Cross-Defendants arising out of letters sent to businesses
 6 either in pre-litigation and arising out of litigation already commenced (See FACC, generally).
 7 These communications were either pre-litigation letters or letters sent after litigation commenced
 8 notifying the owners, operators, and persons who controlled these public accommodation
 9 businesses that Defendant Carpenter had experienced discrimination and denial of equal access by
 10 the presence of architectural barriers at these same public accommodations in violation of the Title
 11 III of the Americans With Disabilities Act, 42 U.S.C. §§12181 et se, and in violation of California
 12 disability laws, ie CA Civil Code Section 51, 52, 54.1, and 54.3, or were settlement demand letters
 13 or filed complaints after commencement of litigation . (Decl Pinnock, ¶10) (FACC ¶¶ 9-10, 11-12,
 14 14-24, 29-37, alleging purported facts common to all causes of action). Such litigation letters and
 15 communications arising before or after the filing of a lawsuit are communications that have been
 16 found to be protected speech or the exercise of the right to petition in similar matters. See *Dove*
 17 *Audio v Rosenfeld, Meyer & Susman* 47 Cal.App.4th 777, 784 (1995) [letters soliciting support for
 18 administrative complaint as "communications preparatory to or in anticipation of the bringing of an
 19 action"]. In the *Dove Audio* case, the court found there was an absolute privilege under CA Civil
 20 Code § 47(b) accorded to demand letters from an attorney to a potential adversary and that such
 21 communications are protected under CCP § 425.16(e)(2) . The *Dove Audio* court went on to state:

22 "The constitutional right to petition . . . includes the basic act of filing litigation or
 23 otherwise seeking administrative action." (*Ludwig v. Superior Court* (1995) 37 Cal.
 24 *App. 4th* 8, 19 [43 Cal.Rptr.2d 350].) Just as communications preparatory to or in
 25 anticipation of the bringing of an action or other official proceeding are within the
 26 protection of the litigation privilege of *Civil Code* section 47, subdivision (b) (see
 27 *Rubin v. Green, supra*, 4 Cal.4th at pp. 1194-1195), we hold that such statements
 28 are equally entitled to the benefits of section 425.16. (See *Ludwig v. Superior Court,*
supra, 37 Cal. App. 4th at p. 19, comparing the two statutes.)

27 *Id* at 784.

1 See also *Briggs, supra*, 19 Cal.4th at 110, 1114-1115 [CCP § 425.16 covers statements relating to a
2 judicial or official proceedings]; *Dowling v Zimmerman*, 85 Cal.App.4th 1400, 1420 (2001) [CCP §
3 425.16 protects letter regarding pending lawsuit]; *Wilcox, supra* 27 Cal.App.4th at 821-822 [CCP §
4 425.16 protects letters soliciting financial support for lawsuit]; *eCash Technologies v Guagliardo*,
5 127 F.Supp.2d 1069, 1077, 1083-1084 (C.D. Cal 2000) [CCP § 425.16 protects letter discussing
6 pending litigation]; *Rusheen v Cohen*, (2006) 37 Cal. 4th 1048 [the litigation privilege extends to
7 those noncommunicative actions which are necessarily related to the communicative act]. In the
8 instant case, the pre-litigation letters, potential settlement letters and other communications sent by
9 Cross-Defendants were communications preparatory to or in anticipation of the bringing legal
10 action in a court of competent jurisdiction and/or settlement communications or other
11 communications pursuant to litigation already commenced. (Decl Pinnock, ¶10). Cross-
12 Complainant Pharmacy admits that these communications were pre-litigation letters, or
13 communications during litigation, and/or settlement communications on behalf of Carpenter or
14 other clients of Theodore Pinnock and Pinnock & Wakefield. (FACC ¶¶ 9-10, 11-12, 14-24, 29-
15 37, alleging purported facts common to all causes of action).

16 Additionally, Pinnock asserts that the activities alleged in the complaint are also protected
17 under CCP § 425.16(e)(3) and (4). As above, CCP § 425.16(e)(3) states that "any written or oral
18 statement or writing made in a place open to the public or a public forum in connection with an
19 issue of public interest" and CCP § 425.16(e)(4): "or any other conduct in furtherance of the
20 exercise of the constitutional right of petition or the constitutional right of free speech in
21 connection with a public issue or an issue of public interest". CCP § 425.16(e)(4) applies to
22 private communications concerning issues of public interest. *Terry v Davis Community Church*
23 131 Cal App 4th 1534, 33 Cal Rptr 3d 145 (2005, 3rd Dist). Definition of "public interest" within
24 the meaning of the anti-SLAPP statute, CCP § 425.16, has been broadly construed to include not
25 only governmental matters, but also private conduct that impacts a broad segment of society and/or
26 that affects a community in a manner similar to that of a governmental entity. *Tuchscher*
27 *Development Enterprises, Inc. v San Diego Unified Port Dist.*, 106 Cal App 4th 1219, 132 Cal
28 *Rptr 2d 57* (2003, 4th Dist). . Internet postings are also communications protected under CCP

1 section 425.16. See *Wilbanks v Wolk*, 121 Cal App 4th 883 (2004); *Ampex Corp. v Cargle*, 128
2 Cal App 4th 1569 (2005) [communications posted on web sites open to the general public are
3 statements made in a public forum entitled to protection]. In the present case, Cross-Complainant
4 Pharmacy admits that the speech or petition related activity by the Cross-Defendants meet one of
5 the elements of these sections since the speech or conduct was in connection with an issue of
6 public interest. (FACC, ¶8, 11, 12, 37). Internet postings are also communications protected
7 under CCP section 425.16. See *Wilbanks v Wolk*, 121 Cal App 4th 883 (2004); *Ampex Corp. v*
8 *Cargle*, 128 Cal App 4th 1569 (2005) [communications posted on web sites open to the general
9 public are statements made in a public forum entitled to protection].

10 In the present case, Cross-Complainant Pharmacy alleged claims in its FACC arise from the
11 alleged activities of the Cross-Defendants that are specifically protected activities under CCP §
12 425.16(e)(1-4). Cross-Defendants assert that these communications may also be found to be
13 communications in connection with an issue of public interest. (Decl. Pinnock, ¶13, 14). Cross-
14 Complainant Pharmacy has not and will not be able to identify any communication or
15 noncommunicative actions which are necessarily related to the communicative act that are not
16 covered by the SLAPP statute.

17 **B. Pharmacy Can Not Meet Its Burden It Shall Prevail On Their Claims**

18 Cross-Defendants Carpenter, Pinnock and Pinnock & Wakefield have demonstrated above a
19 *primaefacie* showing that the claims of the Cross-Complainant Pharmacy are subject to the SLAPP
20 statute. The burden now shifts to the Cross-Complainant to demonstrate that it will prevail on their
21 claims. Cross-Complainant will not be able to meet this burden. Cross-Complainant Pharmacy 's
22 claims fail as a matter of law for a number of reasons including but not limited to: Cross-
23 Complainant lacks standing to bring any claims about since Cross-Complainant did not suffer any
24 injury in fact and Cross-Complainant has suffered no damages, and the allegations and evidence
25 proffered by the Cross-Complainant of the Cross-Defendants acts and communications are not
26 admissible evidence since these acts and communications enjoy absolute privilege under Civil
27 Code § 47(b) accorded to prelitigation letters and communications and settlement letters arising
28 before and bafter filing of litigation from an attorney to a potential adversary or actual defendant.

1 These communications or acts are pursuant to Cross-Defendants' rights of free speech and right to
2 petition the courts pursuant to the US Constitution and the Constitution of California.

3 Additionally, these communications and conduct are protected by CA Rules of Evidence including
4 but not limited to Rules 1152 and 1154.

5 **1. Communications Privileged Under California Law and/or Not Admissible**
6 **Under CA Evidence Rules**

7 The plaintiff must demonstrate that the complaint is legally sufficient and supported by a
8 prima facie showing of facts to sustain a favorable judgment if the evidence submitted by plaintiff
9 is credited. *Batzel v. Smith*, 333 F.3d 1018, 1024 (9th Cir.2003) (citations omitted). In an anti-
10 SLAPP motion as with a motion for summary judgment, the evidence the plaintiff submits in
11 support of its claims **must be admissible evidence**. *Kyle v. Carmon*, 71 Cal.App.4th 901, 907, 84
12 Cal. Rptr. 2d 303 (1999); *Ludwig v. Superior Court* 37 Cal. App. 4th 8, 15-16 (1995). Only
13 evidence admissible at trial may be considered. *Evans v Unkow*, 38 Cal.App.4th 1490, 1497 (1995).

14 The California Supreme Court has recently reiterated its previous holdings with regard to
15 communications that are entitled to absolute privilege under Cal Civil Code section 47(b).

16 *Hagberg v California Federal Bank*, 32 Cal. 4th 350; 81 P.3d 244; 7 Cal. Rptr. 3d 803 (CAL
17 2004). In *Hagberg*, the California Supreme court states:

18 "In its application to communications made in a "judicial proceeding," section 47(b)
19 is not limited to statements made in a courtroom. Many cases have explained that
20 section 47(b) encompasses not only testimony in court and statements made in
21 pleadings, but also statements made prior to the filing of a lawsuit, whether in
22 preparation for anticipated litigation or to investigate the feasibility of filing a
23 lawsuit. (See *Rubin v. Green*, supra, 4 Cal.4th at pp. 1194-1195.) As we have said,
24 "it is late in the day to contend that communications with 'some relation' to an
25 anticipated lawsuit are not within the privilege." (*Ibid.*) Rather, the privilege
26 applies to "any publication required or permitted by law in the course of a judicial
27 proceeding to achieve the objects of the litigation, even though the publication is
28 made outside the courtroom [when] no function of the court or its officers is
involved." (*Silberg*, supra, 50 Cal.3d at p. 212; see also *PG&E v. Bear Stearns*
(1990) 50 Cal.3d 1118, 1132-1133, 1137 [270 Cal. Rptr. 1, 791 P.2d 587] [the
privilege encompasses a private entity's statements that instigate another person or
entity to undertake litigation].) We have noted the application of the privilege to
communications with " 'some relation to a proceeding that is ... under serious
consideration;' " to " 'potential court actions;' " and to " 'preliminary conversations
and interviews related to contemplated action,' " and we also have determined that

1 the privilege applies to communications made, prior to the filing of a complaint, by
 2 a person "meeting and discussing" with potential parties the "merits of the proposed
 ... lawsuit." (*Rubin v. Green, supra, 4 Cal.4th at p. 1194-1195.*)

3 *Hagberg* at 249 [internal citations to *Rubin v. Green, 4 Cal.4th 1187 (CAL 1993); Silberg,*
 4 *50 Cal.3d 205 (CAL 1990); PG&E v. Bear Stearns, 50 Cal.3d 1118 (CAL 1990)]. See*
 5 *also Rusheen v Cohen, (2006) 37 Cal. 4th 1048 [the litigation privilege extends to those*
noncommunicative actions which are necessarily related to the communicative act].

6 The privilege bestowed by CC § 47, relating to privileged communications in judicial
 7 proceedings, is absolute and not obviated by actual malice or the intent to do harm. Allegations of
 8 conspiracy do not pierce the protective shield embodied in the statute. *McClatchy Newspapers,*
 9 *Inc. v Superior Court, 189 Cal App 3d 961 (1987, 5th Dist).* The rule is the same even though the
 10 wrongful conduct of the defendant is willful, intentional, malicious, or fraudulent. *California*
 11 *Physicians' Service v Superior Court, 9 Cal App 4th 1321 (1992, 4th Dist).*

12 In the present case, the communications at issue as listed by Pharmacy were either pre-
 13 litigation letters in contemplation of litigation, communications after litigation commenced,
 14 settlement offer letters, or filed complaints. Cross-Complainant admit that these communications
 15 were preparatory to litigation, settlement, or communications in the course of litigation. (FACC ¶¶
 16 9-10, 11-12, 14-24, 29-37, alleging purported facts common to all causes of action). Additionally,
 17 Cross-Complainant Pharmacy will not be able to prevail since any evidence that may not fall within
 18 the CC § 47 privilege will not be admissible at trial including but not limited to exclusion under
 19 CA Rules of Evidence 1152 and 1154 since the communications at issue were intended to be
 20 settlement communications.

21 **2. Cross-Complainant Pharmacy Can Not Establish It Will Prevail On Its Claims**

22 Cross-Complainant Pharmacy asserted a number of California claims that they can not
 23 establish that they shall prevail upon as a matter of law. (See Section III.B.1 supra). These
 24 California claims should be struck pursuant to the anti-SLAPP statute.

25 a. California UBPA claim

26 Cross-Complainant Pharmacy alleges as a claim California's Unfair Business Practices Act
 27 (CA Business & Professions Code § 17200). (FACC, ¶39 -41). A B&P § 17200 claim is subject
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1 to the anti-SLAPP statute. *Bernardo v Planned Parenthood*, (2004) 115 Cal. App. 4th 322. Cross-
2 Complainant Pharmacy can not prevail on this claim as a matter of law. First, Cross-Complainant
3 Pharmacy can not show that they shall prevail on this claims for the reasons stated above in
4 sections III.B.1 supra. Second, Cross-Complainant Pharmacy can not show that they shall prevail
5 on this California claim since they fail to state specific facts or otherwise plead the required
6 elements of this cause of action. (FACC, ¶39 -41). Pharmacy fails to establish a reasonable
7 probability of prevailing on the merits of claims that any of the alleged communications were
8 unlawful, unfair or fraudulent within the meaning of the UBPA. Third, even if Cross-Complainant
9 seek injunctive relief pursuant to this claim such relief is only available via CA B&P Code § 17203
10 which states in relevant part “[a]ny person may pursue representative claims or relief on behalf of
11 others **only if the claimant meets the standing requirements of Section 17204**. This 17204
12 section states that “[a]ctions for any relief pursuant to this chapter ... upon the complaint by...
13 **association or any person who has suffered injury in fact and has lost money or property as a**
14 **result of such unfair competition**”. CA Business & Professions Code § 17204. A federal court
15 has stated: “[t]he UCL now requires a private plaintiff seeking to bring an action for injunctive or
16 restitutionary relief to establish that he or she ‘has suffered injury in fact and has lost money or
17 property.’ *Cal. Bus. & Prof. Code § 17204*. Cross-Complainant who wishes to maintain
18 representative actions must satisfy both this standing requirement and the requirements for a class
19 action in California Code of Civil Procedure § 382. *Id. § 17203*.” *Chamberlan v Ford Motor Co.*,
20 *369 F. Supp. 2d 1138, 1150 (ND Cal 2005)*. Pharmacy fails to meet either or both of these
21 standing requirements for a representative action. Pharmacy does not allege, nor can it, that it was
22 the recipient of the communications they complain about since defendant Pinnock did not address
23 any communications to them prior to the filing of this lawsuit. (Decl Pinnock). Hence, any
24 communications to Pharmacy or its representatives occurred after filing the present action, and is
25 covered by the litigation privilege. Cross-Complainant Pharmacy does not allege, nor can it, that
26 Pharmacy suffered injury in fact and/or that Pharmacy have lost money or property as a result of
27 being a consumer of services by Cross-Defendants. (Pinnock Decl ¶12, Carpenter Decl ¶7), Cross-
28 Defendants have not received money or property from Pharmacy). Cross-Complainant Pharmacy

1 does not allege, nor can it, that Pharmacy suffered injury in fact and/or that Pharmacy have lost
2 money or property to Cross-Defendants as a result. (See FACC generally). Pharmacy's
3 expenditure of attorney fees and costs after the filing of the present action to defend against
4 Plaintiff Carpenter's present complaint are not monetary losses contemplated by the statutory
5 scheme, i.e. the monetary loss must result prior to the lawsuit and have been received by the Cross-
6 Defendants not attorney fee costs paid to Pharmacy's own defense counsel as implied by Pharmacy.
7 (FACC ¶49). It is not sufficient under this cause of action for Cross-Complainant Pharmacy merely
8 to allege potential harm to it. At minimum, Cross-Complainant Pharmacy is required to show that
9 it suffered a loss of money or property prior to the filing of this Cross-Complaint. As a result,
10 Cross-Complainant Pharmacy fails to establish standing or that the relief Cross-Complainant seeks
11 is available to them under the California statute itself.

12 Cross-Complainant Pharmacy cannot establish a cause of action under this CA cause of
13 action since the acts complained about concern either pre-litigation letters, communications
14 pursuant to litigation, or settlement communications that are absolutely privileged under California
15 Civil Code § 47(b). The privilege bestowed by CC § 47, relating to privileged communications in
16 judicial proceedings, is absolute and not obviated by actual malice or the intent to do harm.
17 Allegations of conspiracy do not pierce the protective shield embodied in the statute. *McClatchy*
18 *Newspapers, Inc. v Superior Court, 189 Cal App 3d 961 (1987, 5th Dist)*. The rule is the same
19 even though the wrongful conduct of the defendant is willful, intentional, malicious, or fraudulent.
20 *California Physicians' Service v Superior Court, 9 Cal App 4th 1321 (1992, 4th Dist)*. Hence, in
21 the present matter, assuming arguendo, that Cross-Complainant Pharmacy's allegations were true
22 that something was improper regarding the communications between Cross-Defendants and the
23 recipients of the subject communications, these communications are still absolutely privileged
24 under California CCP § 47(b) and would not be admissible as evidence. However, Cross-
25 Complainant Pharmacy was not the recipients of any of the alleged communications prior to the
26 present lawsuit. (Decl Pinnock). Any communications to Pharmacy by Cross-Defendants and
27 those noncommunicative actions which are necessarily related to the communicative act were in the
28 context of the present litigation and is absolutely privileged under California CCP § 47(b).

1 b. Abuse of Process Claim

2 Cross-Complainant Pharmacy also alleges the tort of Abuse of Process against the Cross-
 3 Defendants as its Third Cause of action . (FACC, ¶¶45-50). Cross-Complainant Pharmacy's
 4 claim fails as it relies entirely on protected communications and conduct. (Decl Pinnock). The
 5 common law tort of abuse of process arises when one uses the court's process for a purpose other
 6 than that for which the process was designed. It has been interpreted broadly to encompass the
 7 entire range of procedures incident to litigation. The essence of the tort is misuse of the power of
 8 the court; it is an act done in the name of the court and under its authority for the purpose of
 9 perpetrating an injustice. To succeed in an action for abuse of process, a litigant must establish that
 10 the defendant: (1) contemplated an ulterior motive in using the process, and (2) committed a willful
 11 act in the use of the process not proper in the regular conduct of the proceedings. *Rusheen v*
 12 *Cohen*, (2006) 37 Cal. 4th 1048, 1057. Cross-Complainant Pharmacy does not have standing to
 13 raise issues regarding acts outside the context of the present case and hence is not able to raise
 14 issues regarding other complaints filed by Cross-Defendants Carpenter, Pinnock, or Pinnock &
 15 Wakefield. Additionally, Cross-Complainant cannot establish the elements of this tort since the
 16 purpose of the communications was not to perpetrate an injustice but to enforce the civil rights of
 17 persons with disabilities. (Decl Pinnock). Finally, Pharmacy cannot establish this cause of action
 18 since the acts complained about concern communicative acts that are absolutely privileged under
 19 California Civil Code § 47(b).

20 The privilege is now held applicable to any communication, whether or not it amounts to a
 21 publication, and all torts except malicious prosecution. Further, it applies to any publication
 22 required or permitted by law in the course of a judicial proceeding to achieve the objects of the
 23 litigation, even though the publication is made outside the courtroom and no function of the court
 24 or its officers is involved. *Rusheen v Cohen*, (2006) 37 Cal. 4th 1048, 1057 [The privilege applies
 25 to the tort of Abuse of Process]. Indeed, the *Rusheen* court held that "...where the cause of action
 26 is based on a communicative act, the litigation privilege extends to those noncommunicative
 27 actions which are necessarily related to that communicative act. *Rusheen* at 1052. The *Rusheen*
 28 court went on to review applications of the privilege in prior abuse of process cases that "[t]he

1 "[p]leadings and process in a case are generally viewed as privileged communications." (*Navellier*
2 *v. Sletten* (2003) 106 Cal.App.4th 763, 770 [131 Cal. Rptr. 2d 201].) The privilege has been
3 applied specifically in the context of abuse of process claims alleging the filing of false or
4 perjurious testimony or declarations. (*Pollock v. University of Southern California* (2003) 112
5 Cal.App.4th 1416, 1431 [6 Cal. Rptr. 3d 122] [declaration "functions as written testimony," is a
6 "communication, not conduct," and "is exactly the sort of communication the privilege is designed
7 to protect"]; *Pettitt v. Levy* (1972) 28 Cal. App. 3d 484, 489 [104 Cal. Rptr. 650] ["[p]reparing and
8 presenting false documents is equivalent to the preparation and presentation of false testimony"];
9 *Carden v. Getzoff* (1987) 190 Cal. App. 3d 907, 913-915 [235 Cal. Rptr. 698] [claim that expert
10 witness had manufactured false evidence for former wife in dissolution action was privileged].)"
11 *Rusheen* at 1058. In the present case, Pharmacy has alleged only communications that are
12 privileged or are non-communicative actions that are necessarily related to the communicative acts
13 that are privileged. (FACC ¶¶ 9-10, 11-12, 14-24, 29-37, alleging purported facts common to all
14 causes of action). The Abuse of Process claim fails.

15 c. Civil Conspiracy Claims

16 Cross-Complainant Pharmacy alleges two civil conspiracy claims as its Second Cause of Action
17 (FACC, ¶¶42-44) and Fourth Cause Of Action (FACC, ¶¶51-54). A civil conspiracy does not give
18 rise to a cause of action unless an independent civil wrong has been committed. *Rusheen v Cohen*,
19 (2006) 37 Cal. 4th 1048, 1057 [citing *Doctors' Co. v. Superior Court* (1989) 49 Cal.3d 39, 44 (260
20 Cal. Rptr. 183, 775 P.2d 508)]. The elements of an action for civil conspiracy are (1) formation
21 and operation of the conspiracy and (2) damage resulting to plaintiff (3) from a wrongful act done
22 in furtherance of the common design. *Id.* First, Pharmacy failed to comply with CA Civil Code
23 Section 1714.10(a) that states in relevant part: "No cause of action against an attorney for a civil
24 conspiracy with his or her client arising from any attempt to contest or compromise a claim or
25 dispute, and which is based upon the attorney's representation of the client, shall be included in a
26 complaint or other pleading unless the court enters an order allowing the pleading that includes the
27 claim for civil conspiracy to be filed the pleading has established that there is a reasonable
28 probability that the party will prevail in the action." . "Failure to obtain a court order where

1 required by subdivision (a) shall be a defense to any action for civil conspiracy filed in violation
 2 thereof.” CA Civil Code Section 1714.10 (b). Since Pharmacy failed to comply with the pre-filing
 3 requirement, the civil conspiracy causes of action fail. Second, Cross-Complainant Pharmacy
 4 cannot establish an independent civil wrong has been committed pursuant to its UBPA and Abuse
 5 of Process claims for the reasons stated above in sections III.B.2.a-b. Pharmacy’s causes of action
 6 pursuant to the UBPA and Abuse of Process are subject to the SLAPP statute and thus no
 7 independent civil wrong has been committed. Finally, as previously stated, all of Cross-
 8 Complainants allegations concerning Cross-Defendants actions are absolutely privileged under
 9 California Civil Code § 47(b). These two civil conspiracy claims fail for the reasons stated above.

10 **C. Relief Available Under Anti-SLAPP Statute**

11 If an anti-SLAPP motion to strike is granted, the suit is dismissed and the prevailing
 12 defendant is entitled to recover his or her attorney's fees and costs. *See § 425.16(c). Batzel v.*
 13 *Smith, 333 F.3d 1018, 1025 (9th Cir.2003).* The prevailing party on a special motion to strike is
 14 entitled to attorney's fees and costs to compensate them for the expense of responding to the
 15 SLAPP suit and the motion. CCP § 425.16(c); *n10 Robertson v. Rodriguez, 36 Cal. App. 4th 347,*
 16 *362, 42 Cal. Rptr. 2d 464 (1995), Rusheen v Cohen, (2006) 37 Cal. 4th 1048..* All discovery
 17 proceedings are stayed upon the filing of a notice of motion under CA CCP § 425.16 and the stay
 18 remains in effect until notice of entry of the order ruling on the motion. *CCP § 425.16(g).* A
 19 plaintiff cannot avoid an anti-SLAPP motion by amending the complaint prior to the hearing on the
 20 motion. *Sylmar Air Conditioning v. Pueblo Contracting Services, Inc., 122 Cal.App.4th 1049, 1055*
 21 *(2004)* [the *Sylmar* court stating that allowing the plaintiff a chance to disguise the vexatious nature
 22 of the suit “would totally frustrate the Legislature’s objective of providing a quick and inexpensive
 23 method of unmasking and dismissing such suits”]. A party against whom an anti-SLAPP motion
 24 has been granted cannot amend their complaint, those claims are dismissed with prejudice having
 25 been decided on the merits by the court granting the anti-SLAPP motion. *Simmons v. Allstate Ins.*
 26 *Co., 92 Cal.App.4th 1068, 1073 (2001).* The *Simmons* court also stated the rationale is that
 27 amendments would frustrate the California’s legislature’s objective of providing a quick and
 28 inexpensive method of unmasking and dismissing such suits.” *Simmons at 1073.* Cross-

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1 Defendants Carpenter, Pinnock and Pinnock & Wakefield hereby request attorney fees and costs as
2 permitted under the statute and shall set forth such a request in more detail after the decision of this
3 court on the merits of the present motion. In the present case, Cross-Defendants Pinnock and
4 Pinnock & Wakefield also concurrently filed a Demurrer motion to dismiss Cross-Complainant
5 Pharmacy's second and fourth causes of action for civil conspiracy due to Pharmacy's failure to
6 obtain the required leave of court necessary prior to filing these causes of action. Cross-Defendants
7 intend and respectfully request this court to first decide this present anti-SLAPP motion to strike
8 before addressing Cross-Defendants' Pinnock, and Pinnock & Wakefield's Demurrer motion
9 presently pending before this court.

10 IV. CONCLUSION

11 For all the reasons stated above, Cross-Defendants Carpenter, Pinnock, and Pinnock &
12 Wakefield have shown that Cross-Complainant Pharmacy's lawsuit against Cross-Defendants is a
13 Strategic Lawsuit Against Public Participation (SLAPP) as defined by CA CCP § 425.16. For the
14 reasons stated above, Cross-Complainant can not meet their burden to demonstrate a probability of
15 prevailing on any of the causes of action contained within Cross-Complainant FACC. This court
16 should dismiss with prejudice this Cross-Complaint and all the causes of action contained therein
17 without leave to amend as required under CA CCP § 425.16. Cross-Defendants Carpenter,
18 Pinnock, and Pinnock & Wakefield seek attorney fees and costs as permitted under the statute and
19 shall set forth such a request after the decision of this court on the merits of the present motion.

20 Respectfully submitted:

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22 Dated: October 7, 2008

By:

PINNOCK & WAKEFIELD, APC


DAVID C. WAKEFIELD, ESQ.

Attorneys for Cross-Defendants

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