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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

MIKE GREENBERG,

Plaintiff and Respondent,

v.

ISS FACILITY SERVICES, INC., et al.,

Defendants and Appellants.

A131911

(San Mateo County  
Super. Ct. No. CIV 500688)

Defendant ISS Facility Services, Inc. (ISS) and Thomas R. Norman, its western region division president, appeal from the denial of their special motion to strike the complaint of plaintiff Mike Greenberg as a strategic lawsuit against public participation pursuant to Code of Civil Procedure<sup>1</sup> section 425.16, commonly known as the anti-SLAPP statute. The trial court determined that four causes of action, each arising out of the termination of Greenberg's employment, were not based upon speech or petitioning activity protected by section 425.16, and that Greenberg showed a probability of prevailing on his fifth cause of action for defamation. We shall affirm.

**Factual and Procedural History**

The background of this controversy is described in the complaint and in the declarations submitted in support of and opposition to defendants' anti-SLAPP motion. In October 2009, the United States Government Accountability Office (US GAO) issued a report, entitled "Service-Disabled Veteran-Owned Small Business Program: Case Studies

<sup>1</sup> All further statutory references are to the Code of Civil Procedure unless otherwise noted.

Show Fraud and Abuse Allowed Ineligible Firms to Obtain Millions of Dollars in Contracts.” The report concluded that ineligible firms had obtained millions of dollars in contracts under the program. One case study in the report alleged potential fraud and abuse by a prime contractor who had been awarded a contract to render services at the Veterans Administration Hospital in Palo Alto (VA Hospital). Although not mentioned by name, it appeared to ISS that this case study referred to Corners Construction Company (Corners).

ISS provided janitorial services at the VA Hospital under a subcontract agreement with Corners. According to Norman, ISS learned of the US GAO report and its apparent reference to Corners in February 2010, and immediately began an internal investigation of its business relationship with Corners. As later described by Norman, ISS concluded that Corners had misrepresented its eligibility to obtain the prime contract to provide services at the VA Hospital under the service-disabled veteran-owned small business program by making it appear that at least half of the personnel costs under the prime contract were paid as compensation to Corners’ employees.<sup>2</sup> ISS also found evidence which suggested that Greenberg, without the knowledge of ISS’s senior management or counsel, had assisted Corners in misrepresenting its eligibility. Norman later stated that Greenberg had acted from “an inadequate understanding or perhaps a lack of regard for applicable federal contracting requirements.” As a result of its internal investigation, ISS took several “remedial measures,” including terminating Greenberg and discontinuing its business relationship with Corners. On April 6, 2010, ISS sent a letter to the contracting officer at the VA Hospital, with a copy to the managing director of forensic audits and

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<sup>2</sup> The service-disabled veteran-owned small business program under which the prime contract had been awarded to Corners requires the small business to spend “at least 50 percent of the cost of personnel for contract performance . . . on employees of the [business] or employees of other service-disabled veteran-owned small business[es].” According to ISS, Greenberg and Corners conspired to create the appearance that Corners was providing more than half of the labor under the prime contract although ISS had, in fact, provided all of the labor.

special investigations at the US GAO,<sup>3</sup> summarizing its findings and documenting the “remedial measures” it had taken in response to its discoveries.

After Greenberg was terminated he filed this action. His complaint alleges causes of action for nonpayment of wages (first cause of action), accrual of waiting time penalties (second cause of action), wrongful termination in violation of public policy (third cause of action), defamation (fourth cause of action), and intentional infliction of emotional distress (fifth cause of action).<sup>4</sup>

The complaint alleges that Greenberg was hired by ISS in June 2007 and, on April 7, 2010, was terminated. The stated reason for the termination was that he had signed a subscription service agreement with Corners without authorization and had “made unauthorized changes” to ISS’s invoices to Corners. The complaint asserts that “[t]he alleged ‘reasons’ given by ISS for [his] termination were pretextual and false.” Greenberg alleges that he was in fact terminated to shift responsibility to him for ISS’s misconduct relating to the VA Hospital contract, and because “ISS determined that it could retain the millions of dollars of business which [he] had generated over the years without having to pay [him] future commissions, and to rid itself of a highly compensated, older employee over the age of 50 years.” The complaint alleges that ISS failed to pay Greenberg approximately \$40,133 in earned commissions and that ISS and Norman refused to delete his electronic signature or provide confirmation that it had deleted his electronic signature, which caused him severe emotional distress.

The fourth cause of action for defamation alleges that “Defendants published false and defamatory statements regarding [Greenberg] with respect to the project and subcontract with Corners.” The defamatory publication to which the fourth cause of action

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<sup>3</sup> A copy of the letter was also sent to Thomas L. McGovern III of Hogan & Hartson LLP. The record does not reveal which party Mr. McGovern presumably represented.

<sup>4</sup> After defendants filed the anti-SLAPP motion but before the trial court heard the motion, Greenberg filed a first amended complaint. We review defendants’ anti-SLAPP motion with reference to the original complaint, as did the trial court, and do not consider the amended complaint. (*Prediwave Corp. v. Simpson Thacher & Bartlett LLP* (2009) 179 Cal.App.4th 1204, 1209-1210.)

seemingly refers is the April 6 letter sent to the VA Hospital. The letter is described in the wrongful termination cause of action as follows: “In order to deflect attention from ISS and its possible violation of federal laws and regulations, Norman sent a letter to the contracting officer at the VA Hospital . . . . In this letter, ISS claimed that if the arrangement between Corners . . . and ISS had been fully explained to higher level management of ISS, the subcontract would not have been approved. The letter further stated that high level management of ISS was not advised of the arrangement and that such arrangement was the responsibility of [Greenberg], who entered into the subcontract with a lack of regard for applicable Federal contracting requirements. The letter went on to state that [Greenberg’s] employment with ISS would be terminated the next day because he allegedly acted inconsistently with ISS’s business conduct standards. . . . The letter attempted to portray [Greenberg] as a rogue employee who acted on his own to violate or conspire to violate federal laws and regulations with Corners.”

Defendants filed a special motion to strike all five causes of action of the complaint pursuant to section 425.16, contending that each is based on acts in furtherance of defendants’ rights of petition and speech and that Greenberg could not show a probability of prevailing on any of these claims. After briefing and argument, the trial court denied the motion as to all causes of action, holding that the four employment related causes of action did not arise from defendants’ protected activity and that, although the fourth cause of action for defamation arose from acts in furtherance of defendants’ rights of petition and speech, Greenberg had shown a probability of prevailing on this claim. Defendants timely appealed.

## **Discussion**

### *A. The Anti-SLAPP Statute*

“A SLAPP suit—a strategic lawsuit against public participation—seeks to chill or punish a party’s exercise of constitutional rights to free speech and to petition the government for redress of grievances. [Citation.] The Legislature enacted Code of Civil Procedure section 425.16 —known as the anti-SLAPP statute—to provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional

rights.” (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055-1056.) “[U]nder Code of Civil Procedure section 425.16, subdivision (b)(1), a defendant may move to strike ‘[a] cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech . . . in connection with a public issue. . . .’ ” (*McConnell v. Innovative Artists Talent and Literary Agency, Inc.* (2009) 175 Cal.App.4th 169, 175.) Acts in furtherance of petition or free speech rights are defined to include “(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, . . . or (4) any other conduct in furtherance 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.” (§ 425.16, subd. (e).)

“To prevail on an anti-SLAPP motion, the movant must first make ‘ “a threshold showing the challenged cause of action” arises from an act in furtherance of the right of petition or free speech in connection with a public issue.’ ” (*A.F. Brown Electrical Contractor, Inc. v. Rhino Electric Supply, Inc.* (2006) 137 Cal.App.4th 1118, 1124.) “[T]he statutory phrase ‘cause of action . . . arising from’ means simply that the defendant’s act underlying the plaintiff’s cause of action must *itself* have been an act in furtherance of the right of petition or free speech. [Citation.] In the anti-SLAPP context, the critical point is whether the plaintiff’s cause of action itself was *based on* an act in furtherance of the defendant’s right of petition or free speech.” (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) “We look to the gravamen of a plaintiff’s complaint to see if it is based on a defendant’s protected First Amendment activity.” (*McConnell v. Innovative Artists Talent and Literary Agency, Inc.* (2009) 175 Cal.App.4th 169, 177, citing (See *Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 188 [“it is the *principal thrust* or *gravamen* of the plaintiff’s cause of action that determines whether the anti-SLAPP statute applies”]; see also *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89 [“[T]he critical consideration is whether the cause of action is *based on* the defendant’s

protected free speech or petitioning activity.”].) “In deciding whether the ‘arising from’ requirement is met, a court considers ‘the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.’ (§ 425.16, subd. (b).)” (*City of Cotati, supra*, at p. 79.) “Once the movant meets this burden, the plaintiff must demonstrate ‘“a probability of prevailing on the claim.”’ [Citation.] If plaintiff fails to do so, the cause of action must be stricken.” (*A.F. Brown Electrical Contractor, Inc., supra*, at p. 1124.) “Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute.” (*Navellier v. Sletten, supra*, at p. 89.)

An order denying an anti-SLAPP motion is appealable. (§ 425.16, subd. (i).) On appeal we “independently review[] the trial court’s order [denying] a special motion to strike under section 425.16” (*Rusheen v. Cohen, supra*, 37 Cal.4th at p. 1055) and conduct “an independent review of the entire record.” (*A.F. Brown Electrical Contractor, Inc. v. Rhino Electrical Supply Inc., supra*, 137 Cal.App.4th at p. 1124.)

*B. Plaintiff’s Causes of Action for Nonpayment of Wages, Accrual of Waiting Time Penalties, and Intentional Infliction of Emotional Distress*

The first and second causes of action, for nonpayment of wages and accrual of waiting time penalties, are based on ISS’s alleged failure to pay compensation owed to Greenberg, and the fifth cause of action for intentional infliction of emotion distress is based on defendants’ alleged failure to delete Greenberg’s electronic signature or to provide confirmation that it had done so. None of this conduct can possibly be considered an act in furtherance of defendants’ rights of petition and speech in connection with a public issue as defined in section 425.16, subdivision (e). These causes of action clearly fail to satisfy the first prong of the SLAPP analysis. (E.g., *Navellier v. Sletten, supra*, 29 Cal.4th at p. 89.) Thus, the trial court properly denied defendants’ special motion to strike these causes of action.

### *C. Wrongful Termination Cause of Action*

Plaintiff's third cause of action is for wrongful termination in violation of public policy. ISS contends that its termination of Greenberg is protected activity within the meaning of section 425.16 because "Greenberg alleges in paragraph 25 [of his complaint] that his termination was a communicative act that was intended to, and which did in fact, communicate to the federal government the message that it should focus its ongoing fraud and abuse investigation on Greenberg, that Greenberg was culpable, and that Greenberg acted on his own and without authorization from ISS."

The Supreme Court has "acknowledged that conduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments' [citation]. [¶] In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.' " (*Texas v. Johnson* (1989) 491 U.S. 397, 404.)

Here, there is nothing in the complaint or any evidence that has been submitted to suggest that Greenberg's termination was intended to convey a message to the federal government. The complaint alleges that the termination was wrongful for multiple reasons, including age discrimination and the attempt to avoid paying earned commissions. Greenberg recounts the circumstances leading to the letter being sent and the contents of the letter to suggest that the termination was designed in part to substantiate ISS's contention that only Greenberg was responsible for the misconduct concerning the VA Hospital contract and to show that the reasons given for terminating him were pretextual. Even if Greenberg's allegations are true, they do not convert the termination into a communication to the government or to anyone else. The act of terminating Greenberg's employment, as distinguished from sending the April 6 letter advising the VA Hospital of the termination, was not a communicative act. There was no showing that the challenged cause of action arose from a constitutionally protected act. Thus, defendants did not satisfy the first prong of the SLAPP inquiry. The trial court

properly denied defendants' anti-SLAPP motion with regard to the wrongful termination cause of action.

*D. Defamation Cause of Action*

Greenberg's fourth cause of action, for defamation, is based on the April 6 letter sent to the contracting officer of the VA Hospital and copied to the US GAO. The trial court held that sending this letter was protected activity within the meaning of section 425.16, subdivision (e), but that Greenberg had made a prima facie showing that he would prevail on this cause of action. We agree.

*1. Protected Activity*

Defendants contend the letter constitutes protected speech or petitioning activity within the meaning of section 425.16, subdivisions (e)(1) and (e)(2).<sup>5</sup> We doubt that either of these subdivisions apply. The letter was not "made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law" within the meaning of subdivision (e)(1), nor was it "made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law," within the meaning of subdivision (e)(2). The US GAO had already completed its report when the April 6 letter was sent and whether the US GAO or the Veterans Administration would take any further action or commence any official proceedings relative to the contents of the report was entirely speculative. Nonetheless, we believe that sending the letter does come within the final catch-all definition in subdivision (e), as "any other conduct in furtherance 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."

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<sup>5</sup> In their opening brief, defendants state that "[b]oth the trial court and Greenberg concede that [section] 426.15 applied to ISS's statements in Greenberg's cause of action for defamation." This statement is inaccurate. Greenberg has argued throughout these proceedings that the defamation cause of action is not based on protected activity and is not subject to section 425.16.

Sending the April 6 letter undoubtedly was conduct in furtherance of the right of free speech (*Gooding v. Wilson* (1972) 405 U.S. 518, 521-522.) and, we conclude, was done “in connection with a public issue or an issue of public interest.” “Section 425.16 does not define ‘public interest’ or ‘public issue.’ Those terms are inherently amorphous and thus do not lend themselves to a precise, all-encompassing definition. [Citations.] Some courts have noted commentary that “ ‘no standards are necessary because [courts and attorneys] will, or should, know a public concern when they see it.’ ” [Citations.]’ [Citations.] ¶] Nevertheless, courts have discussed how to decide whether a statement concerns a matter of public interest. In *Nygaard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027 . . . , the court pointed out that although section 425.16 does not define “public interest,” it does mandate that its provisions “be construed broadly” to safeguard “the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.” [Citation.] The court explained that “[t]he directive to construe the statute broadly was added in 1997, when the Legislature amended the anti-SLAPP statute “to address recent court cases that have too narrowly construed California’s anti-SLAPP suit statute.” [Citation.]’ (*Nygaard*, at p. 1039 . . . .)” (*Cross v. Cooper* (2011) 197 Cal.App.4th 357, 371-372, fns. omitted.)

Accordingly, “ [t]he definition of “public interest” within the meaning of the anti-SLAPP statute has been broadly construed to include not only governmental matters, but also private conduct that impacts a broad segment of society and/or that affects a community in a manner similar to that of a governmental entity. [Citations.]’ [Citations.] ‘Although matters of public interest include legislative and governmental activities, they may also include activities that involve private persons and entities, especially when a large, powerful organization may impact the lives of many individuals.’ ” (*Du Charme v. International Brotherhood of Electrical Workers, Local 45* (2003) 110 Cal.App.4th 107, 115.) “[P]rotection under section 425.16 for statements in connection with a public issue or an issue of public interest is not dependent on those statements having been made in a public forum. Rather, subdivision (e) of section 425.16 applies to private communications

concerning issues of public interest.” (*Hailstone v. Martinez* (2008) 169 Cal.App.4th 728, 736.)

Here, the April 6 letter relates to the discovery and investigation of fraud and abuse in government contracting under the service-disabled veteran-owned small business program. Fraud in connection with public contracting affects a broad segment of society and may impact the lives of many individuals, including compliant service-disabled veteran-owned small businesses that fail to obtain contracts awarded to companies engaging in fraudulent practices. The mention of Greenberg by name in the context of the April 6 letter, read as a whole, is incidental to the discussion of fraud. The explanation of his alleged role in the apparent fraud is integral to the discussion of Corners’ alleged noncompliance with federal contracting regulations and ISS’s asserted lack of culpability. The fact that Greenberg would be terminated was mentioned to emphasize that Greenberg’s conduct was contrary to the policies of ISS and that the management of ISS was not responsible for the fraud that had been detected. While the termination of a particular employee is ordinarily not a matter of public interest (see, e.g., *Du Charme v. International Brotherhood of Electrical Workers, Local 45, supra*, 110 Cal.App.4th at pp. 118-119 [announcement that plaintiff had been terminated, posted on defendant’s website, was not in connection with a public issue or a matter of public interest]), the circumstances giving rise to Greenberg’s termination did relate directly to a matter of public interest, the fraudulent activity described in the US GAO report.

Treating a letter such as the April 6 letter as protected activity within the meaning of section 425.16, subdivision (e) unquestionably furthers the legislative finding that “it is in the public interest to encourage continued participation in matters of public significance.” (§ 425.16, subd. (a).) This treatment recognizes the right of an individual or company to attempt to dissuade public officials from taking action adverse to their interests. This interpretation also tends to encourage those who become aware of potentially fraudulent or criminal activity or who have information that they consider may bear on such activity to bring their information to the attention of the appropriate

government agency. Reading the statute more narrowly would have exactly the opposite effect.

We therefore conclude that sending the April 6 letter was protected activity within the meaning of subdivision (e), and that the trial court correctly held that ISS satisfied the first prong of the anti-SLAPP analysis. We therefore must consider whether the court correctly found that Greenberg has shown a probability of prevailing on the merits.

## 2. *Probability of Prevailing*

“ ‘ “In order to establish a probability of prevailing on the claim (§ 425.16, subd. (b)(1)), a plaintiff responding to an anti-SLAPP motion must ‘ “state[] and substantiate[] a legally sufficient claim.” ’ [Citations.] Put another way, the plaintiff ‘must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.’ [Citations.] In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant (§ 425.16, subd. (b)(2)); though the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant’s evidence supporting the motion defeats the plaintiff’s attempt to establish evidentiary support for the claim.” ’ ” (*Nygaard, Inc. v. Uusi-Kerttula, supra*, 159 Cal.App.4th at p. 1044.) Greenberg may overcome defendants’ evidence “by showing [that their] purported ‘ “defenses are not applicable to the case as a matter of law or by a prima facie showing of facts which, if accepted by the trier of fact, would negate such defenses.” ’ ” ” (*Birkner v. Lam* (2007) 156 Cal.App.4th 275, 285.)

“The prima facie showing of merit must be made with evidence that is admissible at trial. [Citation.] Unverified allegations in the pleadings or averments made on information and belief cannot make the showing.” (*Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1289.)

To make a prima facie showing on the defamation cause of action, Greenberg was required to produce evidence that the statements in the April 6 letter are false and exposed him “to hatred, contempt, ridicule, or obloquy,” caused him to be shunned or

avoided, or had “a tendency to injure him in his occupation” (Civil Code § 45.) and he was required to produce evidence negating the defense that the letter was subject to the litigation privilege.

*a. Prima Facie Case*

The April 6 letter states that “there are . . . documents that reflect an effort on the part of an ISS employee and Corners to create the appearance of an employment relationship between Corners and the individuals working at the Palo Alto facility. . . .” The letter goes on to explain that Greenberg signed a subscription service agreement and revised invoices to make it appear that Corners was providing a majority of the labor, and “if this arrangement had been fully explained to higher level management at ISS, it would not have been approved. . . . [I]t appears that did not occur and that this arrangement principally was the responsibility of Mr. Greenberg.” In opposition to the SLAPP motion, Greenberg submitted his own declaration which competently tends to show the falsity of these statements. Greenberg states that he “fully informed [upper management] of the proposed business arrangement between Corners Construction and ISS for the VA Hospital account,” was directed to sign the subcontract on behalf of ISS, and was “given authority by ISS management to sign any other documents necessary to the business arrangement between ISS and Corners.”<sup>6</sup> Greenberg further states that he “had no involvement in and did not direct anyone at ISS to change invoices.” Defendants point to contradictory evidence but the court “does not *weigh* the credibility or comparative probative strength of competing evidence.” The defendants’ evidence overcomes the plaintiff’s showing on a SLAPP motion only if that evidence defeats the plaintiff’s right

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<sup>6</sup> Defendants objected to the consideration of these statements on the ground that they lack foundation (Evid. Code, § 702), but the objection was properly overruled because Greenberg set forth sufficient information to show that he has personal knowledge of the facts. Defendants also asserted that the term “subcontract” is vague and ambiguous because Greenberg’s use of that term indicates that he believed the subscription services agreement was a part of the subcontract. (Evid. Code, § 765, subd. (a).) We do not find Greenberg’s use of the term to be vague or ambiguous.

to recover as a matter of law. (*Nygaard, Inc. v. Uusi-Kerttula, supra*, 159 Cal.App.4th at p. 1044.)

On appeal, defendants do not challenge the sufficiency of plaintiff's prima facie showing of defamation in any other respect, and for good reason. Greenberg stated that as a result of the letter, which apparently was transmitted to the FBI, he has become the subject of a federal investigation. Further, he states that he has lost business opportunities and his reputation in the janitorial and cleaning industry has been damaged. Defendants do challenge the trial court order overruling their evidentiary challenges to Greenberg's assertion of these latter facts. Without questioning the correctness of that ruling, it is sufficient to note that there is no challenge to the statement that the April 6 letter led to Greenberg being investigated by the FBI, which sufficiently supports the harm element of the defamation cause of action.

*b. Litigation Privilege*

The litigation privilege provides that a "privileged publication or broadcast is one made: . . . (b) In any . . . (2) judicial proceeding . . . ." (Civ. Code, § 47, subd. (b).) The California Supreme Court has recognized that the privilege's "application to communications made in a 'judicial proceeding,' . . . is not limited to statements made in a courtroom. Many cases have explained that [Civil Code] section 47(b) encompasses not only testimony in court and statements made in pleadings, but also statements made prior to the filing of a lawsuit, whether in preparation for anticipated litigation or to investigate the feasibility of filing a lawsuit." (*Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 361.) "Nonetheless . . . this prelitigation privilege 'applies only when the communication has some relation to a proceeding that is contemplated in good faith and under serious consideration. The bare possibility that the proceeding might be instituted is not to be used as a cloak to provide immunity for defamation when the possibility is not seriously considered.' [Citations.] [¶] . . . [W]e have therefore held that the litigation privilege only attaches when imminent access to the courts is seriously proposed and actually contemplated, seriously and in good faith, as a means of resolving a dispute and not simply a tactical ploy to induce a settlement." (*Eisenberg v. Alameda Newspapers*,

*Inc.* (1999) 74 Cal.App.4th 1359, 1378-1379.) There is no indication that at the time the April 6 letter was sent defendants contemplated the commencement of litigation. Whether any federal entity would commence official proceedings was entirely speculative, and the letter clearly was not sent as a means of resolving an existing dispute. “[T]he ‘mere possibility or subjective anticipation’ of litigation is insufficient; it is necessary that there be proof of ‘some *actual verbalization* of the danger that a given controversy may turn into a lawsuit . . . .’ ” (*Id.* at p. 1379.)

Nor does the April 6 letter come within the litigation privilege as a communication meant to prompt an official investigation or other official proceeding. “Numerous . . . cases agree that the [Civil Code] section 47(b) privilege applies to complaints to governmental agencies requesting that the agency investigate or remedy wrongdoing” and “[b]y the same token, the overwhelming majority of cases conclude that when a citizen contacts law enforcement personnel to report suspected criminal activity and to instigate law enforcement personnel to respond, the communication also enjoys an unqualified privilege under section 47(b).” (*Hagberg v. California Federal Bank, supra*, 32 Cal.4th at pp. 363-364.) However, the April 6 letter does not fit within this application of the privilege, as reflected by the cases in which the privilege has been upheld in this context. For example, in *Hagberg* the privilege was applied to preclude liability of a bank that erroneously called the police to report that plaintiff was attempting to “negotiate a counterfeit check.” (*Id.* at p. 356.) Similarly, in *Salma* the privilege was held to protect a defendant who had filed formal complaints requesting that the police investigate what he believed was illegal activity. (*Salma v. Capon, supra*, 161 Cal.App.4th at p. 1285; see also, e.g., *Long v. Pinto* (1981) 126 Cal.App.3d 946, *King v. Borges* (1972) 28 Cal.App.3d 27.)

Here, the defendants reported the results of an internal investigation, which found evidence that an employee had “acted inconsistent with ISS’s business conduct standards.” The letter was not sent to prompt an investigation but, at most, to attempt to preclude action against ISS. While Greenberg contends the letter resulted in him becoming the subject of investigation by the FBI, there is no suggestion that the letter

was sent for the purpose of causing the FBI or any other agency to initiate such an investigation.

The privilege that does seem potentially applicable in the present situation is the privilege for “a communication, without malice, to a person interested therein . . . by one who is also interested.” (Civ. Code, § 47, subd. (c).). However, defendants did not assert this privilege in support of their SLAPP motion, which in all events is a qualified privilege and can be defeated by a showing of malice. (*Deaile v. General Telephone Co.* (1974) 40 Cal.App.3d 841, 847.)

In sum, Greenberg has presented a prima facie case of defamation and the litigation privilege on which defendants rely has not been shown to bar his claim. Thus, the trial court correctly found that Greenberg carried his burden under the second prong of the SLAPP analysis and denied the motion to dismiss the defamation cause of action.

**Disposition**

The order is affirmed.

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Pollak, J.

We concur:

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McGuinness, P. J.

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Jenkins, J.