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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

TRI-CITY HEALTHCARE DISTRICT et al.,  Plaintiffs and Appellants,  v.  KATHLEEN STERLING,  Defendant and Respondent.	D060431  (Super. Ct. No. 37-2011-00052050- CU-PO-NC)
TRI-CITY HEALTHCARE DISTRICT,  Plaintiff and Appellant,  v.  KATHLEEN STERLING,  Defendant and Respondent.	D061265  (Super. Ct. No. 37-2011-00052050- CU-PO-NC)

CONSOLIDATED APPEALS from an order and postjudgment order of the  
Superior Court of San Diego County, Earl H. Maas III, Judge. Affirmed.

Plaintiffs and appellants Tri-City Healthcare District (Tri-City) and Richard Crooks appeal from an order granting a special motion to strike of defendant and respondent Kathleen Sterling, a member of Tri-City's publicly elected board of directors (the Board) pursuant to Code of Civil Procedure<sup>1</sup> section 425.16, commonly known as the anti-SLAPP (strategic lawsuit against public participation) statute. After Tri-City took certain disciplinary actions against Sterling, it and Crooks brought an action against her including claims for trespass, injury to its business reputation and declaratory relief. In granting Sterling's ensuing anti-SLAPP motion as to those causes of action, the trial court ruled the causes of action arose from Sterling's exercise of her constitutional right of petition or free speech in connection with her speech at Tri-City board meetings, and "Sterling ha[d] shown a probability of prevailing on each of the three claims because there is no evidence of a wrongful trespass, no evidence to support injury to business reputation, and because the declaratory relief cause of action includes a request for an injunction that would violate Sterling's First Amendment rights." Pointing out Tri-City is a legislative body, plaintiffs contend the trial court erred in its ruling because their causes of action arise from Tri-City's discipline of Sterling, which does not implicate Sterling's constitutional speech or petition rights. They also contend they demonstrated a probability of prevailing on the merits.

Tri-City later appealed from the trial court's postjudgment order awarding Sterling attorney fees, contending section 425.16, subdivision (c)(2) bars an award of attorney

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

fees because its action was brought pursuant to Government Code section 59460. We consolidated Tri-City's appeals, and affirm the orders.

### FACTUAL AND PROCEDURAL BACKGROUND

Tri-City is a public healthcare district organized under Health and Safety Code section 32000 et seq. It is a public agency doing business as Tri-City Medical Center, which is a public hospital, and it is governed by the Board. As of the filing of the present anti-SLAPP motion, Sterling had been a publicly elected member of the Board since 1998.

In December 2010, and again in January and February 2011, the Board issued resolutions censuring Sterling for violations of board policy based on her conduct and statements during closed and special public meetings. In the first resolution, the Board found Sterling refused to leave a closed session meeting after it had determined she had a conflict of interest, and she thereafter made "disrespectful" comments (including " 'You're all a bunch of F-ers' " and " 'You are Nazis' ") to board members and management staff. In the second resolution, the Board publicly censured Sterling for engaging in disruptive conduct when asked to leave the meeting room, interrupting her colleagues, "falsely" accusing them of Brown Act violations, "referr[ing] to her colleagues as 'Nazis[,] and stat[ing] words to the effect that a Board member should 'take the brown shirt and wear it,' . . . ." The Board barred Sterling from the main board meeting room for three board meetings, allowing her to participate only by teleconference from an adjacent room. The Board's third and fourth resolutions of public censure issued in February 2011. The Board found that during the course of a special

public meeting on January 12, 2011, Sterling entered the main assembly room while the meeting was in session, "aggressively roamed through the assembly room repeatedly taking flash photographs," accused her colleagues of Brown Act violations, intentionally disrupted the meeting, and refused to leave the meeting room when directed by the Board's chair and security. In part, the Board barred Sterling from the main boardroom for the remainder of her term, barred her from receiving district-provided benefits, and authorized legal action to be taken against Sterling.

In March 2011, plaintiffs filed a complaint for damages and declaratory relief against Sterling alleging causes of action for trespass, assault, battery, "injury to business reputation and dilution," and negligence. In part, plaintiffs alleged the Board had censured and sanctioned Sterling for prior misconduct, including by barring her from being physically present in the assembly room for future board meetings, and limiting her to participating telephonically from a different room across the hall. They alleged that on February 24, 2011, at 3:28 p.m., Sterling burst through the open door to the Board's meeting room, and when blocked by Crooks, who provided security for the Board and secured the meeting room, shouted, " I am a member of the public and want to see who's here.' " Plaintiffs allege Sterling began to assault and batter Crooks and others.

According to the complaint, at 7:40 p.m., Sterling again attempted to enter the meeting room by pushing and crawling over Crooks. When the incident was later reported to police, Sterling stated she had merely tried to enter the boardroom before the meeting started because she wanted to greet several constituents in the audience as well as one of her board colleagues.

Plaintiffs incorporated these allegations by reference into each of their causes of action. Additionally, in their trespass cause of action, plaintiffs alleged that Sterling's acts "constituted a violation of the orders of the [Board] and Trespass to the lands/properties under the use possession [*sic*] and control of the [Board]." In their cause of action for injury to business reputation and dilution, plaintiffs alleged Sterling's acts "created a likelihood of injury to Plaintiff's business reputation and of dilution of Plaintiffs' [*sic*] business which is grounds for injunctive relief . . . ." In connection with their declaratory relief action, plaintiffs alleged Sterling's prior misconduct for which she had been censured or sanctioned included "alleged verbal and physical assaults on other [board] members and violating various laws applying to [the board] members and common law conflict of interest laws, disrupting meetings and recording portions of a closed-session meeting." Plaintiffs sought a judicial declaration "to ascertain their rights and profits," alleging that Sterling was required by law to observe the censures/sanctions of the Board by not entering the assembly rooms, and that her failure to do so caused "legal exposures to [plaintiffs] which should be awarded as money damages . . . ."

Sterling filed a special motion to strike plaintiffs' trespass, injury to business reputation, and declaratory relief causes of action under section 425.16. She argued the challenged causes of action arose directly from her right to free speech and petition, and that the claims had no legal or factual support. Sterling characterized the conduct at issue as her "attendance at Board meetings, . . . her language or conduct at those meetings . . . [and her] trying to enter the public Board meeting room to speak with her constituents." According to Sterling, her conduct fell within all four criteria of protected activity under

section 425.16, including as constituting "conduct in furtherance of the exercise of the constitutional right of petition or . . . free speech in connection with a public issue or an issue of public interest." She argued plaintiffs' claims had no merit on various grounds.

Plaintiffs opposed the motion on grounds the conduct at issue was the Board's censure of one of its own members, which, they argued, did not implicate the member's First Amendment rights. They argued Sterling was censured for her improper noncommunicative conduct, including assault, battery, improper disruptions of meetings, and violation of conflict of interest rules, not for her speech or views. Tri-City argued that even if the anti-SLAPP statute applied, it could demonstrate a prima facie showing of success on the merits of its claims. In part, it argued Sterling's censure did not impinge on her First Amendment rights, it was authorized by statute, and did not violate Tri-City's bylaws or Sterling's equal protection rights.

The trial court granted Sterling's anti-SLAPP motion and struck the trespass, injury to business reputation, and declaratory relief causes of action. The court found those causes of action arose from Sterling's exercise of her constitutional right of petition or free speech in connection with her speech at Tri-City board meetings. It further found Sterling had shown a probability of prevailing on the merits on each of the three claims because there was no evidence of a wrongful trespass, no evidence to support injury to business reputation, and the declaratory relief cause of action included a request for an injunction that would violate Sterling's First Amendment rights. Plaintiffs appealed from that order.

Several months later, Sterling moved for an award of enhanced attorney fees and costs incurred in relation to her anti-SLAPP motion. Tri-City opposed the motion on grounds Sterling was not entitled to attorney fees because its action was one to determine the validity of a legislative body's action against one of its members, and was thus statutorily barred under section 425.16, subdivision (c)(2). The trial court granted the motion, awarding Sterling \$29,026 in attorney fees. In doing so, the court rejected Sterling's request for a fee enhancement and declined to apply the section 425.16, subdivision (c)(2) statutory exemption, ruling Tri-City's cause of action for declaratory and injunctive relief did not mention, nor were its allegations and claims based on, Government Code section 54960.<sup>2</sup> Tri-City appealed from that order, and we issued an order consolidating the appeals.

## DISCUSSION

### I. *Section 425.16 Legal Principles and Standard of Review*

"A special motion to strike is a procedural remedy to dispose of lawsuits brought to chill the valid exercise of a party's constitutional right of petition or free speech.

[Citation.] The purpose of the anti-SLAPP statute is to encourage participation in matters

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<sup>2</sup> In part, the trial court ruled: "[P]ursuant to . . . [section] 425.16[, subdivision] (c)(2), attorneys' fees are not available when the causes of action stricken are brought to stop violations of the Brown Act, to determine the applicability of the Brown Act to a threatened action by a legislative body, or to determine whether a rule to discourage the expression by members of a legislative body is valid or invalid. [¶] Although Plaintiff's complaint does state a cause of action for declaratory and injunctive relief, that cause of action does not mention Government Code section 54960 and does not seek a determination as to the validity of its action to discourage the expression of Defendant Sterling. Plaintiff's allegations and claims are not based on Government Code section 54960. As such, . . . section 425.16[, subdivision] (c)(2) does not apply."

of public significance and prevent meritless litigation designed to chill the exercise of First Amendment rights. [Citation.] The Legislature has declared that the statute must be 'construed broadly' to that end." (*Fremont Reorganizing Corp. v Faigin* (2011) 198 Cal.App.4th 1153, 1165.)

Under section 425.16, subdivision (b)(1), a cause of action is subject to a special motion to strike if the cause of action arises from any act of the defendant in furtherance of the defendant's constitutional right of petition or free speech in connection with a public issue, unless the court determines the plaintiff establishes a probability of prevailing on the claim. (§ 425.16, subd. (b)(1).) The statute describes an " 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' " as including "(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, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, 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).) If the defendant shows the cause of action arises from a statement described in subdivisions (e)(1) or (e)(2) of section 425.16, the defendant is not required to separately demonstrate

that the statement was made in connection with a "public issue." (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1113.)

"The analysis of an anti-SLAPP motion . . . involves two steps. 'First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one "arising from" protected activity.' " (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 819.) The mere fact an action is filed after protected activity takes place, or that the cause of action arguably may have been " 'triggered' " by protected activity, does not mean the action arose from that activity within the meaning of section 425.16. (*Episcopal Church Cases* (2009) 45 Cal.4th 467, 477.) " 'In the anti-SLAPP context, the critical consideration is whether the cause of action is *based on* the defendant's protected free speech or petitioning activity.' " (*Ibid.*; see *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78 ["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"].) The court looks to " 'the gravamen or principal thrust' of the action." (*Episcopal Church Cases*, 45 Cal.4th at pp. 477-478, citing *Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 193.) The fact that "protected activity may lurk in the background—and may explain why the rift between the parties arose in the first place—does not transform a . . . dispute into a SLAPP suit." (*Episcopal Church Cases*, at p. 478.)

" 'If the court finds [the threshold] showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim.'

[Citation.] '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.' " (*Oasis West Realty, LLC v. Goldman, supra*, 51 Cal.4th at pp. 819-820.)

We review an order granting a motion to strike under section 425.16 de novo. (*Oasis West Realty, LLC v. Goldman, supra*, 51 Cal.4th at p. 820.) " 'We consider "the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based." [Citation.] However, we neither "weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law." ' " (*Freeman v. Schack* (2007) 154 Cal.App.4th 719, 727, quoting *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.)

## II. *Threshold Showing of Protected Activity*

### A. *Sterling Has Not Forfeited The Right to Apply the Anti-SLAPP Law to Her Claims*

Plaintiffs contend none of the causes of action challenged in Sterling's anti-SLAPP motion arise from any of Sterling's constitutionally protected activity. Rather, they argue the claims arise from the Board's "discipline of Sterling and her disobedience of [board] sanctions . . . ." According to plaintiffs, because Sterling is a publicly elected member of the Board, a legislative body, her personal constitutional rights vis-à-vis the Board on which she sits are limited; that is, her speech and First Amendment rights are somehow forfeited and not protected from the legislative body's judgment or disciplinary power. For their forfeiture principle, plaintiffs rely generally on *Carsten v. Psychology*

*Examining Com.* (1980) 27 Cal.3d 793 and *Holbrook v. City of Santa Monica* (2006) 144 Cal.App.4th 1242. They ask us to apply United States Supreme Court authority as to whether state recusal rules violate legislators' First Amendment right to vote on given matters and federal authorities applying principles of legislative immunity.<sup>3</sup>

In *Vargas v. City of Salinas* (2009) 46 Cal.4th 1, the California Supreme Court rejected the plaintiffs' broad claim that government speech, or speech by public officials or employees acting in their official capacity, unlike the speech of an individual or corporation, is not protected by the First Amendment of the federal Constitution or article 1, section 2 of the California Constitution, and thus cannot constitute "protected activity" within the meaning of the anti-SLAPP statute. (*Vargas*, at pp. 16-17.) The court said, "Whether or not the First Amendment of the federal Constitution or article I, section 2 of the California Constitution *directly* protects government speech in general or the types of communications of a municipality that are challenged here—significant constitutional questions that we need not and do not decide—we believe it is clear, in light of both the

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<sup>3</sup> Plaintiffs discuss authorities including *Nevada Comm'n on Ethics v. Carrigan* (2011) \_\_\_ U.S. \_\_\_ [131 S.Ct. 2343] [restrictions upon legislators' voting are not restrictions upon their protected speech because a legislator's vote "is the commitment of his apportioned share of the legislature's power to the passage or defeat of a particular proposal . . . [and] the legislative power thus committed is not personal to the legislator but belongs to the people"]; *Whitener v. McWatters* (4th Cir. 1997) 112 F.3d 740 [board of supervisors' vote to discipline one of its members for lack of decorum was a legislative act protected by absolute legislative immunity], the Ninth Circuit's opinion in *Blair v. Bethel School Dist.* (9th Cir. 2010) 608 F.3d 540, and those of other federal appellate courts in *Camacho v. Brandon* (2d Cir. 2003) 317 F.3d 153, distinguished by *Nevada Comm'n on Ethics v. Carrigan*, \_\_\_ U.S. \_\_\_ [131 S.Ct. at pp. 2349-2350], *Velez v. Levy* (2d Cir. 2005) 401 F.3d 75, *Youngblood v. DeWeese* (3d Cir. 2003) 352 F.3d 836, *Zilich v. Longo* (6th Cir. 1994) 34 F.3d 359, and *Phelan v. Laramie County Community College Bd.* (10th Cir. 2000) 235 F.3d 1243.

language and purpose of California's anti-SLAPP statute, that the statutory remedy afforded by section 425.16 extends to statements and writings of governmental entities and public officials on matters of public interest and concern that would fall within the scope of the statute if such statements were made by a private individual or entity." (*Vargas*, at p. 17.)

The court based its conclusion on the language of the statute and its broad scope, as well as its legislative history. (*Vargas v. City of Salinas*, *supra*, 46 Cal.4th at pp. 17-19.) In particular it observed subdivision (e) of section 425.16 very broadly defines the statutory phrase " 'act . . . *in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue . . .* ' " (*Vargas*, at pp. 17-18.) It reasoned the statute "does not purport to draw any distinction between (1) statements by private individuals or entities that are made in the designated contexts or with respect to the specified subjects, and (2) statements by governmental entities or public officials acting in their official capacity that are made in these same contexts or with respect to these same subjects." (*Id.* at p. 18.) The court acknowledged that while there may be some ambiguity in the statutory language, subdivision (e) of section 425.16 is most reasonably understood to mean that the statutory phrase includes all such statements, without regard to whether they were made by private individuals or by governmental entities or officials. (*Vargas*, at p. 18.) The court observed the legislative history indicated that the Legislature's concern regarding the potential chilling effect that abusive lawsuits may have on statements relating to a public issue or matter of public interest extended to statements by public officials or employees

acting in their official capacity as well as statements by private individuals or organizations. (*Id.* at p. 19, & fn. 9.) Thus, it held the anti-SLAPP statute "may not be interpreted to exclude governmental entities and public officials from its potential protection." (*Ibid.*)

*Vargas* cited favorably *Schaffer v. City and County of San Francisco* (2008) 168 Cal.App.4th 992, in which the reviewing court disposed of a plaintiff's claim that the anti-SLAPP statute did not apply to acts of police officers in the course of their duties because officers doing so were assertedly not exercising First Amendment rights. (*Schaffer*, at p. 999.) The plaintiff in *Schaffer* had relied upon cases—including *Garcetti v. Ceballos* (2006) 547 U.S. 410 and *Morales v. Jones* (7th Cir. 2007) 494 F.3d 590—in which public officials claimed they were subject to adverse employment actions as a result of their speech, and the courts had considered whether the First Amendment protected a government employee from discipline based on speech made pursuant to the employee's official duties. (*Schaffer*, 168 Cal.App.4th at pp. 999-1000, citing *Garcetti*, 547 U.S. at pp. 413, 421 & *Morales*, 494 F.3d at pp. 597-598.)<sup>4</sup> *Schaffer* found both cases inapposite because neither involved the anti-SLAPP statute: "Neither *Garcetti* nor *Morales* addressed whether police officers' statements in the course of their duties constitute acts in furtherance of their constitutional rights of free speech or petition within the meaning

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<sup>4</sup> The United States Supreme Court in *Garcetti v. Caballos* held "that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." (*Garcetti v. Ceballos*, *supra*, 547 U.S. at p. 421.)

of California's anti-SLAPP statute. This distinction is critical, because the salient question in this case is not whether respondents' acts are protected as a matter of law under the First Amendment of the United States Constitution in some other context, but whether they fall within the statutory definition of conduct that the Legislature deemed appropriate for anti-SLAPP motions." (*Schaffer*, at p. 1001.)

Plaintiffs' California authorities are inapposite on the question of whether Sterling has met her burden as the moving defendant to satisfy the anti-SLAPP law's threshold showing. The appellate court in *Holbrook* applied the anti-SLAPP statute to constitutional, Brown Act (Gov. Code, § 54950 et seq.) and Occupational Safety and Health Act claims asserted against a City for its council's actions in conducting late-night public meetings, conduct that the court determined was protected as speech and petition activity within the meaning of all four criteria of the anti-SLAPP statute. (*Holbrook v. City of Santa Monica*, *supra*, 144 Cal.App.4th at pp. 1247-1248.) The court in *Holbrook* went on to address the city's claim, asserted in connection with the second, probability-of-prevailing prong of the anti-SLAPP law, that the plaintiffs, both members of the city council, lacked standing to challenge the actions of the government entity of which they were members. (*Id.* at pp. 1250-1258.) In particular, *Holbrook* held the plaintiffs lacked Brown Act standing—standing based on citizenship—which was "precisely the kind of standing that a citizen forfeits when he or she becomes a public official." (*Id.* at pp. 1256-1257.) Thus, when the plaintiffs became city council members, they forfeited the Brown Act standing they would have had as California citizens to sue the city council, requiring the court to conclude they could not demonstrate a likelihood of success on the

merits for lack of standing. (*Id.* at p. 1259.) *Holbrook's* holding is dependent on the nature of the claim asserted by the plaintiff against the government entity. Similarly, *Carsten v. Psychology Examining Com.*, *supra*, 27 Cal.3d 793, focuses on whether a public official seeking a writ of mandate has a source of standing beyond that of being a citizen-taxpayer. (*Carsten*, at pp. 799-800; see *Holbrook*, 144 Cal.App.4th at p. 1251.) Moreover, unlike the plaintiffs in *Holbrook* and *Carsten*, Sterling is the defendant in this case; she is not seeking standing to sue Tri-City or the Board. (See *Carsten*, at p. 795 [court addressed the "unique issue" presented by a board member's suing "the very board on which he or she serves as a member"].)

As for the federal authorities on which plaintiffs rely (footnote 2, *ante*), none involve the anti-SLAPP statute, and none "suggests that the first prong of the anti-SLAPP statute is coextensive with those federal constitutional provisions." (*Schaffer v. City and County of San Francisco*, *supra*, 168 Cal.App.4th at p. 1001.)

Our high court's decision in *Vargas* disposes of plaintiffs' claim that Sterling, in the context of her anti-SLAPP motion, is precluded from asserting First Amendment rights as against the Board. The question, as both *Vargas* and *Schaffer* explain, is whether Sterling has demonstrated that Tri-City's activities forming the basis of Sterling's claims constitute "protected activity" within the meaning of the first step of the anti-SLAPP statute. (*Vargas v. City of Salinas*, *supra*, 46 Cal.4th at p. 19.) That is, she must show " 'the act or acts of which the plaintiff complains were taken "in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue," as defined in the statute.' " (*Schaffer v.*

*City and County of San Francisco, supra*, 168 Cal.App.4th at pp. 1001-1002.) We turn to that inquiry.

*B. Sterling's Trespass, Injury to Business Reputation and Declaratory Relief Claims Arise from Constitutionally Protected Activity*

To address the first prong of the anti-SLAPP law, our focus is on whether the principal thrust of the conduct underlying plaintiffs' causes of action—the "activity that gives rise to [Sterling's] asserted liability" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 92)—is constitutionally protected within the meaning of the anti-SLAPP law. "The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning." (*Ibid.*; see also *id.* at p. 93 [nature or form of the action is not what is critical but "rather that it is against a person who has exercised certain rights"]; *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1244 (*Huntingdon*)). "We 'do not evaluate the first prong of the anti-SLAPP test solely through the lens of a plaintiff's cause of action.'" (*Hecimovich v. Encinal School Parent Teacher Organization* (2012) 203 Cal.App.4th 450, 465.)

"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.'" (*City of Cotati v. Cashman, supra*, 29 Cal.4th at p. 79.) We keep in mind that the anti-SLAPP statute should be "construed broadly" (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 60, fn. 3) and a plaintiff

cannot avoid the statute's operation by attempting, through the artifices of pleading, to characterize an action as a garden variety tort claim when in fact the liability claim is predicated on protected speech or conduct. (*Navellier v. Sletten, supra*, 29 Cal.4th at pp. 90-92.)

As summarized above, plaintiffs' complaint asserts that Sterling violated the Board's censure orders by attempting to enter the Board's main public meeting room, from which she was barred under the Board's censures. In support of her anti-SLAPP motion, Sterling averred in a sworn declaration that she was sued for actions she had taken "in furtherance of [her] role as an elected official on [the] Board of Directors." She states she was forced by the Board's resolution to sit in a room apart from the other board members and the public, which limited her ability to participate in the meetings and represent her constituents. According to Sterling, on February 24, 2011, she attempted to enter the public meeting room the first time before the meeting began, and the second time during a break between the general meeting and the closed session. She stated the Board's censure prevented her from having direct contact with other board members and the public and seeing visual presentations used during the meetings. She maintained she was generally ignored when she asked for more information on issues being discussed, but when she complained, she was accused of being disruptive. Sterling stated she was being punished for "exercising [her] right to free speech and participation, on an equal footing, in the Board meetings."

Plaintiffs argue they did not sue Sterling for any constitutionally protected activity, but for violating the Board's resolutions and disobeying disciplinary measures imposed

because of her disruptive behavior. In their opposition papers in the trial court, plaintiffs suggested Sterling engaged in "violent conduct" not protected by the First Amendment. According to plaintiffs, the circumstances are like those of the lawsuits brought by the public entities in *Santa Monica Rent Control Bd. v. Pearl Street, LLC* (2003) 109 Cal.App.4th 1308 (*Pearl Street*), *Department of Fair Employment and Housing v. 1105 Alta Loma Road Apartments, LLC* (2007) 154 Cal.App.4th 1273, and *San Ramon Valley Fire Protection Dist. v. Contra Costa County* (2004) 125 Cal.App.4th 343.)

We are not persuaded by plaintiffs' arguments. Each case on which they rely turns on its own facts and unique actions giving rise to liability. In *Pearl Street*, for example, a rent control board sued a limited liability company and managers for declaratory and injunctive relief, for defendants' engaging in sham tenancies so as to fall within rent control laws. (*Pearl Street*, 109 Cal.App.4th at pp. 1311-1312, 1315.) The Court of Appeal held the defendants were sued because they were charging an illegal rent, not because they had later filed administrative paperwork with the rent control board, though the latter action may have "triggered" the law suit. (*Id.* at p. 1318.)<sup>5</sup>

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<sup>5</sup> In *Department of Fair Employment and Housing v. 1105 Alta Loma Road Apartments, LLC*, *supra*, 154 Cal.App.4th 1273, the gravamen of the Department of Fair Employment and Housing's disability discrimination lawsuit against a landlord was held to be the landlord's refusal to reasonably accommodate the tenant's disability, not an attack on the landlord for serving and filing official notices with the municipality to remove units from the rental market and its prosecution of an unlawful detainer action. (*Id.* at pp. 1283-1284.) Those latter actions merely constituted the department's evidence of the discrimination. (*Id.* at pp. 1284-1285.) In *San Ramon Valley Fire Protection District v. Contra Costa County Employees' Retirement Association*, *supra*, 125 Cal.App.4th 343, the fire protection district's combined petition for mandamus and complaint for declaratory relief was found not a SLAPP, because the suit challenged

Rather, we see the circumstances of plaintiffs' claims against Sterling as akin to those in *Huntingdon*, *supra*, 129 Cal.App.4th 1228, in which this court held the plaintiffs' cause of action for an injunction against future trespass was subject to the anti-SLAPP law because any trespass involved in the picketing activity at the home of one of the plaintiffs was incidental to the defendants' exercise of their First Amendment rights. (*Huntingdon*, at pp. 1245-1247.) We explained, "If the defendant *concedes*, or the evidence *conclusively establishes* the conduct complained of was illegal, as a matter of law the defendant cannot make a prima facie showing the action arises from protected activity within the meaning of section 425.16." (*Id.* at p. 1246; see also *Cross v. Cooper* (2011) 197 Cal.App.4th 357, 383-384.) In *Huntingdon*, the defendants did not concede they committed any illegal acts, and the evidence did not show illegality as a matter of law. (*Huntingdon*, at p. 1246.) We held the protests over animal testing involved a classic form of speech involving a matter of public concern and controversy, which further took place in a public forum. (*Id.* at pp. 1246-1247.)

Here, as the defendants did in *Huntingdon*, Sterling made a sufficient prima facie showing that the conduct giving rise to the trespass (as well as the injury to business reputation claim) was Sterling's desire for access to a public meeting room to express her views to the board members, or her constituents in the audience, concerning matters involving Tri-City, a public hospital. With some exceptions (involving district trade secrets and other proposals relating to conversions of ownership or dissolution), the

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action of the retirement association in assertedly overcharging the district for certain pension contributions, not the content of any speech the association had promulgated. (*Id.* at pp. 346-347, 357.)

Board is required by law to hold its regular and special sessions open to the public. (Health & Saf. Code, § 32106.) We conclude such meetings qualify as "official proceeding[s] authorized by law" under section 425.16, subdivision (e)(2). (See, e.g., *Kibler v. Northern Inyo County Local Hosp. Dist.* (2006) 39 Cal.4th 192, 199, 203 [hospital peer review proceedings are official proceedings authorized by law because the procedure is required by provisions of the Business and Professions Code, and official proceedings within the meaning of the anti-SLAPP law are not limited to proceedings before governmental entities]; *Vergos v. McNeal* (2007) 146 Cal.App.4th 1387, 1396 [Regents of the University of California's statutory hearing procedures qualify as official proceedings authorized by law for section 425.16 purposes].) Sterling does not concede unlawful activity, and indeed, the board meeting transcript in the record demonstrates that the February 24, 2011 meeting was called to order at 3:31 p.m., *after* Sterling attempted the first time to enter the meeting room. The Board's censure barred Sterling from meetings, not from entering the public assembly rooms at Tri-City where the meetings took place. Though some of Sterling's conduct does not constitute "speech" in the literal sense, the anti-SLAPP statute expressly applies not only to spoken words, but also to any *conduct* undertaken in furtherance of free speech rights in connection with an issue of public interest. (§ 425.16, subd. (e)(4).) Sterling's actions occurred in a place that was " ' "open to the public where information is freely exchanged," ' " namely, the public assembly room at Tri-City. (*Huntingdon*, 129 Cal.App.4th at p. 1247.) Plaintiffs admit that "[m]uch, but not all, of Sterling's 'uncivil behavior' did occur during official meetings."

We reach a similar conclusion with regard to plaintiffs' claim for declaratory relief and the conduct giving rise to that claim, that is, Sterling's oral statements or conduct during the course of the Board's public meetings involving matters of hospital administration. The declaratory relief cause of action thus arises from an oral statement both made before an official proceeding or in connection with an issue under consideration or review by an official proceeding authorized by law (§ 425.16, subds. (e)(1), (e)(2)), and also made in a place open to the public or a public forum in connection with an issue of public interest, namely, matters of public hospital administration. (§ 425.16, subd. (e)(3).)

It is of no moment that some of Sterling's alleged acts may have occurred in connection with a closed board meeting. For " 'where a cause of action alleges both protected and unprotected activity, the cause of action will be subject to section 425.16 unless the protected conduct is "merely incidental" to the unprotected conduct.' " (*Huntingdon, supra*, 129 Cal.App.4th at p. 1245; see also *M.F. Farming, Co. v. Couch Distributing Co.* (2012) 207 Cal.App.4th 180, 197 [citing cases; " 'where the defendant shows that the gravamen of a cause of action is based on nonincidental protected activity as well as nonprotected activity, it has satisfied the first prong of the SLAPP analysis' "].) Sterling's efforts to enter the meeting room before or during public meetings are not merely incidental to any unprotected conduct.

The burden thus shifted to plaintiffs to present evidence demonstrating a probability of prevailing on the merits of their claims.

### III. *Probability of Prevailing on the Merits*

" 'In order to establish a probability of prevailing on the claim (§ 415.16, subd. (b)(1)), a plaintiff responding to an anti-SLAPP motion must " 'state[ ] and substantiate[ ] a legally sufficient claim.' " [Citation.] 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 (§ 415.16, 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. [Citation.]' As . . . further elaborated on this point in *Taus v. Loftus* [(2007)] 40 Cal.4th 683, 714: '[W]hen a defendant makes the threshold showing that a cause of action that has been filed against him or her arises out of the defendant's speech-related conduct, the [anti-SLAPP] provision affords the defendant the opportunity, at the earliest stages of litigation, to have the claim stricken if the plaintiff is unable to demonstrate both that the claim is legally sufficient and that there is sufficient evidence to establish a prima facie case with respect to the claim.' " (*Vargas v. City of Salinas, supra*, 46 Cal.4th at pp. 19-20.)

### A. *Trespass and Dilution Claims*

Plaintiffs' claims for trespass and dilution are based on the same conduct reflected in the allegations incorporated by reference into each cause of action, namely, Sterling's conduct in seeking entry to the Board's public meeting room before and during breaks in the meeting.

In opposition to Sterling's motion, plaintiffs made a cursory argument directed only at their claim for trespass. They argued: "Sterling trespassed on Tri-City's property because she entered the meeting room in violation of the Board's specific order for her to stay away from that room. . . . In doing so, she injured Crooks and other Tri-City employees. . . . These facts are sufficient to make out a prima facie case of trespass." Plaintiffs cited to their points and authorities reciting Sterling's conduct in attempting to enter the public boardroom. Plaintiffs' points and authorities in turn refer to some of the evidence submitted in opposition to Sterling's anti-SLAPP motion, namely: declarations from Crooks and other Tri-City representatives filed in another proceeding (*Tri-City Healthcare District v. Sterling*, Super. Ct. S.D. County, No. 37-2011-00052101-CU-PT-NC) in support of Tri-City's unsuccessful request for a civil restraining order against Sterling; minutes from the January 12, 2011 and February 24, 2011 board meetings; resolutions relating to the Board's censure of Sterling for the January 12, 2011 and November 4, 2011 meetings; a Tri-City crime incident report concerning the February 24, 2011 meeting; and portions of the reporter's transcript from the restraining order hearing on March 25, 2011. Sterling filed written objections to the evidence, arguing much of it

was hearsay and lacked foundation, and it was unauthenticated, irrelevant, and prejudicial.<sup>6</sup>

On appeal, plaintiffs do not discuss the elements of trespass or business dilution, nor do they focus on whether they have shown a probability of prevailing on the merits of those particular causes of action. Rather, they maintain they demonstrated a prima facie case supporting *the validity of the discipline*, which, they assert, "is central to the claims that Sterling attacked in her anti-SLAPP motion." Plaintiffs assert Tri-City "produced compelling evidence that the discipline imposed was necessary to the board's ability to effectively function so as to provide healthcare within the district"; Sterling's behavior was "loud and abusive"; she engaged in "physical altercations" with security personnel;

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<sup>6</sup> Plaintiffs purported to authenticate the evidence with the declaration of attorney B. Allison Borkenheim, who averred only that each document or item was a "true and correct copy" of a board policy, reporter's transcript, declaration, report, or board resolution. Assuming the trial court could take judicial notice of these documents as court records, it could not accept the truth of their contents. A court may not take judicial notice of the *truth* of hearsay statements in court records. (*Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063-1064, overruled on other grounds in *In re Tobacco Cases II* (2007) 41 Cal.4th 1257; *Steed v. Department of Consumer Affairs* (2012) 204 Cal.App.4th 112, 122 [trial court may take judicial notice of minute order, but not of truth of factual findings and determinations on which the minute order is based]; *Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 882 [holding with respect to court records; court may take judicial notice of existence of documents in court file, including the truth of results reached, but may not take notice of hearsay statements or allegations in affidavits or declarations "because such matters are reasonably subject to dispute and therefore require formal proof"].) In any event, the declarations demonstrate that Sterling sought to enter the meeting room before the meeting and during a break. Crooks's declaration avers that on February 24, 2011, Sterling sought to enter the boardroom at 3:28 p.m., telling him, "I am a member of the public and want to see who's here." The meeting minutes indicate that the meeting was called to order three minutes later, at 3:31 p.m.. Another declarant, Tri-City Chief Executive Officer Larry Anderson, stated that Sterling again sought to enter the meeting room later that day "during a break in the meeting . . ."

she threatened to withhold her vote on policy matters; and she "improperly harassed Tri-City employees." They argue "[a] trier of fact could thus find not only that the board had the power to discipline Sterling, but that it used that power judiciously."

These arguments by themselves do not convince us that plaintiffs' evidence presented in opposition to Sterling's motion (1) "would be admissible at trial" (*Cross v. Cooper, supra*, 197 Cal.App.4th at p. 370) or (2) demonstrates a probability of prevailing on the merits of their claims for trespass and business dilution. In dealing with the second prong of the anti-SLAPP analysis, we are not concerned with the validity of the Board's discipline, but whether plaintiffs made a prima facie showing of facts that, in view of the language of the Board's resolution barring Sterling from the main boardroom "for an additional three board meetings," Sterling's conduct in attempting to enter the meeting room *prior* to the meeting or during meeting breaks constitutes trespass and business dilution so as to support a judgment in their favor. (*Taus v. Loftus, supra*, 40 Cal.4th at pp. 713-714.) Though the parties argued the point during oral arguments in the trial court, plaintiffs do not address that inquiry on appeal. We conclude they have not met their burden to state and substantiate legally sufficient claims for trespass and business dilution so as to establish a probability of prevailing on the merits of those causes of action.

#### B. *Declaratory Relief*

Plaintiffs' sole argument below as to Tri-City's cause of action for declaratory relief was that Tri-City "is entitled to seek declaratory relief that its censure orders are valid, especially given Sterling's consistent disobedience to, and her subsequent decision

to directly challenge, those orders." Tri-City relied on *Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634, 647 for the proposition that "[t]he purpose of a declaratory judgment is . . . to liquidate doubts with respect to uncertainties or controversies which might otherwise result in subsequent litigation . . . ."

This court has recently explained: "Declaratory relief is available 'in cases of actual controversy relating to the legal rights and duties of the respective parties.' (. . . § 1060.) "Whether a claim presents an 'actual controversy' within the meaning of . . . section 1060 is a question of law that we review de novo." [Citation.] When an actual controversy does exist, . . . section 1061 gives the trial court discretion to determine whether it is "necessary" and "proper" to exercise the power to provide declaratory relief. [Citation.] A trial court's decision to exercise that power is reviewed under an abuse of discretion standard of review.' [Citation.] Doubts about the propriety of the court's decision are generally resolved in favor of granting relief. [Citation.] ¶¶ 'One purpose of declaratory relief is "to liquidate doubts with respect to uncertainties or controversies which might otherwise result in subsequent litigation." [Citation.] "One test of the right to institute proceedings for declaratory judgment is the necessity of present adjudication as a guide for plaintiff's future conduct . . . to preserve his legal rights." [Citation.] "The 'actual controversy' referred to in [. . . section 1060] is one which admits of definitive and conclusive relief by judgment within the field of judicial administration, as distinguished from an advisory opinion upon a particular or hypothetical state of facts. The judgment must decree, not suggest, what the parties may

or may not do." ' ' " (*Coronado Cays Homeowners Assn. v. City of Coronado* (2011) 193 Cal.App.4th 602, 607-608.)

Assuming, arguendo, plaintiffs' declaratory relief cause of action seeks a judicial declaration as to the validity of its censure orders,<sup>7</sup> plaintiffs have not as a threshold matter cited to any *evidence* supporting their claim of an actual, present controversy concerning the future application of its censure orders. Stated another way, plaintiffs have not shown why an opinion by the trial court on the scope and meaning of the Board's censures would not be merely advisory at this stage. " 'The fundamental basis of declaratory relief is the existence of an *actual, present controversy* over a proper subject.' " (*City of Cotati v. Cashman, supra*, 29 Cal.4th at p. 79; § 1060.) "Whether a case is founded upon an 'actual controversy' centers on whether the controversy is justiciable. 'The principle that courts will not entertain an action which is not founded on an actual controversy is a tenet of common law jurisprudence, the precise content of

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<sup>7</sup> As Sterling points out, plaintiffs' cause of action for declaratory relief in fact asks for a judicial declaration concerning *money damages*. Indeed, plaintiffs ask in part for a declaration "that [Sterling] is required by law to observe the censures/sanctions of the [Board] and thus not enter [the Board's] assembly rooms and her failure to do so has causing [*sic*] legal exposures to [the Board] which should be awarded as money damages to Plaintiffs in an amount to be determined by the judge or jury as appropriate." They allege a judicial declaration is necessary in order that plaintiffs may ascertain their "rights and profits" that they allege were "wrongfully and illegally appropriated" by Sterling. Sterling argues this cause of action is not validly one for declaratory relief, but actually a "stealth" damages claim for trespass. We agree that declaratory relief will not stand where the complained of acts took place before the lawsuit was commenced and the relief sought is that the court review them and declare the plaintiff entitled to a money judgment. (*Orloff v. Metropolitan Trust Co.* (1941) 17 Cal.2d 484, 489; see also *C.J.L. Construction, Inc. v. Universal Plumbing* (1993) 18 Cal.App.4th 376, 390 [ " ' "The availability of another form of relief that is adequate will usually justify refusal to grant declaratory relief" ' " ].)

which is difficult to define and hard to apply. The concept of justiciability involves the intertwined criteria of ripeness and standing. A controversy is 'ripe' when it has reached, but has not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made.' " (*Stonehouse Homes LLC v. City of Sierra Madre* (2008) 167 Cal.App.4th 531, 540.)

"Ripeness is aimed at 'prevent[ing] courts from issuing purely advisory opinions. [Citation.] It is rooted in the fundamental concept that the proper role of the judiciary does not extend to the resolution of abstract differences of . . . opinion. It is in part designed to regulate the workload of courts by preventing judicial consideration of lawsuits that seek only to obtain general guidance, rather than to resolve specific legal disputes.' " (*City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 63.)

The record—via Sterling's November 4, 2008 certificate of election—indicates that Sterling's term as director will end on or about November 4, 2012. Plaintiffs have not presented evidence that Sterling will remain as a director, nor have they shown whether additional board meetings or other proceedings are anticipated that will give rise to application of the Board's censures.<sup>8</sup> Plaintiffs do not explain what pending *future* actions will require a declaration on the validity the Board's disciplinary actions against Sterling. It is not enough to merely assert that its discipline was appropriate, and that Sterling disagrees with it. "The mere fact that [the parties] disagree over [a legal issue]

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<sup>8</sup> At oral argument before us, Tri-City's counsel represented that Sterling's term would end at the close of 2012, and that there are scheduled board meetings before that time. But counsel's argument is not evidence.

does not create a justiciable controversy. Courts may not render advisory opinions on disputes which the parties anticipate might arise but which do not presently exist.

[Citations.] For declaratory relief, the party must show it either has suffered or is about to suffer an injury of 'sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented.' " (*Stonehouse Homes LLC v. City of Sierra Madre, supra*, 167 Cal.App.4th at p. 542.) Plaintiffs have not made such a showing, and we therefore affirm the order striking their declaratory relief cause of action under section 425.16.

We observe plaintiffs have asked for leave to amend their declaratory relief cause of action, but that action is beyond the purview of the statute. "[S]ection 425.16 provides no mechanism for granting anti-SLAPP motions *with leave to amend*." (*Martin v. Inland Empire Utilities Agency* (2011) 198 Cal.App.4th 611, 626-629 [" ' "Allowing a SLAPP plaintiff leave to amend the complaint once the court finds the [defendant's] prima facie showing has been met would completely undermine the statute by providing the pleader a ready escape from section 425.16's quick dismissal remedy." ' " (Italics omitted).])

#### IV. *Attorney Fees and Costs*

Section 425.16, subdivision (c)(2) provides in part: "A defendant who prevails on a special motion to strike in an action subject to paragraph (1) shall not be entitled to attorney's fees and costs if that cause of action is brought pursuant to Section . . . 54960 . . . of the Government Code." (See Code commrs. note foll. 14B West's Ann. Code Civ. Proc. (2012 supp.) § 425.16.)

The Ralph M. Brown Act (Brown Act), found at Government Code section 54950 et seq. concerns open meetings, and its purpose is to "ensure openness in decisionmaking by public agencies and facilitate public participation in the decisionmaking process." (*Service Employees Inter. Union, Local 99 v. Options—A Child Care & Human Servs. Agency* (2011) 200 Cal.App.4th 869, 877.) Government Code section 54960 permits the district attorney or any interested person to commence an action by mandamus, injunction, or declaratory relief "for the purpose of stopping or preventing violations or threatened violations of this chapter by members of the legislative body of a local agency or to determine the applicability of this chapter to actions or threatened future action of the legislative body, or to determine whether any rule or action by the legislative body to penalize or otherwise discourage the expression of one or more of its members is valid or invalid under the laws of this state or of the United States, or to compel the legislative body to audio record its closed sessions as hereinafter provided." (Gov. Code, § 54960, subd. (a).<sup>9</sup>) A "local agency" under the statute includes a "district . . . or any board, commission or agency thereof, or other local public agency." (Gov. Code, § 54951.)

Tri-City contends its lawsuit falls within the plain language of the statute. It maintains its action sought a judicial declaration of the validity of the Board's disciplinary actions against Sterling for her disruptive behavior as a Board member, and thus

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<sup>9</sup> Government Code section 54960, subdivision (a) has been amended in a manner not relevant here, because the amendments "shall not apply to past actions of a legislative body that occurred before January 1, 2013." (Stats. 2012, ch. 732 (Sen. Bill No. 1003) (2011-2012 Reg. Sess.))

constitutes an action for "a declaration that a legislative body's action to penalize one of its members is legally valid . . . ."

Sterling responds that two of the three stricken causes of action—plaintiffs' causes of action for trespass and business dilution—do not fall within section 425.16, subdivision (c)(2), and that she is therefore entitled to attorney fees for those causes of action. She maintains, as she did in connection with the order granting her anti-SLAPP motion, that Tri-City's cause of action for declaratory relief did not in fact ask for a judicial determination of the validity of Tri-City's censures or anything Tri-City had done, but rather sought money damages for trespass.

We agree that the exemption for a prevailing defendant to recover attorney fees within section 425.16, subdivision (c)(2) does not apply to plaintiffs' causes of action for trespass or business dilution, which are not Brown Act causes of action, but ask for money damages and injunctive relief to enjoin Sterling from entering the Board meeting room and engaging in "unfair business practices." As we have stated, Tri-City's declaratory relief cause of action sought a judicial declaration that Sterling is "required by law to observe the censures/sanctions of the [Board] and thus not enter [the Board's] assembly rooms and her failure to do has causing [*sic*] legal exposures to [the Board] which should be awarded as monetary damages to Plaintiff in an amount to be determined by the judge or jury as appropriate." Plaintiffs ambiguously allege they desired to "ascertain their rights and profits . . . ." Not only does the cause of action fail to reference Government Code section 54960, but it does not in any apparent way seek to enforce provisions of the Brown Act. Plaintiffs' allegations indicate the Board "actions"

or penalties that are the subject of the declaratory relief are not to discourage Sterling's expression (hence, its requirement that she participate in board meetings from a separate room), but for her entry into the meeting room when she was assertedly prohibited from doing so. We agree with the trial court that plaintiffs' allegations are not based on Government Code section 54960, rendering inapplicable the exception to a prevailing defendant's recovery of attorney fees under Code of Civil Procedure section 425.16, subdivision (c)(2).

DISPOSITION

The orders are affirmed.

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O'ROURKE, J.

WE CONCUR:

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McDONALD, Acting P. J.

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McINTYRE, J.