No. S233526

IN THE

SUPREME COURT

Of The State Of California

SWEETWATER UNION HIGH SCHOOL DISTRICT,
Plaintiff and Respondent

v.

GILBANE BUILDING COMPANY, et al.
Defendants and Appellants.

ANSWERING BRIEF ON THE MERITS

After a Decision by the Court of Appeal
Fourth Appellate District, Division One [D067383]

San Diego Superior Court [37-2014-00025070-CU-MC-CTL]
Hon. Eddie C. Sturgeon, Judge

John S. Moot (SBN 106060)
Sarah Brite Evans (SBN 210980)
Alison K. Adelman (SBN 306629)
SCHWARTZ SEMERDJIAN
CAULEY & MOOT LLP
101 West Broadway, Suite 810
San Diego, CA 92101
Telephone No. (619) 236-8821
Facsimile No. (619) 236-8827
johnm@sscmlegal.com
sarah@sscmlegal.com
alisona@sscmlegal.com

James A. Ardaiz (SBN 60455)
BAKER MANOCK & JENSEN, PC
5260 North Palm, Suite 421
Fresno, CA 93704
Telephone No.: (559) 432-5400
Facsimile No.: (559) 432-5620
jardaiz@bakermanock.com

Attorneys for Plaintiff and Respondent
SWEETWATER UNION HIGH SCHOOL DISTRICT

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Facsimile No. (619) 236-8827
johnm@sscmlegal.com
sarah@sscmlegal.com
alisona@sscmlegal.com

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BAKER MANOCK & JENSEN, PC
5260 North Palm, Suite 421
Fresno, CA 93704
Telephone No.: (559) 432-5400
Facsimile No.: (559) 432-5620
jardaiz@bakermanock.com

Attorneys for Plaintiff and Respondent
SWEETWATER UNION HIGH SCHOOL DISTRICT

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I. INTRODUCTION

This case illustrates an abuse of the anti-SLAPP statute (Code of Civil Procedure section 425.16) which was designed to protect parties exercising their First Amendment rights from being financially terrorized by well-heeled opponents here seeking to quell threatening litigation under the guise of freedom of speech. In this case, the Sweetwater Union High School District ("Sweetwater" and/or "District") seeks to void certain construction management contracts secured by Gilbane Construction ("Gilbane") by illegal influence peddling. Gilbane seeks to utilize the anti-SLAPP procedure to dismiss the lawsuit, claiming that its influence peddling was protected First Amendment activity because Gilbane officials had a right to contact public officials to present their position to them, and that, in the absence of legally-admissible evidence of illegal activity, the anti-SLAPP statute compels dismissal of Sweetwater's lawsuit. Although Sweetwater presented evidence to the trial court that demonstrated Gilbane's corrupt actions and intentions, Gilbane argues in simple terms that if that evidence is not properly before the court, Sweetwater cannot prevail and demonstrate a probability of prevailing on its claims. Thus, Gilbane seeks to exclude the damning evidence from consideration in order to avail itself of First Amendment protections, clearly distorting what was intended by the anti-SLAPP process.

The anti-SLAPP statute establishes a procedure for striking a pleading that is brought primarily to "chill" the valid exercise of the constitutional rights of freedom of speech and petition for redress of grievances. *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 197. A lawsuit arising from Constitutionally protected speech or activity is a SLAPP if it "lacks even minimal merit." *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89. The statute provides in pertinent part that in making its determination with respect to the motion, "the court shall

consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." Code Civ. Proc. § 425.16(b)(2).

Sweetwater responded to Gilbane's anti-SLAPP motion by presenting the guilty pleas and sworn factual bases for them by the public officials and Gilbane personnel who admitted their misconduct in documents filed in the Superior Court. Additionally, Sweetwater presented sworn grand jury testimony in order to further demonstrate the probability of prevailing on its claims.

At issue in this case is whether the sworn factual bases for the guilty pleas constitute affidavits under the anti-SLAPP statute and whether sworn testimony of individuals complicit in the pay-to- play scheme qualify as admissible and responsive affidavits under the anti-SLAPP statutory scheme. Petitioners instead have characterized the issue before this Court as "Is testimony given in a criminal case by nonparties to a later civil case subject to Evidence Code section 1290 et. seq. (Former Testimony) setting conditions for receiving former testimony in evidence?" See Opening Brief on the Merits at p. 1. The Supreme Court granted the petition of Gilbane and Gilbane/SGI a joint venture (the joint venture) from the decision of the Court of Appeal, Fourth Appellate District, Division One, *Sweetwater Union High School Dist. v. Gilbane Building Co.* (2016) 245 Cal.App.4th 19, ("*Sweetwater*"), which held that the evidence presented to the trial court satisfactorily established that Sweetwater's case had the requisite merit to proceed forward, despite Gilbane's First Amendment claims, and further held that the evidence presented did constitute affidavits within the meaning of the anti-SLAPP statute.

To establish a probability of prevailing on its claims that the former governmental officials had a prohibited interest in the contracts at issue, Sweetwater offered the guilty pleas and narrative sworn factual bases

supporting the guilty pleas of the contractors who gave the lavish gifts to the public officials as well as guilty pleas and their sworn factual bases of the public officials to whom Gilbane provided the illegal gifts and who voted on the contracts. Sweetwater also offered the sworn criminal grand jury testimony of Gilbane's Program Director and a Chief Executive Officer of the Gilbane/SGI Joint Venture who, along with another SGI manager, testified at length as to the extravagant gifts they gave, using their credit card receipts and calendars to confirm the dates and amounts of the gifts given. Gilbane would have the Court ignore such evidence at this early, pre-trial stage so as to avoid altogether the day of reckoning for the political corruption scandal Gilbane played an instrumental role in creating. Such a result is contrary to the purpose and intent of the anti-SLAPP statute.

II. STATEMENT OF THE CASE

A. Procedural History

Sweetwater commenced this action after a new, interim Board of Trustees authorized its filing following the guilty pleas and removal from office of four of the five members of the Board of Trustees for abusing their position of trust with respect to public contracts. Sweetwater's complaint alleges Gilbane, the Gilbane/SGI Joint Venture, and an additional defendant the Seville Group, Inc. ("SGI") engaged in an elaborate scheme to lavish expensive dinners, trips and other gifts on the District's former superintendent and several members of the Board, who in turn voted to award defendants a series of contracts in violation of Government Code § 1090. The complaint seeks to void the District's program management contracts with all three entities and to require them to disgorge the monies Sweetwater paid them under these contracts to manage their bond program and school construction.

The SLAPP process provides for summary disposal of appropriate lawsuits through a special motion to strike under section 425.16, commonly referred to as an "anti-SLAPP motion."

> [It] requires the court to engage in a two-step process. First the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that 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....If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim.

Equilon Enterprises v. Consumer Cause, Inc. (2002) 29 Cal.4th 53, 67.

Gilbane filed an anti-SLAPP motion in which the Gilbane/SGI Joint Venture joined. The trial court denied the motion under the first prong of the anti-SLAPP statute on the ground that the conduct underlying the complaint was illegal as a matter of law and therefore was not protected by the Constitutional guarantees of free speech and petition. Other than addressing and ruling on Gilbane's objections to evidence, the trial court did not rule on the second prong, whether Sweetwater had met its burden to establish its case had the requisite minimal merit to proceed forward. Appellant's Appendix ("AA") 1477-1478, 1479.

The Court of Appeal affirmed. *Sweetwater, supra,* 245 Cal.App.4th at p.19. The Court of Appeal held that while the evidence that Sweetwater presented may establish that *some* of the conduct may have been illegal, the evidence did not establish that all of the conduct at issue was illegal as matter of law, as some of the contributions were to pageants, charities or campaigns. Thus the Appellate Court did not agree with the trial court that

the anti-SLAPP motion could be resolved in Sweetwater's favor on the first prong.

As a result, the Appellate Court looked to the anti-SLAPP second prong—whether the District showed a probability of prevailing on its claims—and addressed and affirmed the Superior Court's evidentiary rulings on the proffered guilty pleas, the narratives supporting the factual basis for those guilty pleas, as well as to certain grand jury testimony and documents presented to the grand jury. The Appellate Court noted that both Sweetwater and Gilbane requested judicial notice of the plea forms reflecting the guilty or no contest pleas. *Sweetwater, supra*, 245 Cal.App.4th at p.28, fn. 8. AA 34 -35, 481-482, 483-547, 603-606.

Gilbane's Petition For Review did not contest all of the findings and holdings of the Court of Appeal. Rather, it confined its petition to the evidentiary rulings and the portion of opinion about the use and "admissibility" of the guilty pleas, their attached narratives supporting the factual bases of the guilty pleas, and the grand jury testimony and exhibits about which the witnesses at the grand jury testified. The sole issue here is whether this testimony given under oath can be admissible evidence used to oppose an anti-SLAPP motion because such testimony is equivalent to an affidavit. Petitioner asserts that it cannot, however for the reasons set forth herein, Petitioner is wrong in each of its assertions.

B. Statement of Facts

The District's causes of action for violations of Gov't Code § 1090 allege that former Superintendent Gandara and several former Board members had prohibited financial interests in contracts with the named defendants. 1 AA 50 *et seq*. The prohibited financial interests that District officials had in those contracts came as a result of activity by the principals and managers of the Gilbane/SGI Joint Venture.

In 2000, California voters approved Proposition 39, which reduced the voting threshold for the passage of school bonds from two-thirds to 55 percent, in turn increasing the number of voter-approved school facilities bonds. Since this time, voters in the Sweetwater Union High School District have approved two separate propositions designed to fund school improvements — in 2000, Proposition BB, a $187 million bond, and in 2006, Proposition O, allowing the District to issue $644 million in bonds. 1 AA 52, 248; 3 AA 607-620. Both propositions allowed the District to hire program managers to monitor the construction projects. *Id.* Harris/Gafcon (hereinafter "Harris") was hired by Sweetwater as the program manager for the Proposition BB. 5 AA 1246 at paragraph 3. Harris had stellar performance reviews for Proposition BB work and exceeded the expectations of those who were in charge of the program. *Id.* at paragraph 4 and 5 AA 1232 at paragraph 4. Harris finished the Proposition BB projects ahead of time, and their work quality was very good. *Id.*[1]

i. Gilbane and SGI sought to become program managers for Proposition O while wining and dining key District officials.

In the months *before* the November 2006 election when Proposition O was on the ballot, Gilbane and SGI began providing expensive dinners and sporting event tickets to key District officials, as follows:

---

[1] Appellants argue their performance as program manager was exemplary. However, no forensic audit was ever done to determine if the Gilbane/SGI joint venture overcharged the District for program management or committed fraud. After they were replaced, the same work was done for 60% less than what was charged by SGI. See Declaration of Tom Calhoun at 5 AA 1223-24 and Declaration of Eric Hall at 5 AA 1226-27.

By Whom	To Whom	When and What	In Appellate Record at
Flores	Sandoval	2/17/06 - meal at Anthony's	4 AA 999, at pg. 1546:4-8, 1546:28-1547:7
Flores	Quiñones	2/17/06 - meal at Greystone	*Id.*
Amigable	Sandoval	9/22/06 - meal at Baci	4 AA 960-61, at pg. 351:16-354:22
Flores	Gandara and Sandoval	10/05/06 - dinner at Flemings	4 AA 1000, at pg. 1554:21-1555:4
Amigable	Sandoval	10/12/06 - dinner at Morton's	4 AA 962, at pg. 357:14-358:19
Flores	Sandoval	10/27/06 - dinner at Lou & Mickey's	4 AA 1001, at pg. 1558:26-1559:17

On November 7, 2006, Proposition O was approved. 1 AA 52. Soon thereafter, then-Superintendent Gandara indicated his plans to re-compete the program management services work for Proposition O instead of allowing Harris to continue the work which they were already doing under the existing Proposition BB bond. 5 AA 1246 at paragraph 5. Gandara sought to replace Harris despite good performance reviews for Proposition BB work. 5 AA 1025 at pg. 2885:6-17. In her declaration filed in opposition to the anti-SLAPP motion, Sweetwater's Director of Planning and Construction and at one point Assistant Superintendent Katy Wright stated that the Proposition BB projects were being managed "ahead of time" and "[t]heir work quality was very good." AA 1245-1247. Ms. Wright who "was directly involved with the management of the Proposition BB bond," attested that when she heard that Gandara was not planning to use Harris/Gafcon for the new Proposition O construction work, she

informed Gandara that "the District would essentially lose a year because it would take a while for a new team to get up to speed and understand what happened at each of the campuses." She also "relayed" to Gandara "the good quality of work that [Harris/Gafcon] performed for the District on Proposition BB." In addition, despite Wright's expertise "with respect to managing the work done under the bond measures," she was "not asked to participate or provide the criteria by which the program manager was to be selected," and was "not allowed to participate" in the decision to select the Joint Venture even after she asked to participate. AA 1245-1247.

Gilbane and SGI continued giving financial inducements to District officials. Amigable provided Sandoval with tickets to a San Diego Chargers game that cost $415 each. 4 AA 936 at pg. 362:19-363:18. Amigable provided a dinner to Gandara and Sandoval at Po Pazzo that cost $1,416.08. 4 AA 964 at pg. 364:21-367:5.

On February 20, 2007, the Board directed Gandara to initiate the Request for Proposal/Request for Qualifications ("RFP/RFQ") process for the Proposition O program management services. 5 AA 1036 at pg. 1446:25-1447:15 and 1171-1173. Initially when the RFP/RFQ was submitted, there was a clause prohibiting proposers from contacting any District official or Board member. 5 AA 1127. This clause was necessary "to maintain the integrity of the process" and prevent improper "attempts to influence the process". 5 AA 1030-1031, at pg. 1293:26-1294:4. Gandara had this clause removed. 5 AA 1235 at paragraph 4.

These initial dinners and tickets were just the tip of the iceberg of what became a routine pattern of enticement between the private contractors and District officials. In the two months between when the "no contact" clause was removed and when the District Board approved hiring the Gilbane/SGI JV, its people had significant contact with several Board members, as is shown below:

By Whom	To Whom	When and What	In Appellate Record at
Amigable and Flores	Sandoval and Ricasa	03/09/07 - $1,383 dinner at Baci including flying in lobsters, plus $538.50 for wine	4 AA 966-968, at pg. 381:26-384:28 and 386:9-387:25
Amigable	Sandoval and Smith	03/30/07 – $729 dinner	4 AA 968-68, at pg. 398:22-400:7
Amigable	Sandoval	04/14/07 - tickets to Athletics-Yankees baseball game, paid $1,285.75 for food and beverages	4 AA 969, at pg. 400:15-401:12
Flores	Quiñones	04/19/07 – dinner	4 AA 1005-06, at pg. 1574:10-1576:4

Amigable indicated that he wanted to show the March 9 dinner attendees that he was "willing to get them nice wine" and that he wanted them to expect that "if we are going to dinner, we are going to a nice dinner." 4 AA 966 at pg., 383:4-12. The reason for this was, as SGI's Flores testified:

> You said you had no assurances that your contributions would result in a winning selection. But were you confident that a lack of contributions would guarantee you would not be selected?
>
> A. I would say so.

4 AA 1004 at pg. 1568:1-5.

ii. After lavish entertainment expenditures, Gilbane and SGI were awarded their first District contract, and their expenditures increased.

Gilbane and SGI's efforts paid off quickly. On April 21, Gandara called Amigable to indicate he was going to recommend them to the Board, despite opposition to the change and support for Harris from within. 4 AA 970-971 at pg. 407:16-408:25, 410:26-411:8. During this call, Gandara

asked Amigable to draft a "white paper" to help Gandara defend his position of why the Gilbane/SGI JV was selected over Harris, in anticipation of concerns over the selection. 4 AA 971 at pg. 408:2-25. Amigable testified the whole purpose of the "pre-sell" was to establish a relationship so Gandara would call him for help like this in getting the Gilbane/SGI JV selected. *Id.* at pg. 410:11-21.

On April 24, 2007, Gandara recommended that Gilbane and SGI provide program management services for the Proposition O Bond Measure. 3 AA 621. That same day, Board action authorized the District to negotiate a permanent contract. *Id.*

SGI's CEO Flores testified that he believed that SGI would experience negative consequences if he did not acquiesce to the Board members' demands for further gifts. 4 AA 1003 at pg. 1565:2-26. As such, Gilbane and SGI provided additional financial inducements in the weeks between the April 24 vote to negotiate a contract and the next vote on the permanent contracts on May 16, 2007. SGI provided $15,000 to the Mariachi event at the bequest of Sandoval and Gandara. 4 AA 1007 at pg. 1586:28-1587:27. Amigable provided dinner to Board member Ricasa at a restaurant in Point Loma that cost $313. 4 AA 972-73, at pg. 414:6-418:6.

iii. District officials awarded the Gilbane/SGI Joint Venture multiple contracts after months of expensive dinners, theater tickets and an all-expense paid New Year's Eve weekend at the Rose Bowl.

On May 16, 2007, the Board including Trustee Pearl Quiñones, Arie Ricassa and Greg Sandoval unanimously approved two agreements with the Gilbane/SGI Joint Venture—the interim Proposition O program management agreement and the program management agreement to complete Harris' Proposition BB Projects. 1 AA 53, 66-85; 3 AA 627-628, 648, 652-671. The wining and dining then continued at an incredible rate in the eight months between the May 2007 approval of this *interim*

Proposition O contract and the January 2008 approval of the *permanent* contract. While the permanent Proposition O program management agreement was being negotiated, the financial courting became more elaborate:

By Whom	To Whom	When and What	In Appellate Record at
Amigable	Gandara and Quiñones	06/16/07 - dinner at Baci	4 AA 974, at pg. 422:15-423:12, 4 AA 975, at pg. 425:2-6
Ortiz	Sandoval and Gandara	07/20/07 - dinner at Bertrand at Mr. A's	5 AA 1042, at pg. 1863:12-20, 4 AA 1008, at pg. 1595:7-16
Ortiz	Quiñones	08/03/07 - dinner at Bertrand at Mr. A's	5 AA 1043, at pg. 1866:14-26
Ortiz	Quiñones	09/04/07 - dinner at Buon Giorno	5 AA 1042, at pg. 1863:21-1864:14
Amigable	Gandara	09/08/07 - dinner at Loews Coronado Bay Resort	4 AA 977, at pg. 453:1-454:2
Amigable	Gandara	09/08/07 - gondola ride at Loews Coronado Bay Resort	*Id.*
Amigable	Sandoval and Gandara	09/13/07 - beverages at Hotel Del Coronado	4 AA 976-77, at pg. 451:24-452:12
Amigable	Gandara	10/11/07 - dinner at Flemings	4 AA 978, at pg. 462:9-463:19
Amigable	Gandara	10/11/07 - tickets to La Jolla Playhouse	*Id.*
Amigable	Gandara and	10/26/07 - dinner at	4 AA 979, at pg.

By Whom	To Whom	When and What	In Appellate Record at
	Sandoval	Baci	466:28-468:14
Amigable and Flores	Quiñones	11/05/07 - tickets to see Jersey Boys	4 AA 980, at pg. 469:7-471:24
Amigable and Flores	Quiñones	11/08/07 - dinner at Morton's	*Id.*
Amigable and Flores	Gandara	11/10/07 - tickets to see Jersey Boys	*Id.*
Amigable and Flores	Gandara	11/10/07 - dinner at Fleming's	4 AA 981, at pg. 472:13-473:11
Amigable	Sandoval and Gandara	12/08/07 - dinner at Top of the Market	4 AA 981-82, at pg. 475:16-476:21
Amigable	Sandoval and Gandara	12/08/07 - drinks at Top of the Hyatt	4 AA 982, at pg. 475:16-477:14
Amigable	Gandara	12/17/07 - Holiday get-together for Gandara's staff at Frida's	5 AA 1045, at pg. 1880:24-1881:16
Ortiz	Sandoval	12/17/07 - dinner at Rei Do Gado	5 AA 1045, at pg. 1878:26-1880:6
Ortiz	Sandoval	12/17/07 - tickets to the Lyceum Theatre	*Id.*
Ortiz	Sandoval and Gandara	12/31/07 - dinner at Twin Palms	4 AA 1010, at pg. 1616:26-1618:20 4 AA 1011-12, at pg. 1623:22-1624:10
Ortiz	Sandoval and Gandara	12/31/07 - suites at the Biltmore Hotel	*Id.*
Ortiz	Sandoval and Gandara	01/01/08 - Rose Bowl tickets	4 AA 1010, at pg. 1617:26-1618:6
Amigable	Sandoval, Gandara and others	01/05/08 - dinner at Morton's	4 AA 983, at pg. 487:2-27

By Whom	To Whom	When and What	In Appellate Record at
Amigable	Sandoval	01/25/08 - dinner at Fish Market	3 AA 511, facts 96, 97

Certain extravagant expenditures during this timeframe are noteworthy. In November 2007, Amigable and Flores provided Quiñones tickets to see the play "Jersey Boys" at a cost of $90 per ticket and took her to a dinner at Morton's Steakhouse that cost $711.23. 4 AA 980, at pg. 469:7-471:24. Less than one week later, Amigable and Flores also provided tickets to Gandara and his family to see the play "Jersey Boys," this time at a cost of $165 per ticket. 4 AA 981, at pg. 472:13-473:11. On top of the theater, Amigable and Flores also provided dinner that evening to the Gandara family at Fleming's Steakhouse that cost $625.22. 4 AA 981, at pg. 472:13-473:11.

On New Year's Eve weekend 2007, SGI treated Gandara and Sandoval as well as their families to a weekend in Pasadena to celebrate the Rose Bowl. SGI provided dinner at the Twin Palms Restaurant in Pasadena, hotel suites at the Los Angeles Biltmore Hotel, as well as nine Rose Bowl tickets for Gandara and Sandoval. 4 AA 1010, at pg. 1616:26-1618:20, 4 AA 1011, at pg. 1623:22-1624:10.

iv. District officials reward the Gilbane/SGI Joint Venture with yet another lucrative contract.

After the lavish dinners, theater tickets, and Rose Bowl weekend, the Board approved the permanent Proposition O program management services contract on January 28, 2008, with Sandoval, Quiñones and Ricasa all voting yes. 1 AA 53, 87-147, 163-223; 3 AA700, 711; 4 AA 717-777. In the four months between this vote and a lucrative contract amendment, the following financial benefits were provided:

By Whom	To Whom	When and What	In Appellate Record at
Amigable	Sandoval and Gandara	02/01/08 - $854.21 dinner at Baci	3 AA 514, facts 106, 107
Amigable	Quiñones	02/22/08 - $243 dinner at Dobson's	3 AA 515, facts 108, 109
Amigable	Sandoval and Gandara	02/23/08 - $957.41 dinner at Top of the Market	3 AA 515, facts 110, 111
Amigable	Quiñones	03/07/08 - $285.29 dinner at Donovan's	3 AA 515-516, facts 112, 113
Amigable	Sandoval, Gandara and Ricasa	03/14/08 - dinner at Island Prime	3 AA 516, fact 114
Amigable	Gandara	03/25/08 - $378.38 dinner at Baci	3 AA 516, facts 115, 116
Amigable	Gandara	03/27/08 - discounted plane ticket	3 AA 516, fact 117
Amigable	Quiñones	04/04/08 - dinner at Po Pazzo	3 AA 516, fact 118
Amigable	Quiñones	04/2008 - discounted plane ticket	3 AA 517, fact 119

On May 20, 2008, the Board approved an Amendment/Supplement to the program management agreement with the Gilbane/SGI joint venture, with Sandoval, Quiñones and Ricasa again voting yes. 4 AA 778, 787-788, 792-794. This three page amendment expanded the contract scope to include "construction services" for which the joint venture ultimately received $7,466,762.88. 4 AA 792, 5 AA 1237-38, 4 AA 895 and 4AA 896.

More financial benefits followed. In November of 2008, SGI provided a lavish trip for Gandara and his wife. SGI provided the plane tickets to fly to Northern California and paid for three nights of hotel

accommodations, multiple wine tastings, and a hot air balloon ride that cost $245 per person. 5 AA 1048-49, at pg. 1926:19-1928:3, 5 AA 1050, at pg. 1050, at pg. 1931:9-17, 5 AA 1050, at pg. 1931:24-1932:4, 5 AA 1050, at pg. 1933:22-28, and 5 AA 1052, at pg. 1939:14-1940:22. The trip itself caused SGI's Program Manager Jaime Ortiz to exceed his credit card limit, which SGI internal communications stated was "worth it." 5 AA 1051, at pg. 1937:28-1938:11, 4 AA 1013, at pg. 1653:6-1654:18, and 4 AA 1013, at pg. 1655:5-27.

SGI alone was awarded the June 2010 contract for which SGI received $9,034,423.06. 4 AA 795 and 897. Separate from this contract the Gilbane/SGI JV received over $17 million. 5 AA 1239-40, at ¶¶ 12-15, 4 AA 0879-92, 5 AA 1238-39, at ¶¶ 6-8, 4 AA 893, 4 AA 894, 5 AA 1237-38, at ¶¶ 3-5, 4 AA 895, and 4 AA 896.

C. The Guilty Pleas

Gilbane's former Program Director Henry Amigable pled guilty[2] to violating Education Code §35230, which prohibits offering any valuable thing to a member of the governing board of any school district with the intent to influence his/her action in regard to the making of any contract before the school district's governing board. 2 AA 388, *et seq.* Under penalty of perjury, Amigable stated in writing in the factual basis to his plea and later confirmed in open Court the following:

> Between March 9, 2007 and June 22, 2010 I provided gifts, meals and tickets to entertainment events directly to Jesus Gandara, Superintendent, Greg Sandoval, elected Board member, Arlie Ricassa, elected Board member, and Pearl Quiñones, elected Board member, of the Sweetwater Union High School District. I provided the meals, tickets and gifts upon my initiative as sanctioned and encouraged by my

[2] Appellants claim Amigable pled no contest. The reporter's transcript from Mr. Amigable's change of plea hearing unequivocally reflects he pled "guilty." See 6 AA 1450 at lines 16-20 and 1452 at lines 4-6.

> employers. I also provided meals, tickets and gifts at the request of the elected board members and the Superintendent. The meals, tickets and gifts were made on behalf of my employers with the intent to influence the boards' decisions in granting construction contracts from the Sweetwater Union High School District to the firms for which I was working. My expenses were generated with the endorsement of my employers and they were reimbursed to me by my employers. At no time did the elected board members or Superintendent reimburse me or my employers for the meals, tickets or gifts I gave them on behalf of my employers.

2 AA 389, 392, 5 AA 1175, 1178 and 6 AA 1448-1454, especially 1452 line 11 through 1453 line 6.

SGI's CEO Rene Flores also admitted his illegal conduct—he pled no contest to aiding and abetting a violation of Gov't Code § 87203's reporting requirements which require public officials such as school board members to disclose sources of their income. 2 AA 394, *et seq.* Also in writing and under penalty of perjury, Mr. Flores stated in the written factual basis to his plea:

> Between March 9, 2007 and June 22, 2010, I provided donations, meals, gifts, and tickets to entertainment events directly to Jesus Gandara, Superintendent, Greg Sandoval, elected Board member, Arlie Ricassa, elected Board member, and Pearl Quiñones, elected Board member, of the Sweetwater Union High School District as requested by these public officials. At no time did the elected board members or Superintendent reimburse me for the donations, meals, tickets or gifts.

2 AA 395, 398, 5 AA 1180, 1183.

Mirroring Amigable's and Flores' pleas are those of the District's former Superintendent and several former Board members. These are the same individuals that Amigable admitted he had an "intent to influence" regarding "construction contracts from the Sweetwater Union High School District to the firms for which [he] was working" and the same individuals

that Flores pled he aided and abetted in their gift disclosure reporting violations.

Former Board member Sandoval pled guilty to violating Penal Code § 182 (a)(1) and Gov't Code §89503, a felony crime of conspiracy to violate the Political Reform Act's prohibitions against accepting gifts above the specified legal limit. 2 AA 411, *et seq.* Under penalty of perjury, Sandoval admitted in the written factual basis to his plea and later in open Court:

> In 2008, I was an elected School Board Member for the Sweetwater Union High School District. I accepted gifts from Henry Amigable in 2008 with a total value of more than $2,770 and I did not report them. The maximum amount of gifts one may receive from one source per year as of 2008 was four hundred twenty dollars ($420). Henry Amigable provided these gifts with the intent to influence my vote on business awarded to Gilbane, his employer.

2 AA 413, 414 and 5 AA 1204, 1205 and 1206-1213, especially 1210 line 23 through 1211 line 12.

Former Board member Quiñones pled guilty to the same felony violation of Gov't Code § 89503 as Sandoval. 2 AA 406, *et seq.* In the written factual basis to her plea and under penalty of perjury, Quiñones admitted:

> In 2007, I was an elected School Board Member for the Sweetwater Union High School District. I accepted gifts from Henry Amigable in 2007 with a total value of in excess of $500 and I did not report them. The maximum amount of gifts one may receive from one source per year as of 2007 was three hundred and ninety dollars ($390). Henry Amigable provided these gifts with the intent to influence my vote on business awarded to Gilbane, his employer.

2 AA 408, 409 and 5 AA 1196, 1197.

Former Superintendent Gandara pled guilty to the same felonious crime as Sandoval and Quiñones. 2 AA 394, *et seq.* In the written factual basis to his plea and under penalty of perjury, Gandara admitted:

> In 2008, I was the Superintendent of Sweetwater Union High School District. I accepted gifts from Rene Flores from SGI in 2008 with a total value of more than $4,500 and I did not report them. The maximum amount of gifts one may receive from one source per year as of 2008 was four hundred twenty dollars ($420). Rene Flores provided these gifts with the intent to influence my decision on business awarded to SGI, his company.

2 AA 418, 419, 5 AA 1200, 1201.

Former Board member Ricassa pled guilty to violating Gov't Code §89503, which is the Political Reform Act's prohibition against accepting gifts above the specified legal limit. 2 AA 400, *et seq.* In the written factual basis to her plea and under the penalty of perjury, Ricasa admitted:

> In 2009, I was an elected School Board Member for the Sweetwater Union High School District. I accepted gifts from Rene Flores (SGI) in 2009 with a value of $2,099 and I did not report them. The maximum amount of gifts one may receive from one source per year was four hundred twenty dollars ($420). Rene Flores provided these gifts with the intent to influence my vote on business awarded to Seville Group, Inc.

AA 402, 404, 5 AA 1191, 1193.

Mr. Amigable's plea form states: "I declare under the penalty of perjury, under the laws of the state of California, that I have read and understood and initialed each item above and any attached addendum and everything on the form and any attached addendum is true and correct."

The plea forms of Flores, Quiñones, Gandara and Sandoval all contain the identical "under oath of penalty of perjury" language. Ricasa's plea form is substantially identical but is a slightly different format.

Assuming the foregoing statements which are part of the factual basis of each guilty plea are admissible, it is clear that the conduct in question was illegal and designed to corruptly influence the votes of the officials involved. The grand jury testimony, the declarations of former and current Sweetwater employees, and the guilty pleas collectively establish a *prima facie* violation of Government Code § 1090. See AA 1231-1233 (Husson), 1234-1236 (Leyba), and 1245-1247 (Wright). Accordingly, Gilbane cannot shield itself from the consequences of its corrupt conduct utilized to secure public contracts.

III. STANDARD OF REVIEW

An order granting or denying an anti-SLAPP motion is reviewed under a de novo standard. *Soukup v. Law Office of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3. If the trial court's decision is correct on any theory, the anti-SLAPP order must be affirmed. *San Diegans for Open Government v. Har Construction* (2015) 240 Cal.App.4th 611, 622. On appeal, courts "review a ruling on an evidentiary objection in connection with a special motion to strike for abuse of discretion." *Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1347-1348, fn. 3. As in all reviews of discretionary determinations, the trial court abuses this discretion if it rests its ruling on an error of law. See, e.g., *Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1171-1176. However, a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for a wrong reason. If right on any theory of the law applicable to the case, it must be sustained regardless of the consideration which may have moved the trial court to its conclusions. *Davey v. Southern Pacific Co.* (1897) 116 Cal. 325, 329, applying rule to an evidentiary ruling.

IV. LEGAL ARGUMENT: BECAUSE THE PURPOSE OF THE SECOND PRONG OF THE ANTI-SLAPP STATUTE IS TO DETERMINE IF THE REQUISITE MINIMAL MERIT TO PROCEED EXISTS, A STATEMENT UNDER OATH WHICH A WITNESS CAN TESTIFY TO WITHOUT OBJECTION SHOULD BE ADMISSIBLE TO DETERMINE THE PROBABILITY OF PREVAILING.

A. Introduction

The anti-SLAPP statute is intended to truncate lawsuits arising from conduct protected by the First Amendment. The anti-SLAPP statute does not insulate defendants from all liability for claims arising from protected conduct; it only provides a procedure for weeding out, at an early stage, meritless claims arising from protected activity. *Baral v. Schnitt* (2016) 1 Cal.5th 376, 384. In *Baral*, this Court held that a "special motion to strike" may not be avoided by artful pleading if such claims are mixed with assertions of unprotected activity. *Id.* at p. 393.

One week after *Baral*, this Court again addressed the anti-SLAPP statute in a case similar to the one now before the Court. This case and *City of Montebello v. Vasquez* (2016) 1 Cal.5th 409 both involve the application of the anti-SLAPP statute where the complaint alleges violation of one of California's preeminent anti-corruption statutes, Government Code § 1090, but there is one significant factual difference between the cases. *Montebello* only involved legal campaign contributions, while this case concerns contractors giving lavish, illegal gifts to public officials including expensive dinners; theatre, sporting and plane tickets; hotel rooms; wine tastings; payments for sibling's beauty pageants; and large donations to charities for public officials and their friends.

In *Montebello*, this Court reaffirmed the broad application and reach of the anti-SLAPP statute for acts which are in furtherance of a person's right of petition or free speech in connection with a public issue. *Id.* at 416.

However, the broad application of the first prong of the anti-SLAPP statute has at times prompted concerns. For example, after citing legislative history and intent, Justice Baxter noted in his dissent in *Briggs* that SLAPPs are generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights. *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1129. He went on to state an "overly broad construction of section 425.16 subdivision (e)(1) and (2) will also likely have a significant impact on pretrial civil litigation in California." *Id.* Two years later, in *Navellier,* Justice Brown (in a dissent joined by Justices Baxter and Chin) stated a "presumptive application of section 425.16 would burden parties with meritorious claims and chill parties with non-frivolous ones," warning that "[t]he cure has become the disease –SLAPP motions are now just the latest form of abusive litigation." *Navellier v. Sletten* (2002) 29 Cal.4th 82, 96. Indeed, the broad application of the anti-SLAPP statute to claims brought pursuant to Government Code § 1090 more recently raised a concern that it could make it harder to enforce civil laws against public corruption. See *Montebello, supra*, 1 Cal.5th at p. 427, 431.

In this third case of the recent trilogy, this Court is asked to decide whether the broad application of the anti-SLAPP statute's first prong is counter-balanced by the evidentiary standards by which trial courts should evaluate a plaintiff's *prima facie* showing of facts to meet its burden of establishing a probability of prevailing on their claim. See *Soukup, supra* 39 Cal.4th at p. 291. Acting as a procedural device for screening out meritless claims, the anti-SLAPP statute establishes "a summary judgment–like procedure at the early stage of litigation." *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192; see also *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 739; *Soukup, supra*, 39 Cal. 4th at p. 278-279. Given that one of the hallmarks of the anti-SLAPP motion is the

short time for filings and hearings and a stay on all discovery pending resolution (see *Varian, supra,* 35 Cal.4th at p. 192), the standards which are applied to the second prong of this screening device become equally important in order that courts avoid an application that would burden parties with meritorious claims or chill parties with non-frivolous ones.

B. The Court of Appeal Used Its De Novo Authority To Determine that the anti-SLAPP Requirements Were Met.

While the trial court ruled that the protected activity was illegal as a matter of law and decided the case under the first prong, the Appellate Court disagreed, stating "while the evidence may establish that some of the conduct may have been illegal, the evidence does not establish that all the conduct at issue was illegal as a matter of law." *Sweetwater supra,* 245 Cal.App.4th at p. 44. As a result, the Appellate Court proceeded to the second step, evaluating whether the District met its burden to show a probability of prevailing on the merits. See *Montebello, supra*, 1 Cal.5th at p. 424-425; *Flatley v. Mauro* (2006) 39 Cal.4th 299, 316. The Appellate Court concluded, "Sweetwater has demonstrated a probability of prevailing on its 1090 claims against defendants, thereby defeating defendants' anti-SLAPP motion with respect to the second prong of the anti-SLAPP analysis." *Sweetwater, supra*, 245 Cal.App.4th at p. 51.

C. The Sworn Statements Containing The Factual Basis For Multiple Guilty Pleas Are Admissible Here As Affidavits

Gilbane identifies the issue presented for review as "Is testimony given in a criminal case by non-parties to a later civil case subject to Evidence Code § 1290, et seq. setting conditions for receiving former testimony in evidence?" This characterizes the issue too narrowly and does not address the issue decided by the Appellate Court under the second prong. The question here is whether the criminal guilty pleas and the narratives which describe the factual bases of each guilty plea, as well as the grand jury testimony of the principal and employees of the Gilbane/SGI

Joint Venture constitute "evidence" which a court can rely on in deciding whether a plaintiff made a *prima facie* showing of the merits of its case. *Navellier, supra*, 29 Cal.App.4th at p. 94. The short answer is, why not?

This Court has repeatedly held that under this second prong of the anti-SLAPP motion, what is required is only a showing of minimal merit to proceed forward. *Navellier, supra,* 29 Cal.App.4th at p. 94, 96; *Jarrow, supra*, 31 Cal.4th at p. 741; *Briggs, supra*, 19 Cal.4th at p. 1123. In evaluating the minimal level of legal sufficiency, the court does not weigh the credibility or comparative strength of competing evidence, and it is the court's responsibility to accept as true evidence favorable to the plaintiff. *Soukup, supra*, 39 Cal.4th at p. 291. The rationale for only requiring a "*prima facie* showing of a requisite minimal merit" is that this second prong is analyzed at the outset of the case with an automatic discovery stay in place the moment the anti-SLAPP motion is filed.[3] Civ. Proc. § 425.16 (g); *Varian, supra*, 35 Cal. 4th at p. 192; *Equilon, supra*, 29 Cal.4th at p. 65. Because plaintiffs have little time to prepare an opposition and no real opportunity to conduct formal discovery before opposing the motion, the threshold for showing minimal merit to proceed logically must be lower than for summary judgment motions.

i. What as an affidavit?

When the Legislature set up what courts now refer to as the two-prong anti-SLAPP analysis, it provided that "the court shall consider the pleadings, and supporting an opposing *affidavits* stating the facts upon

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[3] The anti-SLAPP statute does provide that a court can lift the stay for specified discovery. Sweetwater filed such a motion, which Gilbane opposed and the trial court denied. Respondents' Appendix (RA) 005-060, 105. This motion sought to lay the foundation for the admissibility of the grand jury transcripts and exhibits. Sweetwater did submit a declaration attesting to the authenticity of the grand jury transcripts and the certificates of the official court reporter for the grand jury. AA 1456-1457, AA 1474.

which the liability or the defense is based." CCP § 425.16(b)(2) (italics added). The legislation provided no specific definition of what is or is not acceptable as an affidavit within the context of the anti-SLAPP statute. However, the term "affidavit" is specifically defined at CCP § 2003, which provides, "An affidavit is a written declaration under oath, made without notice to the adverse party."

This definition of affidavit is supplemented by reference to CCP § 2002, which describes the manner in which testimony may be taken. According to § 2002, the testimony of witnesses is taken in three modes:

1. By affidavit;
2. By deposition:
3. By oral examination.

Thus, an affidavit is distinct from deposition (which is defined in CCP § 2004 as a written declaration under oath made upon notice and subject to cross-examination) and an oral examination (defined in CCP §2005 as an examination in the presence of the jury or tribunal heard from "the lips of the witness").

Necessarily, an affidavit is distinct from both deposition and oral examination. Nothing in the code requires that an affidavit be subject to cross-examination. It is simply a declaration reduced to writing and made under oath.

ii. When and how an affidavit can be used.

Section 2009 of the Code of Civil Procedure outlines how and when an affidavit or declaration maybe used, providing that "[a]n affidavit may be used to verify a pleading or paper in a special proceeding, to prove the service of the summons, notice, or other paper in an action or special proceeding, to obtain a provisional remedy, the examination of witnesses, or a stay of proceedings, and in uncontested proceedings to establish a

record of birth, or *upon a motion*, and in any other case expressly permitted by statute." (Italics added.)

Code of Civil Procedure § 2015.5 provides that an individual making a statement by affidavit or declaration must attest to its truth under penalty of perjury pursuant to California law and further states that, if executed within California, the "certification or declaration may be in substantially the following form:

> I certify (or declare) under penalty of perjury that the foregoing is true and correct:
>
> _____ _____
>
> (Date and Place) (Signature)

Or, if executed anywhere in or outside of California, in the following form:

> I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing is true and correct:
>
> _____ _____
>
> (Date) (Signature)

The Appellate Court held that "each plea form submitted by Sweetwater...meets the requirements set forth in section 2015.5... [f]or this reason, we conclude that the forms reflecting the guilty and no contest pleas, including the written factual narratives incorporated into the pleas, are in all material respects indistinguishable from declarations or affidavits." *Sweetwater, supra*, 245 Cal.App.4th at 37.

Affidavits are commonly used in motion practice. They provide evidentiary authority for the motion and opposition. An example of their use occurs in summary judgment motions, where the Legislature did

specifically state that the contents of affidavits in such motions "shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavits or declarations. An objection base on the failure to comply with the requirements of the subdivision, if not made at the hearing, shall be deemed waived." Civ. Proc. § 437c(d).

While no court has yet commented on what distinction, if any, exists between "affidavit" as the term is used in the anti-SLAPP statute and as is expressly described in § 437c, several decisions of this Court have stated that when it comes to evaluating the merits, the anti-SLAPP statute is "a summary-judgment-like procedure." *Soukup, supra,* 39 Cal.4th at p. 278; *Varian, supra,* 35 Cal.4th at p. 192.

The reference to a "summary-judgment-like" procedure likely emanates from the fact that courts do not weigh the credibility or comparative strength of competing evidence in either motion and that the court accepts the evidence favorable to the plaintiff as true. The difference between an anti-SLAPP motion and a summary judgment motion, however, is significant not only in the stage of the proceedings at which each typical occurs but also in the specific criteria applicable to affidavits supporting summary judgment motions. See Civ. Proc. § 437c(d).

The anti-SLAPP statute does not provide the same specific details as to what an affidavit submitted with or in opposition to an anti-SLAPP motion must contain. While an affidavit is defined as a statement under oath, CCP § 2003 does not require that it comport with the rules of evidence applicable at trial or summary judgment to be admissible. Therefore, the logical interpretation of an affidavit that a court can consider when ruling on an anti-SLAPP motion is that it is a document made under oath outside of the court proceedings in which it is offered which the court may consider true for purposes of the proceeding in which it is offered.

See, e.g., Civ. Proc. § 2003. Necessarily, therefore, an affidavit is hearsay in the classic sense in that it is an out-of-court statement offered for the truth of the matter asserted. Evid. Code § 1200, *et seq.*

The Appellate Court below concluded that "courts may receive and consider hearsay – i.e., out of court statements presented for their truth – for purposes of motion practice, as long as the statements do not contain second level hearsay or evidence that is otherwise irrelevant, not competent or substantively barred under other evidentiary rules." *Sweetwater, supra,* 245 Cal.App.4th at p. 33, fn. 12. The exception for admissibility of an affidavit provided by CCP § 2015.5 is limited to a non-trial setting, such as this anti-SLAPP motion.

While courts have not expressly ruled on this issue, numerous cases have assumed that affidavits submitted in an anti-SLAPP proceeding are subject to the requirement of proof being "made upon competent admissible evidence." See, e.g., *Paiva v Nichols* (2008) 168 Cal.App.4th 1007, 1017; *Hall, supra* 153 Cal.App.4th at p. 1347-1348; *ComputerXpress, Inc. v Jackson* (2001) 93 Cal.App.4th 993, 1010 (the plaintiff may not rely solely on its complaint, even if verified; instead, its proof must be made upon competent admissible evidence). Therefore, affidavits in anti-SLAPP proceedings have been treated as subject to the same standards as an affidavit submitted pursuant to 437c.

D. Petitioner Incorrectly Contends That The Statements At Issue In The Present Case Are Hearsay And Do Not Meet The Former Testimony Exception.

As noted previously, all affidavits are hearsay because they are out of court statements offered for the truth of the matter asserted, and few meet any exception contained within the hearsay rule. The distinction that Petitioner fails to address is that, in motion practice, the hearsay declaration of the affiant is permitted if it contains otherwise admissible evidence.

CCP §§ 2003 and 2015.5. In other words, if the declaration reflects evidence that the affiant would be permitted to testify to if called as a witness, the declaration is admissible. This is absolutely no different than the provisions in CCP 437c applicable to summary judgment motions.

i. Petitioner misconstrues the foundational issue with respect to admissible statements in an affidavit

Petitioner repeatedly refers to the proffered statements under oath as "Former Testimony." See, e.g., Petitioner's brief at p. 10-11. Petitioner further asserts as an additional basis for objection that the District failed to show that any of the declarants were unavailable as a witness. *Id.* at p. 10. Petitioner's argument confuses a trial with a motion *and* ignores the hearsay exception inherent in the statutory provisions that permit affidavits. While it is correct that the affidavits were made in another proceeding, that is irrelevant; no statute defines an "affidavit" as being admissible only in the proceeding in which it was first filed.

ii. These affidavits were judicially noticable

All of the guilty plea narratives and grand jury testimony were part of the records of the Superior Court of the State of California.[4] They are therefore subject to judicial notice as the sworn statements of the declarants. See Evid. Code §§ 452(d)(1), 453. The court is not, however, taking judicial notice of the truth of the statements contained in these records (see, e.g., *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548) but rather taking judicial notice that the statement was made under oath in another judicial proceeding. Or, another way of looking at it is that the court is

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[4] Sweetwater submitted a declaration attesting to the authentication of the certified transcripts of the grand jury testimony and provided the certifications of official reporter for the grand jury. AA 1456-1457, AA 1474. As noted in fn. 21 and 24, the Court of Appeal found that Gilbane did not argue on appeal that the grand jury transcripts were not properly authenticated or that they were not what they were purported to be.

acknowledging that this is the sworn statement of the declarant and, as such, is an affidavit. Whether the sworn statement was given in another proceeding does not change its status an affidavit which is admissible as evidence in a motion hearing.

E. Each Person Who Provided The Written Factual Narrative Incorporated Into His or Her Plea Form As The Factual Basis For His/Her Plea Was Competent To Testify To The Matters Therein.

At trial, affidavits and declarations such as those Sweetwater submitted in opposition to the anti-SLAPP motion here are generally inadmissible.[5] However, an anti-SLAPP motion is not a trial; indeed, it is far from it. The issue in this pre-trial setting is not whether the plea narrative is former testimony which would be admissible at trial but instead whether these persons would be competent to testify as to the facts in their plea narrative without objection if called as witnesses.

Each plea form submitted by Sweetwater with respect to the anti-SLAPP motion meets the affidavit requirements of CCP § 2015.5. Specifically, each individual who signed and dated a plea form attested to the truth of the contents, including the factual basis of his or her plea, under penalty of perjury under the laws of California.

As described above at Section II(B), these witnesses would all be competent to so testify. Mr. Amigable was the former Program Director for Gilbane and is certainly competent to testify he "provided gifts, meals and tickets to entertainment events directly to Jesus Gandara, Superintendent, Greg Sandoval, elected Board member, Arlie Ricasa, elected Board member, Pearl Quiñones, elected Board member, of the Sweetwater Union

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[5] The judgments of conviction entered as to Quiñones, Gandara and Sandoval with respect to the felonies to which they pled guilty could be admitted at a trial pursuant to the hearsay exception provided in evidence code section 1300.

High School District." He is also competent to testify that he "provided the meals, tickets and gifts at the request of the elected board members and superintendent" and that he provided them with the "intent to influence the board's decision in granting construction contracts from the Sweetwater Union High School District to the firms for which I was working." He is further competent to testify that the elected board members or superintendent did not reimburse him or his companies for the meals, tickets or gifts he gave them.

Mr. Flores, the CEO of SGI, is also competent to testify that he provided meals, gifts and tickets to entertainment events directly to the former superintendent and Board members Sandoval, Ricasa and Quiñones; that he did so as requested by these public officials; and that no time did they reimburse him for the donation meals tickets or gifts. Amigable and Flores' plea narratives do not contained a second level of hearsay evidence that would otherwise be barred by any other evidentiary rules.

Similarly, Board members Sandoval, Quiñones, and Ricasa and former superintendent Gandara—each of whom pled guilty—are competent to testify that they accepted gifts from Mr. Amigable (in the case of Sandoval and Quiñones) and from Mr. Flores (in the case of Gandara and Ricasa) and that these gifts exceeded the dollar value described in their pleas. Likewise, each of the former Board members who voted on the contracts were in position to know and testify from the extensive pattern of a gift-giving that they were provided the gifts with the intent to influence their vote as outlined in their plea narratives. If not, Mr. Amigable and Mr. Flores clearly provide evidence of the intent to influence in their pleas.

Given that each person who pled guilty could competently testify as to the facts set forth in their guilty plea narratives, there is no reason why a court should not consider this evidence as part of the anti-SLAPP screening process to determine whether Sweetwater's case met the requirements of

the minimal merit to proceed forward. What could have greater impact in terms of reliability than a factual basis given for a guilty plea that acknowledges the conduct giving rise to the plea?

Courts have consistently used and relied on guilty pleas. Courts send people to prison based on guilty pleas and the factual bases of such pleas. For example, in *People v. Miles* (2008) 43 Cal.4th 1074, 1082-1083, the court document prepared contemporaneously with the conviction was admitted pursuant to the hearsay exception for contemporaneous official records prepared by public officer charged with that duty. The document described the nature of the prior conviction for official purposes and was deemed relevant and admissible.

In *People v. Lee* (2011) 51 Cal.4th 620, 650-651, this Court held the trial court properly took judicial notice that the defendant had pled guilty to a misdemeanor offense and held that the guilty plea fell within the exception to the hearsay rule for admission of a party. Thus the court properly determined the plea document was not inadmissible hearsay when offer to prove the defendant's involvement in the incident in question. *Id.*

In *People v. Abarca* (1991) 233 Cal.App.3d 1347, 1349, 1351, the plea change transcripts and the statements in the transcripts were deemed admissible under Evidence Code section 1280 and 1220. The court noted the guilty plea was signed under the penalty of perjury, stated the party understood the charges against him and that the records contained declarations against penal interest, thus on their face the documents disclosed nothing inherently unreliable and were admissible. *Id* at 1351.

Here, that the court took judicial notice of the guilty plea forms did not create a hearsay layer. What Gilbane actually attempts to argue is that judicial notice of a hearsay statement is automatically improper as a hearsay declaration, but that is not so. A court taking judicial notice is not making a statement as to the existence of an official record; instead the court is

simply acknowledging that it is undisputed that the document reflected is the record. The guilty pleas are nothing more than a statement made under oath which is memorialized in a writing and are part of a court record.

These guilty pleas are not former testimony as that term is used in Evidence Code §§ 1290-1292. As noted in the Law Revision Commission Comments to section 1290, "[t]he purpose of Section 1290 is to provide a convenient term for use in the substantive provisions in the remainder of this article." See 7 Cal.L.Rev.Com. Reports 1 (1965), § 1290. Former testimony refers to testimony offered in an action or proceeding in which the testimony was given, and the party against whom the former testimony is offered had the right to cross examine the declarant with an interest and motive similar to that which they had at the hearing. Evid. Code §1291(a).[6] These substantive provisions provide that the former testimony is not made inadmissible under the hearsay rule if the declarant is unavailable as a witness and that such testimony maybe read in lieu of live testimony. *Id.* This is fundamentally different than the use of an affidavit in an anti-SLAPP motion as permitted by CCP §§ 2009 and 2015.5.

F. The Grand Jury Testimony Is Also The Functional Equivalent of An Affidavit/Declaration And It Is Not Subject to Preclusion.

Another premise of Petitioner's contention is that the Appellate Court wrongly decided that the grand jury testimony could be considered the functional equivalent of a declaration, arguing it was former testimony lacking the foundational showing that the witnesses who gave the testimony were "unavailable". The Court of Appeal logically held that:

> Although the transcripts of the grand jury testimony are hearsay, and therefore inadmissible at trial unless they meet

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[6] Evidence Code 1292 permits the introduction in civil action against a stranger to the prior action where the party in which the prior testimony was given had the right and opportunity to cross-examine the declarant.

> an exception to the hearsay rule, the transcripts are of the same nature as a declaration in that the testimony is given under penalty of perjury. The grand jury transcripts, like the plea forms and the factual narratives incorporated into those forms, may be used in the same manner as declarations for purposes of motion practice.

Sweetwater, supra, 245 Cal.App.4th at 38.

In other words, the grand jury testimony is simply a statement made under oath which can be used in the same manner as an affidavit or declaration permitted in motion practice. Nothing in the anti-SLAPP statute precludes relevant evidence that is consistent with accepted motion practice. Such evidence has exactly the same force and effect under CCP § 2002 as an affidavit since that provision provides that testimony by oral examination is an equivalent to "affidavit" as a manner in which testimony may be taken. Nothing in § 2002 requires cross-examination as a requirement of taking testimony, although that could affect its admissibility at trial.

Further, Petitioner does not dispute that the grand jury statements were made under oath; instead Petitioner's objection is predicated upon the characterization of the grand jury statements under oath as former testimony. Apparently the foundational argument is that because it was testimony not given in the present proceeding, it somehow transmutes into former testimony subject to hearsay objection. Not so.

In its opinion, the Court of Appeal found that the Petitioner confused a rule regarding an exception to the introduction of hearsay testimony at trial with the use of affidavits or declarations in a pretrial setting, such as an anti-SLAPP motion. Petitioner's argument exalts form over substance and was appropriately given short shrift by the Court of Appeal. Petitioner has not made any substantive, credible argument that the individuals testifying under oath in the grand jury could or would not likewise testify to what is

contained in the grand jury transcript treated as an affidavit.[7] Thus these transcripts are admissible in opposition to this motion.

G. The Grand Jury Transcripts Were Not Offered Or Admitted As Former Testimony.

The substantive provisions of Evidence Code sections 1291 and 1292 allow former testimony to be admitted at trial as an exception to the rule against hearsay in three different types of situations. Evidence Code Section 1291 deals with former testimony of an unavailable witness when offered against the person who was party to the former proceeding. Evidence Code Section 1292(a) permits the introduction, in a civil action only, of former testimony of an unavailable witness given in a prior action against a stranger to that prior action where the party to the action or proceeding in which the former testimony was given had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which the party against whom the testimony is offered has at the hearing.

These former testimony provisions are premised on the notion that the lack of opportunity to cross-examine the declarant in the second proceeding is not applicable because the present opponent is the party who offered the testimony in the former proceeding or because that party had the opportunity to cross-examine the declarant earlier with the same or similar motive. The basis of the former testimony hearsay exception's requirement of unavailability is premised on the fact that cross examination is a valuable

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[7] As the Court of Appeal noted, Gilbane made no argument on appeal that the transcripts of the grand jury testimony were not what they purport to be, nor that the trial court erred in considering this evidence on the grounds that it was not properly authenticated. The Court of Appeal noted Defendants appeared to accept that the documents used as exhibits during the grand jury testimony can be properly authenticated and therefore, excepted from the hearsay rule under Evidence Code Section 1271 by that testimony. See *Sweetwater, supra,* 246 Cal.App.4th at p. 38, fn. 21 and p. 41 fn. 24.

right and that the judge or jury should, if possible, "obtain the elusive and incommunicable evidence of witness deportment while testifying." 1 Witkin, Cal. Evid. (June 2016 update) Hearsay, § 258 [citing *Blache v. Blache* (1951) 37 Cal.2d 531, 533].

Because the Legislature provides that anti-SLAPP motions are to be decided using affidavits (which themselves are not subject to cross-examination), the fundamental premise behind the former testimony hearsay exception simply does not apply in this pretrial setting. At an anti-SLAPP hearing, the court does not weigh the credibility or comparative strength of evidence, thus the "elusive and incommunicable evidence of a witness's deportment while testifying" is not a consideration at the anti-SLAPP hearing.

In reaching its conclusion that the trial count properly considered the transcripts of the grand jury testimony of Amigable, Flores and Ortiz[8] and former Sweetwater representatives Wright, Leyba, Husson, Mercado, and Munoz, the Appellate Court found them to be materially indistinguishable from declarations, relying on *Williams v. Saga Enterprises, Inc.* (1990) 225 Cal.App.3d 142. In doing so, the Appellate Court examined the decision in *Gatton v. A.P. Green Services, Inc.* (1998) 64 Cal.App.4th 688, 694 which disagreed with the *Williams*' court conclusion that the testimony from the defendant employees' criminal trial was admissible in opposition to a motion for summary judgement because "the effect of" the testimony of the witness was "the same as would be a declaration" supplied by the same witness. See *Gatton, supra*, 64 Cal.App.4th at p. 693-695; cf. *Williams, supra,* 225 Cal.App.3d at p. 149.

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[8] The Appellate Court mistakenly referred to Ortiz as an employee of Sweetwater. He was a Program Manager for SGI, a Joint Venture partner; 4 AA 976 at p. 449:21-450:7.

Gatton involved the use of depositions offered in a summary judgement motion and discussed the *Williams* holding regarding the former testimony hearsay exception. The depositions from unrelated cases in *Gatton* were offered as "affidavits," and in disagreeing with *Williams*, the *Gatton* court opinion makes reference to the following statement in *Williams*:

> The court added a footnote: "Such testimony [from the underlying criminal trial] could not be received in this case over hearsay objection on the ground that it is admissible under the 'former testimony' exception. Under Evidence Code Section 1292, subdivision (a), it is required that the declarant (ie., Mr. Nolan) be unavailable as a witness. No such showing is made here. However, inasmuch as the recorded testimony was offered in support of the opposition to a summary judgement motion and serves effectively as a declaration by Mr. Nolan, we treat it here as such." (*Ibid.*, fn. 3.)
>
> We cannot abide *Williams's* disregard of the statute. Summary judgment is based on all the evidence set forth in the papers "except that which objections have been made and sustained." (§ 437c, subd. (c)). The statute does also direct that "[e]videntiary objections not made at the hearing shall be deemed waived" (*id.*, subd. (b)), and it would appear from the opinion that the restaurant's lack of authority or argument may have constituted a waiver justifying use of the trial transcript for motion purposes, or that failure to pursue the arguments with proper briefing on appeal was also a waiver. (*Biljac Associates v. First Interstate Bank, supra*, 218 Cal.App.3d 1410, 1422.) But these were not the reasons given in *Williams,* and for *Williams* to suggest that a proper objection would have been meritless simply guts the summary judgment statute and the Evidence Code. No case of which we are aware has ever cited *Williams* for that proposition.

Gatton, supra, 64 Cal.App.4th at p. 694. This statement in *Gatton* is an unfortunate mischaracterization of *Williams*. What *Williams* was referring

to was if there was an intent to offer earlier testimony at trial, that testimony would need to meet the former testimony exception, including a showing of the declarant's unavailability. But this is not the same as testimony offered in an affidavit. All testimony in an affidavit would arguably be inadmissible at trial.

Accurately referenced, *Williams* states: "While the reporter's transcript is from another case, the effect of the examination made of Mr. Nolan is the same as would be a declaration supplied by him in this case." *Williams*, *supra*, 225 Cal.App.3d at 149. Footnote 3 then states:

> Such testimony could not be received in this case over a hearsay objection on the ground that it is admissible under the "former testimony" exception. Under Evidence Code section 1292, subdivision (a), it is required that the declarant (i.e., Mr. Nolan) be unavailable as a witness. No such showing is made here. However, inasmuch as the recorded testimony was offered in support of the opposition to summary judgment motion and serves effectively as a declaration by Mr. Nolan, we treat it here as such.

Id. at 149, fn. 3.

Therefore, *Williams* simply acknowledged that *if the transcript* of the testimony were offered at trial in lieu of that witness' actual trial testimony, then it would have to meet the former testimony exception, but because of the nature of the proceedings then present in *Williams*, it would suffice as an affidavit. That is correct.

Evidence Code Section 1292 governs the use of prior testimony as substantive evidence at trial, in place of live testimony. At trial, there is a need of the "unavailability" safeguard because the witness' former testimony read to the jury is not subject to cross examination at that trial. Here, for purposes of supporting or opposing a pretrial anti-SLAPP motion, the witnesses' demeanor and comportment is not at issue, as the only

question for the court at this second prong is whether relevant and competent evidence supports the plaintiff's claims.

As pointed out by the *Sweetwater* Court of Appeal, the *Gatton* court took the summary judgment standard that an affidavit must show—that if sworn as a witness, the individual can testify competently to the evidentiary fact stated in the affidavit—and transmuted that into a requirement that the party provide some assurances that the witness would actually testify at trial in the case at issue. The *Sweetwater* Court of Appeal noted that *Gatton* stated "there are questions whether the witness, even if alive, *can testify competently* to the deposition's contents," and that "[i]n our record, we also have only a representation by counsel that the witness [ ] was 'still alive,' *not that he was well enough or willing to testify*." *Sweetwater, supra*, 245 Cal.App.4th at p. 40 [citing *Gatton, supra*, 64 Cal.4th at p. 696].

As was noted above, the affidavit/declaration standard for summary judgment motions is higher than the standard for other motions. CCP §437c (d) requires "supporting and opposing affidavits or declarations shall be made by a person on personal knowledge shall set forth the admissible evidence, and show affirmatively that the affiant is competent to testify to the matters stated in the affidavits or declarations." Thus, even these higher requirements for a witness declaration submitted on a summary judgment motion do not require either that the declarant state that he or she **would** so testify at trial if called in this action or that the witness demonstrate his or her **competency**, but rather, the witness is required to provide proper foundation for his/her testimony and demonstrate that the testimony is based on the declarant's own firsthand knowledge such that the witness could provide competent testimony.

Mr. Flores, the CEO of SGI, a Joint Venture partner, Mr. Amigable, the former Project Manager of Gilbane and Jaime Ortiz, a Joint Venture Program Manager all testified at the grand jury. Petitioner has never

contended they were not competent based on firsthand knowledge to testify as to the gifts they provided and, indeed they most certainly were.

While the Court of Appeal in *Sweetwater* appears to have been the first California court to hold the contents of grand jury transcripts can be used as evidence in a pretrial motion, other courts have come to this same conclusion. For example, in *Arceo v. City of Junction City, Kansas* (2002) 182 F.Supp.2d 1062, 1080-1081, several defendants objected to the use of grand jury testimony at the summary judgement stage, arguing that the use of such grand jury testimony was improper because the parties did not have an opportunity to cross examine the witnesses. The Court in *Arceo* noted that the defendants are in the "same position they would have been had *Arceo* filed an affidavit" reflecting the same information which was signed by the witnesses. *Id.* at p. 1080. Because the defendants would have not had the opportunity to cross-examine an affiant, their inability to cross-examine the witnesses during the sworn grand jury testimony did not result in prejudice. *Id.* That courts would allow the use of sworn criminal grand jury testimony in a pre-trial motion setting should not be controversial. After all, the indices for the reliability of such testimony are particularly high, given the very real consequences of lying to a grand jury.

Lastly, the practical reality of this situation should not be overlooked. When an anti-SLAPP motion is filed, an immediate discovery stay goes into effect. As soon as Gilbane filed its motion here, Sweetwater was faced with a situation in which persons already represented by criminal lawyers who pled guilty to criminal offenses were unlikely to cooperate and sign declarations for Sweetwater's anti-SLAPP opposition. In addition, the key grand jury witnesses were either current or former executives/employees of the defendants who were not going to provide Sweetwater with declarations it could use to defeat the current or former

employer's anti-SLAPP motion, void the contracts, and obtain millions of dollars from the companies.

Imposing an "unavailability" requirement under the circumstances and excluding the grand jury testimony would be to ignore facts that clearly exist, facts that witnesses could competently testify to, and fact which, if excluded, would indeed impose a barrier to the enforcement of civil laws against public corruption. That cannot be the outcome here.

H. There Has Been A *Prima Facie* Showing That The Former Superintendent And Former Board Members Who Voted On The Contracts Were Corrupted By A Pervasive Pattern Of Lavish Gift-Giving By Defendants, Which Voids The Contracts At Issues Pursuant To The Express Terms And Purpose Of Government Code § 1090.

Section 1090 confirms that the duties of public office demand absolute loyalty and undivided allegiance from the individual who holds that office. *Thomson v. Call* (1985) 38 Cal.3d 633, 648. In *Lexin v. Superior Court* (2010) 47 Cal.4th 1050, this Court explained the purpose of Section 1090:

> The common law rule and section 1090 recognize "[t]he truism that a person cannot serve two masters simultaneously."..."The evil to be thwarted by section 1090 is easily identified: If a public official is pulled in one direction by his financial interest and in another direction by his official duties, his judgment cannot and should not be trusted, even if he attempts impartiality." Where public and private interests diverge, the full and fair representation of the public interest is jeopardized.
>
> Accordingly, section 1090 is concerned with ferreting out any financial conflicts of interest, other than remote or minimal ones, that might impair public officials from discharging their fiduciary duties with undivided loyalty and allegiance to the public entities they are obligated to serve. Where a prohibited interest is found, the affected contract is void from its inception and the official who engaged in its making is subject to a host of civil and (if the violation was willful) criminal penalties, including imprisonment and disqualification from holding public office in perpetuity.

Id. at 1073, citations omitted.

As stated in *Lexin*, Section 1090 is interpreted liberally to prohibit any form of self-dealing, and the statute cannot be given a narrow and technical interpretation that would limit its scope and defeat the legislative purpose. That the interest "might be small or indirect is immaterial so long as it deprives the [people] of his overriding fidelity to [them] and places him in the compromising situation where, in the exercise of his official judgment or discretion, he may be influenced by personal considerations rather than the public good." *Lexin, supra*, 47 Cal.4th at p. 1075.

Properly understood, section 1090 stands as a prophylactic against the temptations that might corrupt or influence public officials. *Carson Redevelopment Agency v. Padilla* (2006) 140 Cal.App.4th 1323, 1330; *Thomson, supra,* 38 Cal.3d at p. 648, 652. Section 1090 attempts to prevent honest government officials from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with temptation. "It follows from the goals of eliminating temptation, avoiding the appearance of impropriety, and insuring the city of the officers' undivided and uncompromising allegiance that the violation of Section 1090 cannot turn on the question of whether actual fraud or dishonesty was involved. Nor is any actual loss to the city or public agency necessary for a Section 1090 violation." *Carson Redevelopment Agency, supra,* 140 Cal.App.4th at p. 1330.

Courts have held that prohibited financial interests are not limited to express agreements for benefits and in fact need not be established by direct evidence. Instead, such forbidden interests extend to the expectation of benefit arising from the express and implied agreement inferred from the

surrounding circumstances.[9] *Thomson, supra*, 38 Cal.3d at p. 645; *People v. Deysher* (1943) 2 Cal.2d 141, 149-150; *Hub City Solid Waste Services, Inc. v. City of Compton* (2010) 186 Cal.App.4th 1114, 1127-1128.

The evidence submitted in opposition to this anti-SLAPP motion—the plea forms detailing the guilty and no contest pleas by the various former Sweetwater officials and former and current employees of the defendants, as well as the grand jury testimony of individuals involved—is both circumstantial and direct evidence from which one can reasonably conclude the gifts and contributions were made in order to sway the Board members to vote favorable in awarding the contracts to Gilbane and the Joint Venture. The grand jury testimony establishes that the gifts were given before any discussions of the contracts began and when there was new legislation that authorized new Proposition O funding for school construction at Sweetwater. The former superintendent recommended the removal of a "no contact" clause in the Request For the Proposals for the Proposition O program management services contract while both he and Board member Sandoval were being treated to tickets to the San Diego Charger football games as well as an extravagant dinner that cost $1,416.08. More expensive dinners for Board members and more tickets to athletic events occurred just before the former superintendent recommended that Gilbane and SGI be provided the program management services for the Proposition O bond money over the prior program manager

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[9] In an apropos and tongue in cheek analogy, the Court in *U.S. v. Blagojevich* (7th Cir. 2015) 794 F.3d 729, 738 notes as follows: "Few politicians say, on or off the record, 'I will exchange official act X for payment Y.'... 'Nudge, nudge, wink, wink, you know what I mean' can amount to extortion under the Hobbs Act, just as it can furnish the gist of a Monty Python sketch." *Id.*

whose work quality, according to Katy Wright, was very good while managing the Proposition BB projects.

The staging of the contracts—with the approval of an interim program management agreement and program management contract to complete the proposition BB projects before the award of the first permanent contract—coincided with even more elaborate dinners and theatre tickets. The first permanent contract was approved on January 28, 2008. Immediately preceding it and on New Year's Eve weekend 2007, members of the Joint Venture treated superintendent Gandara and Board member Sandoval as well as their families to a weekend in Pasadena to celebrate the Rose Bowl. SGI provided dinner at the Twin Palms Restaurant in Pasadena, hotel suites at the Los Angeles Biltmore Hotel, tickets to the Rose Bowl Parade, as well as nine Rose Bowl tickets.

Before a three paged amendment which expanded the program management contract to include "construction services" for which the Joint Venture ultimately received an additional seven million dollars, there were more dinners at expensive restaurants and discounted plane tickets. The reward and payouts following the award of the contracts included a trip for the former superintendent and his wife which included plane tickets to northern California, three nights hotel accommodations, multiple wine tastings and a hot air balloon ride that cost $245 per person. See citations to the evidence at II B of the Answering Brief. As the Appellate Court below noted,

> It is not necessary for us to determine whether a plaintiff asserting a Section 1090 claim must demonstrate the existence of a quid pro quo arrangement in every instance, because we conclude that even if such a showing is required, Sweetwater presented evidence from which one could reasonably infer that a quid pro quo arrangement existed, even if there is no direct evidence that the parties explicitly discussed such an arrangement.

> The evidence of the plea forms detailing the guilty and no contest pleas by various former Sweetwater officials and former employees of defendants, as well as the grand jury testimony of a number of the individuals involved, is circumstantial evidence from which one could reasonably conclude that the gifts and contributions were made in order to sway the board members to vote in favor of awarding contracts to Gilbane and the Joint Venture.

Sweetwater, supra, 245 Cal.App.4th at 50. This court should confirm that Sweetwater has made a *prima facie* showing that the loyalty and allegiances of the former superintendent and former board members who voted on the contracts in their capacity as public officials was wrongfully corrupted when these individuals accepted the defendants' lavish gifts, in violation of Gov't Code § 1090.

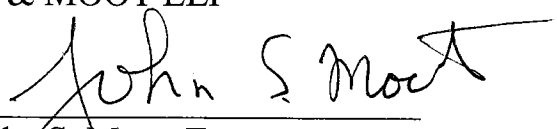
V. CONCLUSION

The *prima facie* showing of the facts sufficient to sustain a judgment in favor of Sweetwater is extensive. The actions of Petitioner illustrate how the intended targets of corruption, whose influence peddling resulted in criminal convictions, are attempting to use a statute intended to protect the exercise of First Amendment rights as a shield for their own misconduct. They use the cost and consequences of the anti-SLAPP statute to intimidate and bludgeon while wrapping themselves in a perverse interpretation of the law. Indeed, Petitioner's request that this Court look the other way and ignore critical facts would turn the use of the anti-SLAPP statute upside down protecting a large government contractor at the expense of the law abiding administrators, teachers, parents and school children of the

Sweetwater Union High School District, who are the very real victims in this case.

Dated: October 20, 2016

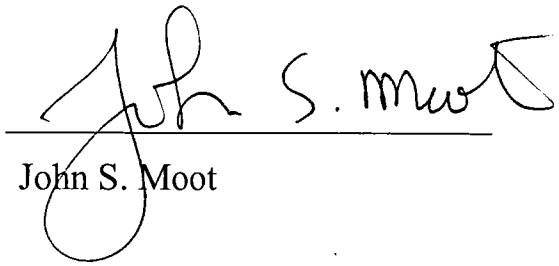
Respectfully submitted,
SCHWARTZ SEMERDJIAN
CAULEY & MOOT LLP

By: 

John S. Moot, Esq.
Sarah Brite Evans, Esq.
Alison K. Adelman, Esq.
Attorneys for Sweetwater
Union High School District

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.504(d)(1) of the California Rules of Court, I hereby certify that this brief contains 13,188 words including footnotes in size 13 font Times New Roman. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

By: 

John S. Moot

PROOF OF SERVICE

Sweetwater Union High School District
v.
Gilbane Building Company, et al.,

IN THE SUPREME COURT OF CALIFORNIA
Supreme Court Case No. S233526
Court of Appeal, Fourth Appellate District, Division One Case No. D067383
San Diego Superior Court Case No. 37-2014-00025070-CU-MC-CTL

I, Allison Haraguchi, declare as follows: I am employed in the City and County of San Diego, California. I am over the age of 18 and not a party to the within action. My business address is 101 W. Broadway, Suite 810, San Diego, California 92101.

On October 20, 2016, I served the foregoing document(s) described below as:

ANSWERING BRIEF ON THE MERITS

[_x_] (BY MAIL) By placing the envelope for collection and mailing following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is place for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

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

Executed on October 20, 2016, at San Diego, California.

Allison Haraguchi

SERVICE LIST

Charles A. Bird, Esq. Christian D. Humphreys, Esq. DENTONS US LLP 4655 Executive Drive, Suite 700 San Diego, CA 92121 Charles.bird@dentons.com Chris.huphreys@dentons.com	Attorneys for Gilbane Building Company and Gilbane/SGI Joint Venture
San Diego Superior Court Central Division Hon. Eddie C. Sturgeon Dept. 67 330 West Broadway San Diego, CA 92101	
Court of Appeal Fourth District Division One 750 B Street, Suite 300 San Diego, CA 92101	
James A. Ardaiz BAKER MANOCK & JENSEN, PC 5260 North Palm, Suite 421 Fresno, CA 93704 jardaiz@bakermanock.com	Attorneys for Sweetwater Union High School District