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UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

NEWPORT BUILDERS, INC., a Nevada  
Corporation,

Plaintiff,

vs.

NORTH BAY CONSTRUCTION, INC., a  
California corporation,

Defendant.

Case No: C 09-0184 SBA

**ORDER DENYING DEFENDANT'S  
MOTION TO STRIKE PLAINTIFF'S  
FIRST AMENDED COMPLAINT**

[Docket 32, 55]

The instant diversity jurisdiction action involves a business dispute between Plaintiff, Newport Builders, Inc. ("Plaintiff"), and Defendant, North Bay Construction, Inc. ("Defendant" or "North Bay Construction"). See 28 U.S.C. § 1332. The parties are presently before the Court on (1) Defendant's Motion to Strike Plaintiff's First Amended Complaint (Docket 32) and (2) Plaintiff's Motion to Strike Reply to Opposition (Docket 55). Having read and considered the papers filed in connection with this matter, and being fully informed, the Court hereby DENIES the motion to strike for the reasons set forth below. In view of this ruling, the motion to strike the reply is DENIED as moot. The Court, in its discretion, finds this matter suitable for resolution without oral argument. See Fed.R.Civ.P. 78(b).

1 **I. BACKGROUND**

2 **A. OWNERSHIP STRUCTURE OF FOUNTAINVIEW #3 INVESTORS, LP**

3 The underlying facts of this case are convoluted and complicated.<sup>1</sup> However, they may be  
4 fairly summarized as follows. The case arises from a state court lawsuit concerning the  
5 construction of an 800-acre residential development known as “Fountainview,” located in Santa  
6 Rosa, California. See DeAngelis v. Fountainview #3 Investors L.P., Sonoma County Super. Ct.,  
7 Case No. SCV-230086, SCV 230178, SCV 236263 (“the Underlying Action”). Fountainview was  
8 developed by Marvin DeAngelis (“DeAngelis”), DeAngelis Construction, Inc., Gary Pope and  
9 DeAngelis-Pope, a general partnership.

10 The Fountainview development was divided into three units or phases. Prior to  
11 construction, DeAngelis sold Unit 3 of Fountainview, consisting of 30 residential units, to an  
12 investment partnership known as Fountainview No. 3 Investors (“Fountainview Investors”).  
13 Fountainview Investors was organized as a limited partnership, with Newport Builders LP as its  
14 *general partner*. The *limited partners* of Fountainview Investors were DeAngelis Construction and  
15 Gary Pope.

16 Newport Builders LP, also is a limited partnership. Its general partner is Newport Builders,  
17 Inc., which is controlled by Gene Lenzi (“Lenzi”). Defendant North Bay Construction originally  
18 was a limited partner of Newport Builders LP. Specifically, Defendant had invested \$500,000 in  
19 Fountainview Investors and obtained a 40 percent equity stake therein. In exchange, it became  
20 entitled to priority in any distributions by Fountainview Investors. John Barella and Nick Rado are  
21 the President and Vice President, respectively, of Defendant.

22 **B. THE UNDERLYING STATE COURT ACTION**

23 On June 4, 2002, the limited partners of Fountainview Investors, led by DeAngelis, sued the  
24 partnership and Newport Builders LP. Specifically, DeAngelis, DeAngelis Construction, Inc.,  
25 Gary Pope (collectively “DeAngelis Plaintiffs”) alleged causes of action against Newport Builders  
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27 <sup>1</sup> The Court notes that both parties have submitted extensive declarations and ancillary  
28 filings in connection with the instant motion, much of which contain inapposite information and  
documentation. In the future, the parties should endeavor to focus their briefs and supporting  
documents specifically to the issues before the Court.

1 LP and Fountainview Investors (collectively “Newport Defendants”) for dissolution of partnership,  
2 account and injunctive relief (“the Underlying Action”).

3 On July 22, 2002, the Newport Defendants filed a cross-complaint against the DeAngelis  
4 Plaintiffs for breach of contract, deceit, breach of fiduciary duty, intentional interference with  
5 prospective economic advantage, unfair business practices, disassociation of partnership and  
6 duress. The Newport Defendants also alleged a claim for professional negligence against an  
7 engineering firm, RGH.

8 In response to the Newport Defendants’ cross-complaint, RGH filed its own cross-  
9 complaint against Defendant and others for declaratory relief, and for contribution and indemnity  
10 against the DeAngelis Plaintiffs. In turn, the DeAngelis Plaintiffs filed a cross-complaint against  
11 Defendant for indemnity and contribution.

12 Defendant eventually was dismissed from each of the aforementioned cross-complaints.  
13 Though no longer a party to the Underlying Action, Defendant voluntarily became involved in the  
14 settlement negotiations between the remaining parties, DeAngelis Plaintiffs and the Newport  
15 Defendants. In the course of those discussions, Defendant made an offer to Lenzi to sell its interest  
16 in Newport Builders LP for \$500,000, the amount of its initial capital contribution. Lenzi claims  
17 he agreed. (Lenzi Decl. ¶ 6.) Allegedly unbeknownst to Lenzi, however, Defendant also made the  
18 same offer to the DeAngelis Plaintiffs. According to Defendant, whichever party acted first would  
19 have the deal.

20 On March 17, 2008, the remaining parties to the Underlying Action appeared in state court  
21 for trial, at which time it was agreed they would pursue further settlement discussions beginning  
22 the next day. (Lenzi Decl. ¶ 12.) However, before those discussions commenced, Lenzi learned  
23 that Defendant already had entered into the aforementioned deal with the DeAngelis Plaintiffs. (Id.  
24 ¶ 12.) This suit followed.

25 **C. SUMMARY OF THE INSTANT ACTION**

26 On January 14, 2009, Plaintiff filed the instant action against Defendant North Bay  
27 Construction. The Complaint alleges six state law causes of action for: (1) breach of partnership  
28 agreement; (2) breach of the implied covenant of good faith and fair dealing; (3) breach of oral

1 contract; (4) intentional interference with prospective economic advantage; (5) disassociation of  
2 North Bay from Newport Builders LP; and (6) dissolution and winding up of Newport Builders LP.  
3 In response to the Complaint, Defendant has filed an anti-SLAPP motion to strike, pursuant to  
4 California Code of Civil Procedure section 425.16. The motion is predicated on the notion that the  
5 conduct at issue is based on the communication of a settlement offer, which Defendant contends  
6 constitutes “protected activity” for which it cannot be held liable.

## 7 **II. LEGAL STANDARD**

8 In 1992, California enacted an anti-SLAPP statute, Code of Civil Procedure section 425.16,  
9 to provide a procedure for a court “to dismiss at an early stage nonmeritorious litigation meant to  
10 chill the valid exercise of the constitutional rights of freedom of speech and petition in connection  
11 with a public issue.” Sipple v. Foundation for Nat’l Progress, 71 Cal. App. 4th 226, 235 (1999).  
12 This type of nonmeritorious litigation is referred to under the acronym “SLAPP,” or Strategic  
13 Lawsuit Against Public Participation. Id. The archetypal SLAPP complaint is a “generally  
14 meritless suit[ ] brought by large private interests to deter common citizens from exercising their  
15 political or legal rights or to punish them for doing so.” Wilcox v. Sup. Ct., 27 Cal. App. 4th 809,  
16 816 (1994). “California enacted section 425.16 to provide a procedural remedy to resolve such  
17 a suit expeditiously.” Dowling v. Zimmerman, 85 Cal. App. 4th 1400, 1414 (2001) (internal  
18 quotation marks and citation omitted).

19 When a plaintiff brings a SLAPP complaint, the defendant may move to strike the  
20 complaint under section 425.16. Cal. Code of Civ. Proc. § 425.16(f). “Analysis of an anti-SLAPP  
21 motion to strike involves a two-step process.” Kearney v. Foley & Lardner, LLP, 566 F.3d 826,  
22 836 (9th Cir. 2009). First, the defendant must make an initial *prima facie* showing that plaintiff’s  
23 suit arises from an act in furtherance of defendant’s right of petition or free speech. Braun v.  
24 Chronicle Publishing Co., 52 Cal. App. 4th 1036, 1042-43 (1997). Second, “[i]f the court  
25 determines that the defendant has met this burden, it must then determine whether the plaintiff has  
26 demonstrated a probability of prevailing on the merits.” Kearney, 566 F.3d at 836-37; Damon v.  
27 Ocean Hills Journalism Club, 85 Cal. App. 4th 468, 474 (2000). If the plaintiff is unable to  
28 provide the factual and legal support for the challenged cause of action, the complaint should be

1 stricken. Code Civ. P. § 425.16(b); Dowling, 85 Cal. App. 4th at 1417. In reviewing a motion  
2 under section 425.16, “the trial court is required to consider the pleadings and the supporting and  
3 opposing affidavits stating the facts upon which the liability or defense is based.” Church of  
4 Scientology v. Wollersheim, 42 Cal. App. 4th 628, 646 (1996).

### 5 **III. DISCUSSION**

6 The threshold question presented is whether the conduct forming the basis of Plaintiff’s  
7 claims constitutes “protected activity” within the meaning of section 425.16. The activities  
8 protected under the anti-SLAPP statute are: (1) written or oral statements made before a legislative,  
9 executive, or judicial proceeding; (2) *written or oral statements made in connection with an issue*  
10 *under consideration or review by a legislative, executive, or judicial body*; (3) written or oral  
11 statements made in a place open to the public or in a public forum in connection with an issue of  
12 public interest; or (4) any other conduct in furtherance of the exercise of the constitutional rights of  
13 petition or free speech in connection with a public issue or an issue of public interest. Cal.Code  
14 Civ. P. § 425.16(e). Whether a cause of action arises from protected activity depends upon its  
15 principal thrust or gravamen. In re Episcopal Church Cases, 45 Cal .4th 467, 477 (2009). “[T]he  
16 critical point is whether the plaintiff’s cause of action [is] based on an act in furtherance of the  
17 defendant’s right of petition or free speech.” City of Cotati v. Cashman, 29 Cal. 4th 69, 78 (2002).  
18 “[A] defendant in an ordinary private dispute cannot take advantage of the anti-SLAPP statute  
19 simply because the complaint contains some references to speech or petitioning activity by the  
20 defendant.” Martinez v. Metabolife Int’l, Inc., 113 Cal. App. 4th 181, 188 (2003).

21 Defendant argues that Plaintiff’s claims are based on its role as “an active participant in the  
22 judicial proceedings in the underlying case”; to wit, Defendant’s interaction with DeAngelis and  
23 Lenzi, who both allegedly solicited its assistance in resolving the remaining claims in the  
24 Underlying Action. (Mot. at 8-9.) In particular, Defendant asserts that its assistance in helping to  
25 resolve the Underlying Action is “protected activity” because it relates to settlement discussions  
26 connected to a judicial proceeding. (Id.) In support of its position, Defendant relies on Gene Thera  
27 v. Troy & Gould Prof. Corp., 171 Cal. App. 4th 901 (2009), where the California Court of Appeal  
28

1 held that an attorney’s communication of a settlement offer on behalf of its client, constituted  
2 “protected activity” under the anti-SLAPP statute. *Id.* at 908.

3 In Gene Thera, Laura Bryan and others were defendants in an action filed against them by  
4 M.A.G. Capital and related entities (“MAG”). MAG was represented by the law firm Troy &  
5 Gould (“TG”), while Ms. Bryan and her co-defendants were represented by attorney Shoemaker.  
6 TG made a settlement offer to Shoemaker in which MAG would dismiss its case against her with  
7 prejudice in exchange for Ms. Bryan’s agreement to cooperate with MAG during the litigation. In  
8 response, Bryan’s co-defendants sued TG and MAG, alleging that the settlement offer was  
9 intended to create a conflict of interest so that Shoemaker could no longer represent any of them in  
10 the MAG action. They alleged causes of action for intentional interference with contractual  
11 relations and negligence.

12 Respondents, TG and MAG, filed a special motion to strike the complaint as a SLAPP  
13 action, contending the causes of action asserted against them were based on protected activity, i.e.,  
14 the communication of the settlement offer. The trial court agreed and granted the motion and  
15 struck the complaint. The Court of Appeal affirmed. *Id.* at 907. In reaching its decision, the court  
16 explained that “statements and writings made in connection with litigation” generally are covered  
17 by the anti-SLAPP statute. *Id.* at 907. Reviewing the basis of the plaintiffs’ causes of action, the  
18 court then found that they were “based on TG’s communication of *an offer to settle the ongoing*  
19 *lawsuit*, a matter connected with issues under consideration or review by a judicial body.” The  
20 court concluded that “[a]n attorney’s communication with opposing counsel on behalf of a client  
21 regarding pending litigation directly implicates the right to petition and thus is subject to a special  
22 motion to strike.” *Id.* at 908 (emphasis added, footnotes omitted).

23 Defendant attempts to analogize its involvement in the settlement discussions between the  
24 DeAngelis Plaintiffs and the Newport Defendants to TG’s act of communicating the settlement  
25 offer on behalf of MAG. That analogy is misplaced. The Gene Thera court unequivocally held  
26 that the protected activity in that case was *the attorney’s act of communicating a settlement offer to*  
27 *opposing counsel on behalf of its clients*. No such communication occurred here. Defendant was  
28 neither acting as legal counsel nor was it communicating a settlement offer on behalf of anyone, let

1 alone itself. In addition, Defendant was no longer a party to the case since it previously had been  
2 dismissed, and thus, had no claims of its own to settle. As such, Defendant's voluntary  
3 involvement with the DeAngelis Plaintiffs and the Newport Defendants, by definition, was not  
4 protected activity.

5 The record demonstrates that Defendant was merely communicating a proposed business  
6 deal, not an offer to settle its own claims. That the Defendant's offer was made while the  
7 DeAngelis Plaintiffs and the Newport Defendants were engaged in efforts to resolve *their* dispute  
8 does not cloak Defendant's communications under the auspices of protected activity. Any  
9 connection between Defendant and the ongoing settlement discussions between the DeAngelis  
10 Plaintiffs and the Newport Defendants was, at best, tangential to the litigation, and otherwise too  
11 attenuated to establish that Defendant was engaged in protected activity. See Martinez v.  
12 Metabolife Internat., Inc., 113 Cal. App. 4th 181, 188 (2003) ("collateral allusions to protected  
13 activity should not subject the cause of action to the anti-SLAPP statute."); see also Cohen v.  
14 Brown, 173 Cal. App. 4th 302, 316 (2009) ("That a cause of action arguably may have been  
15 triggered by protected activity does not entail that it is one arising from such.") (internal quotations  
16 and citation omitted).<sup>2</sup>

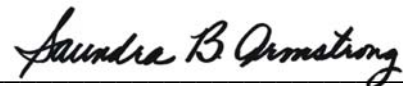
17 **IV. CONCLUSION**

18 For the reasons stated above,

19 IT IS HEREBY ORDERED THAT Defendant North Bay Construction, Inc.'s Motion to  
20 Strike Newport Builders Inc.'s First Amended Complaint (Docket 32) and Plaintiff's Motion to  
21 Strike Reply to Opposition (Docket 55) are DENIED.

22 IT IS SO ORDERED.

23  
24 Dated: July 13, 2009



25 Hon. Sandra Brown Armstrong  
26 United States District Judge

27 <sup>2</sup> Since Defendant has failed to demonstrate that the conduct forming the basis of its claims  
28 constitutes protected activity, the burden does not shift to Plaintiff to show a reasonable probability  
that it will succeed on the merits. Also, Defendant's objections to evidence are moot, since this  
decision is not based on any of the ostensibly objectionable evidence.