Case No. C079880
Nevada County Superior Court Case No. CU12-078288

IN THE COURT OF APPEAL OF CALIFORNIA
THIRD APPELLATE DISTRICT

Kathleen Leonard,
Appellant

v.

Retailer's Credit Association of Grass Valley, Inc.,
Respondent.

Appeal from the Superior Court for Placer County
The Honorable Linda J. Sloven, Judge

APPELLANTS' OPENING BRIEF

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May 16, 2016

Certificate of Interested Persons

I hereby certify under penalty of perjury that, to the best of my knowledge and belief, the following "persons" are the only known persons that qualify as "interested" persons:

Kathleen Leonard

Retailer's Credit Association of Grass Valley, Inc.

Dignity Health, dba Sierra Nevada Memorial Hospital

/s/ Patrick H. Dwyer
Patrick H. Dwyer,
Attorney for Appellant

Date: May 16, 2016

Table of Contents

Table of Authorities

Page

California Supreme Court

California Court Of Appeal

Statutes

Federal District Court

Federal Statutes And Regulations

Rules of Court

California Secondary Authorities

I. Introduction, Statement Of The Case, And Issues Presented

This is the third appeal in this case by Kathleen Leonard, the Appellant ("Leonard"). The first appeal was to the Appellate Division of the Nevada County Superior Court ("Appellate Division") to obtain declaratory and injunctive relief against Retailer's Credit Association of Grass Valley, Inc. ("RCA"), a medical debt collection agency and Respondent in this appeal. When RCA sued Leonard for an alleged small medical bill, it attached Leonard's private health information to the complaint. Leonard denied owing the debt and cross complained for declaratory and injunctive because of the revelation of her private health information into the public court record. RCA could have filed a CCP §425.16 motion to strike (hereafter "425 Motion") against Leonard's cross complaint, but did not do so.

The case went to trial and RCA obtained a judgment on its complaint and the court denied any relief on Leonard's cross complaint. RCA filed for a contractual award of attorney's fees (granted) and Leonard filed an appeal.

The Appellate Division decided after extensive briefing and oral arguments that Leonard's private health information had been attached in violation of HIPPA[1] to RCA's action against Leonard. RCA had neither

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[1] The Appellate Division found that under the Health Insurance Portability and Accountability Act of 1996, "HIPPA", Pub.L. 104-191, 110 Stat.1936, 42 USC § 1320d *et seq.*, Leonard's medical records were protected

obtained Leonard's written authorization to disclose the health information or a suitable protective order from the court in violation of the express mandate of HIPPA. It vacated the trial court's decision against Leonard and ordered that her private medical information be placed under seal in the court's files. The case was remanded for a new trial.

Leonard then filed a first amended cross complaint ("FACC") in the Spring of 2014, some two years after her original cross complaint. The causes of action were based upon a 12 year course of conduct whereby RCA systematically ignored HIPPA and attached private health information to the complaints that it filed for medical debt. RCA would routinely obtain more protected health information from SNMH than it needed to collect the medical debts. In Leonard's billing dispute, RCA had very sensitive health information that had nothing to do with the purported debt and threatened Leonard with its disclosure. The allegations of the FACC present more detail.

RCA filed a 425 Motion against the FACC (RCA's Anti-SLAPP Motion") based upon its contention that the FACC was premised upon the same protected activity that Leonard had asserted in her original cross complaint more than two years prior. This motion is the subject of this appeal. RCA

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health information ("PHI") that could not be put into the court's public files without a suitable protective order.

further argued that Leonard could not prevail on the merits of her case because the litigation privilege protected RCA's attachment of the medical health information to the complaint. Leonard objected that RCA's Anti-SLAPP motion was two years late and that RCA's actions were non-communicative conduct not subject to a 425 Motion and not protected by the litigation privilege. The trial court ruled for RCA.

Leonard filed her second appeal based upon her understanding that her FACC was filed as an unlimited action. The trial court refused the notice of appeal and Leonard moved to re-classify the case, but the motion was denied. Leonard then proceed by writ to this Court of Appeal, and after a denial, petitioned for review with the Supreme Court. The Supreme Court issued an OSC to this Court and the matter was then briefed and submitted for decision. This Court issued its decision in *Leonard v. Superior Court* in May 2015, deciding that the FACC had been filed as an unlimited action and that the notice of appeal filed by Leonard on RCA's Anti-SLAPP Motion was timely. This third appeal then proceeded.

Meanwhile, RCA dismissed its original complaint for debt and Leonard filed a Motion for attorney's fees and costs under CC §1717 and CCP §1021.5. RCA opposed on the grounds that there was no prevailing party and that the private attorney general statute was inapplicable. The trial court ruled

against Leonard, denying all fees and costs. Leonard filed an appeal of this ruling.

Leonard's appeal of RCA's Anti-SLAPP Motion and her appeal of the denial of her motion for fees and costs have been consolidated.

The Major Issues Presented

The primary issues for appeal include:

(a) whether RCA's Anti-SLAPP Motion was timely filed over two years after Leonard filed her original cross complaint against RCA's purported "protected activity";

(b) does the FACC's allegations of a 12 year course of wrongful medical debt collection by RCA present a different gravamen than the original cross complaint that is not protected by CCP §425.16;

(c) does the litigation privilege apply to RCA's course of improper medical debt collection practices that is in violation of specific statutes intended to safeguard private health information;

(d) is the public policy of safeguarding private health information served by allowing medical debt collectors to escape enforcement of HIPPA (and similar laws) through use of the litigation privilege;

(e) was Appellant, who won affirmative relief on her cross complaint, the prevailing party against RCA, which took nothing from its debt

action;

(f) did Appellant correctly and timely file a motion for attorney's fees and costs under CC §1717;

(g) Alternatively, is Appellant entitled to a fee award under CCP §1021.5.

II. Chronology Of Pertinent Events

January 6, 2012 – RCA files Complaint for collection of purported medical debt;

February 22, 2012 -- Appellant files an Answer and a Cross Complaint;

March 23, 2012 -- RCA files a general denial to Appellant's Cross Complaint;

June 11, 2012 – Trial in Department 6; Minute Order of trial court (a) denying Appellant's Motion To Close the courtroom to protect confidentiality of her medical information, (b) admitting into evidence RCA's trial Exhibits A-F, (c) finding that RCA prevailed on the Complaint and Cross Complaint;

July 27, 2012 -- Entry of clerk's Judgment in favor of RCA;

August 13, 2012 – Notice of Appeal filed by Appellant;

November 1, 2013 (clarified on January 10, 2014 (CT 3-4)) – Decision of the Appellate Division

January 10, 2014, the case was returned to the trial court

February 28, 2014 – Motion for Leave to file FACC

April 11, 2014 – FACC filed with leave of court

June 6, 2014 – RCA files anti-SLAPP motion against FACC

August 13, 2014 – Notice Of Entry Of Court's Ruling On RCA Anti-

SLAPP motion against the FACC

October 1, 2014 – Appellant files Notice Of Appeal on Court's Ruling on RCA Anti-SLAPP motion

Re-Classify

October 22, 2014 – Appellant files Petition for Mandamus with the Court of Appeal, Third Appellate District

October 30, 2014 – Appellant's Petition for Mandamus to have the case re-classified as unlimited denied.

November 4, 2014 – Appellant files Petition for Review of denial of case re-classification

November 19, 2014 – California Supreme Court issues OSC to Court of Appeal, Third Appellate District

[Case stayed pending decision of Court of Appeal]

November 25, 2014 – Appellant files Motion For Attorney's Fees and Costs against RCA

May 22, 2015 – Court of Appeal, Third Appellate District issues opinion ordering the case to be re-classified and allowing Appellant to file the Notice of Appeal attempted to be filed on October 1, 2014 regarding the granting of RCA's Anti-SLAPP Motion, the subject of this Appeal.

July 31, 2015 – RCA files Motion to Tax Costs

September 14, 2015 – RCA files Opposition to Appellant's Motion For Attorney's Fees and Costs

September 30, 2015 – Trial Court's Ruling on Appellant's Motion for Attorney's Fees and Costs

October 30, 2015 – Appellant files Notice of Appeal regarding Ruling on Motion for Attorney's Fees and Costs

III. Statement of Appealability

A. Appeal Of The Anti-SLAPP Decision

Appellant timely filed her notice of appeal of the trial court's ruling granting Respondent's anti-SLAPP motion striking Appellant's FACC. *Leonard v. Superior Court* (2015) 237 Cal App 4th 34.

B. Appeal Of The Denial Of Appellant's Motion For Attorney's Fees And Costs

The trial court denied Appellant's Motion for attorney's fees and costs, Supplemental Clerk's Transcript ("SCT") 6-11, on September 30, 2015. The Notice of Appeal was filed on October 30, 2015, within the sixty days for filing an appeal under California Rule of Court 8.104(a). SCT 21.

IV. The Standard of Review

A. The Appeal Of The Granting Of The Anti-SLAPP Motion

The standard of review for reviewing an anti-SLAPP decision is *de novo* review. *San Diegans For Open Government v. Har Construction, Inc.* (2015) 240 Cal. App. 4th 611, 622("*San Diegans*"). The Court of Appeal is not bound by the trial court's findings and it will conduct an independent review of the entire record. *San Diegans* at 622.

B. The Appeal Of The Denial Of Attorney's Fees and Costs

The standard of review for a typical trial court decision on a motion for attorney's fees is the abuse of discretion standard. *PLCM Group, Inc. v. Drexler* (2000) 22 Cal. 4th 1084, 1095. However, in this case there are also issues of law that fall under the *de novo* review standard. These include: whether Appellants Motion for Fees and Costs was timely filed under the California Rules of Court; whether Appellant's CC §1717 Motion arose under the Medical Services contract; whether RCA's dismissal of its complaint after Leonard had prevailed in the first appeal and obtained affirmative relief, but before a final judgment on its original action for debt, invokes CC §1717(b)(2) and prevents Leonard from any attorney's fee recovery.

V. Analysis Under The Anti-SLAPP Statute

RCA begins its Anti-SLAPP Motion with the first prong of the two part analysis of a 425 Motion: i.e., the trial court must determine if the defendant has shown that the challenged cause of *action arises from protected activity*. See e.g., *City of Cotati v. Cashman* (2002) 29 Cal. 4th 69, 76-77. However, RCA is unable to meet this prong of the 425 Motion test for two reasons. First, RCA based its Anti-SLAPP Motion on purported "protected activity" that Leonard first raised over two years before in her original cross complaint, but RCA never filed a 425 Motion. Thus its Anti-SLAPP Motion is untimely. Second, the allegations in the FACC are centered upon RCA's 12 year pattern of wrongful medical debt collection practices that violated specific statutes designed to prevent such behavior which is not "protected activity" under the first prong of the 425 Motion analysis.

A. The Anti-SLAPP Motion Was Untimely Filed

425 Motions are required to be filed within sixty days of service of the complaint. CCP §425.16(f). Accordingly, if as RCA contends, all of Leonard's causes of action in the FACC "arose from" the same operative factual allegations as contained in Leonard's original cross complaint filed on February 22, 2012, CT 31:3-6, then RCA's filing of its Anti-SLAPP Motion over two years later was *inexcusably untimely*.

RCA identified the "protected activity" that is the basis for its Anti-SLAPP Motion to be the attachment of Leonard's medical records to RCA's original complaint and which were later used by RCA at the June 2012 trial. RCA further asserted that all of Leonard's causes of action in the FACC (just like the causes of action in Leonard's original cross complaint) arose solely from RCA's attachment of these documents to RCA's original complaint. CT 28:7 to 29:20; CT 31:3-6. Simply put, RCA has premised its Anti-SLAPP Motion entirely upon purported "protected activity" that Leonard had cross complained against RCA in February 2012, over two years before RCA's Anti-SLAPP Motion in June 2014.

This raises the obvious question of *why RCA waited 20 months to file its Anti-Slapp Motion*. Presumably, RCA would have had the same incentive to protect its purported "right to petition or free speech" prior to the June 11, 2012 trial as it did at the time of filing the Anti-SLAPP Motion in June 2014. A review of RCA's moving papers in support of its Anti-SLAPP fails to mention any reason or cause for the delay or any prejudice that RCA has suffered as a result of Leonard's cross complaint.

B. The Trial Court Misunderstood The 60 Day Time Limit

Leonard directed the trial court's attention to the extraordinarily long delay between Leonard's challenge to RCA's purported "protected activity" in

her original cross complaint and the filing of the Anti-SLAPP Motion (after a full trial and then appeal and reversal). CT 92-94. However, the trial court ignored the fact that the supposed "protected activity" was the gravamen of the original cross complaint filed in 2012. Instead, the trial court simply cited *Lam v. Ngo* (2001) 91 Cal. App. 4th 832 ("*Lam*") for the unrelated proposition that a 425 Motion may be filed after an amended complaint.

What the trial court failed to distinguish was that in *Lam*, the question of timeliness only concerned how to count the sixty day period: i.e., was the time limit 60 days or 60 days, plus five days for service by mail. The *Lam* court found that it was the latter. The *Lam* court also decided that the granting of a preliminary injunction based upon the original complaint could not be used for collateral estoppel effect against a subsequent 425 Motion because the standards for deciding a preliminary injunction are simply not the same as those for deciding a 425 Motion.

What *Lam* did not decide, but which the trial court mistakenly thought it had, was whether the filing of an amended complaint *over two years beyond the initial 60 day period to file a 425 Motion* somehow *restarted* the 60 day time period mandated in CCP §425.16.

Appellant has searched carefully and has not found any direct authority on the question presented by the facts of this case. However, it simply does

not make sense, under either the literal wording of CCP §425.16 or the obvious legislative intent and purpose, to allow the filing of a 425 Motion more than two years after a plaintiff has filed a complaint based on the purported "protected activity". The language of the statute on its face is unambiguous: a defendant has 60 days to file to assert the protection of the statute. Thus, the canon of interpretation that the "plain meaning" of the statute should govern. See *White v. Ultramar, Inc.* (1999) 21 Cal. 4th 563, 572.

Certainly, an amended complaint that bases one or more "new" claims *upon different* "protected activity" than in the original complaint will start a new 60 day time period running for those new claims. But that is not what happened in this case. RCA had every opportunity to file a 425 Motion to assert its "right to petition or free speech" concerning Leonard's original cross complaint in the Spring of 2012, but did not. It has no one to blame for the delay but itself. Accordingly, the trial court's ruling, CT 130:10-14, was in error.

C. The Anti-SLAPP Motion Is Just A Tactical Manipulation

The chronology of events shows that RCA's filing of its Anti-SLAPP Motion was not for the purpose of defending its right to petition or its free speech, or even its right to sue for an alleged unpaid medical bill. Rather,

RCA filed the Anti-SLAPP Motion as a purely "tactical manipulation" exactly as warned against by the Court of Appeal in *Olsen v. Harbison* (2005) 134 Cal. App. 4th 278, at 287 ("*Olsen*") as follows:

> There are two potential purposes of the 60–day limitation. One is to require presentation and resolution of the anti-SLAPP claim at the outset of the litigation before the parties have undertaken the expenses of litigation that begin to accrue after the pleading stage of the lawsuit. The other is to avoid tactical manipulation of the stays that attend anti-SLAPP proceedings. The 'prejudice' to the opponent pertinent to these purposes is that which attends having to suffer such expenses or be subjected to such a stay.

The rule that 425 Motions must not be used as a litigation tactic, but only as a means for protecting free speech, has been repeated numerous times. A good example is *Platypus Wear, Inc. v. Goldberg* (2008) 166 Cal. App. 4th 772, 784 ("*Platypus*") where the Court of Appeal reiterated this rule (quoting from *Kunysz v. Sandler* (2007) 146 Cal. App. 4th 1540, 1543) as follows:

> 'The purpose of an anti-SLAPP statute is to dismiss meritless lawsuits designed to chill the defendant's free speech rights at the earliest stage of the case' " ... [However,] " '[t]hat consideration, obviously, no longer applies once the complaint has been answered and the case has been pending for a year.'

Another recent decision that makes the same point is *San Diegans,* 240 Cal. App. 4th at 624-626, where the Court of Appeal found a 425 Motion untimely when it had been filed sixteen months after a first amended

complaint and there had been extensive discovery and motion proceedings in the case, thereby prejudicing the plaintiff. The Court of Appeal found no good reason for the delay and it found significant prejudice to the plaintiff as a consequence of the delay in bringing the 425 Motion.[2] Comparing the circumstances in *San Diegans* against the facts of this case shows just how much Leonard has been prejudiced. In *San Diegans*, the Court of Appeal was alarmed by the prejudice of some discovery and a few motions. Here, Appellant has had to go through a lengthy and hard fought appeal that was not only very expensive, she had to go through the emotional anguish of knowing that her private medical records were in the court's public records until the Appellate Division finally ordered them to be sealed.

RCA made a tactical guess thought it would win on appeal and it did not need to make a 425 Motion. When its gamble failed, it was faced with the consequences. Having no viable defenses to the factual allegations in the FACC, RCA filed the Anti-SLAPP motion as its best "tactical maneuver" to prevail. Appellant's Opposition to RCA's Anti-SLAPP Motion argued this

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[2] See also, *Kunysz v. Sandler* (2007) 146 Cal. App. 4th 1540, 1543, where the Court of Appeal noted that the purpose of the statute, i.e., to dismiss meritless actions early, would not be served by allowing a §425.16 motion when the case had been pending for almost a year because a defendant that procrastinated that long does not feel that the "chill" on its constitutional right of free expression was urgent or significant.

reality to the trial court. CT 92-94.

RCA's Anti-SLAPP Motion was a tactical device to avoid the law of the case established by the Appellate Division which included, *inter alia*, a ruling that RCA had improperly attached Leonard's medical records to its complaint and that these materials had to be placed under seal in the trial court's files.

D. The Gravamen Of The FACC Was A Course Of Wrongful Conduct That Was Not Communicative

Alternatively, if this Court finds that the gravamen of the allegations in the FACC *is not the same as that in the original cross complaint*, then the analysis shifts to *whether the gravamen* of Leonard's FACC is protected activity that supports RCA's Anti-SLAPP Motion.

Leonard's Opposition to RCA's Anti-Slapp Motion pointed out to the trial court that the nature and scope of the claims in the FACC were substantially different than in the original complaint. If the trial court had looked carefully at the new allegations, it would have realized that the gravamen of the FACC *was the 12 year course of wrongful medical debt collection by RCA*, not the mere attachment of Leonard's medical records to RCA's original complaint.[3] Unfortunately, the trial court only made a very cursory review and it agreed with RCA's position *that the protected activity*

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[3] If the gravamen of the FACC is the same as that in the original cross complaint, then RCA's Anti-SLAPP Motion was untimely.

was the same in both complaints. Consequently, the trial court erroneously went on to the second prong of the 425 Analysis.

1. **Analysis Of The FACC Allegations**

Leonard pointed out in her Opposition to the Anti-SLAPP Motion that the conduct alleged in the FACC went far beyond the mere attachment of her medical records to RCA's original complaint and that the gravamen of her action was a twelve year long pattern of misconduct[4] by RCA. CT 94-96, 98-99. More specifically, Leonard alleged that RCA had been engaged in a long standing course of wrongful collection conduct. The wrongful conduct was divided into three causes of action: invasion of privacy (Count II), unfair competition (Count III), and conspiracy with SNMH (Count IV).

The wrongful conduct alleged by Leonard in the Second Cause of Action was not a vanilla invasion of privacy claim based solely upon the attachment of Leonard's medical records to the original RCA complaint. The invasion of privacy that Leonard experienced was the result of a twelve year pattern of wrongful behavior by RCA in its overall medical debt collection business that included the systematic:

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[4] See the allegations of the FACC ¶¶ 8-7-14, 25-29, 33, 36 at CT 8-10, 12-14.

a. failure to destroy and/or return to SNMH any PHI that it obtained from SNMH that was unnecessary for collecting alleged unpaid balances;

b. regular violation of the right to privacy of alleged debtors by attaching medical records as exhibits to complaints without written consent or obtaining a protective order (or taking any other measure) to preserve the confidentiality of the PHI;

c. regular violation of the right to privacy by introducing medical records as trial exhibits without first obtaining written consent or obtaining a protective order (or taking any other measure) to preserve the confidentiality of the PHI at trial; and

d. violation of Leonard's right to privacy by attempting to extort Leonard into paying the full amount of the alleged balance by telling Leonard that RCA knew about sensitive PHI and intimating that it would reveal such sensitive PHI to unauthorized persons (including the public) if Leonard did not pay the alleged balance.

Leonard's Third Cause of Action for Unfair Competition was not addressed by the trial court. By asserting a claim under B&P Code §17200, Leonard was making it very clear that her allegations were not focused on the single instance of attaching her medical records to the complaint, but were based upon the entire range of misconduct by RCA and SNMH in the handling and use of PHI to collect alleged debts. CT 13. Such behavior does not "arise from" a mere single instance of protected speech. It results from a long term course of conduct showing RCA's disregard for the laws designed to protect the privacy of medical information.

Leonard's theme of coordinated and knowing wrongful use of patient medical records for debt collection was also asserted in the Fourth Cause of Action for Conspiracy between RCA and SNMH. It was this pattern of a long term abuse of PHI that was the basis for the claim.

If the trial court had done a more thorough analysis of Leonard's allegations in the FACC, it would have seen that is was the pattern of wrongful behavior that was at the heart of the cross complaint, i.e, the true gravamen of the action.

VI. The Litigation Privilege Does Not Bar Appellant's Claims

A. The Allegations In The FACC Arise From Non-Communicative Conduct That Is Not Subject To The Litigation Privilege

RCA, having persuaded the trial court that the protected activity was the same in both complaints, then turned to the second prong of the 425 Motion analysis and argued that Leonard had no probability of success because all of its claims were barred by the CC §47(b) privilege. The trial court agreed with RCA and found that there was no probability of success because all of Leonard's causes of action are barred by the litigation privilege. CT 138-139. As shown above, the conduct alleged in the FACC went far beyond that alleged in the cross complaint, and in fact, *was primarily non-communicative in nature*.

In a manner similar to the first prong of a 425 Motion analysis, California courts have ruled that if the gravamen of the alleged wrongful conduct is *non-communicative in nature*, then the CC §47(b) litigation privilege does not apply. In *Action Apartment* v.City of Santa Monica (2007) 41 Cal. 4th 1232, 1249, the Supreme Court explained this rule as follows:

> We have drawn 'a careful distinction between a cause of action based squarely on a privileged communication, such as an action for defamation, and one based upon an underlying course of conduct evidenced by the communication.' (*White v. Western Title Ins. Co.* (1985) 40 Cal.3d 870,...) " 'As a general rule, the privilege 'applies only to communicative acts and does not privilege tortious courses of conduct.' " (Olszewski v. Scripps Health (2003) 30 Cal.4th 798, 830, ... quoting *LiMandri v. Judkins* (1997) 52 Cal. App. 4th 326, 345 ...)

Leonard's allegations in the FACC describe an "underlying course of conduct" by RCA. The attachment of Leonard's medical records to RCA debt collection action was not an isolated, one-time event. Rather, it was the result of RCA's normal operating practice and procedure that ignored federal and state laws specifically crafted to prevent exactly this type of misuse of personal medical information. On top of that, Leonard further alleges how RCA regularly possessed private medical information that it had no reason to have and how RCA tried to intimidate Leonard into paying her medical bill by threatening to release the results of very sensitive medical tests.

The allegations in the FACC parallel the decision in *LiMandri v.*

Judkins (1997) 52 Cal. App. 4th 326 (*LiMandri*") that was relied upon by the Supreme Court in its *Action Apartment* decision to illustrate a "course of tortious conduct" that was "non-communicative" and not protected by §47(b). Here is the language from *LiMandri* that the Supreme Court focused upon in *Action Apartment*:

> For example, in *LiMandri*, the Court of Appeal held that the litigation privilege did not bar plaintiff's 'cause of action for intentional interference with contractual relations because it [was] based upon an alleged tortious course of conduct,' including the preparation and execution of documents creating a security interest in a portion of settlement proceeds and the 'refusal to concede the superiority of [plaintiff's] contractual lien.' (*LiMandri*, supra, 52 Cal. App. 4th at p. 345 ...)

RCA's wrongful course of conduct as a medical debt collector, of which the attachment of Leonard's medical records was just one incident, constituted a course of tortious conduct that was non-communicative that must not be allowed to hide behind the litigation privilege.

B. The Litigation Privilege of CC §47(b) Is Not Applicable Because It Would Render The Laws Enacted To Protect Private Health Information Inoperable

California courts have recognized that when the litigation privilege under CC §47(b) is asserted in a manner that would render a specific law inoperable, then the privilege must give way to the intent and purpose of that law. See *Action Apartment*, 41 Cal. 4th at 1246, where the Supreme Court

held that the privilege cannot be used to prevent criminal and State Bar prosecutions under statutes that are "more specific than the litigation privilege and would be significantly or wholly inoperable if [their] enforcement were barred when in conflict with the privilege."

The *Action Apartment* decision was soon followed by the Court of Appeal Decision in *Komarova v. National Credit Acceptance, Inc.* (2009) 175 Cal. App. 4th 324, 337-340 ("*Komarova*"). In *Komarova*, the litigation privilege was set aside in favor of the intent and purpose of the Robbins–Rosenthal Fair Debt Collection Practices Act, CC § 1788 et seq. "Rosenthal Act". Coincidentally, *Komarova* involved a debt collection agency, just like RCA, engaged in a pattern of conduct both before and after a litigation that was in violation of the plaintiff's rights under the Rosenthal Act. Even though the debt collection acts were in furtherance of the litigation against the debtor and therefore fell within the gambit of CC §47(b), the Court of Appeal found that the Rosenthal Act would be rendered inoperable if the alleged conduct were permitted. Accordingly, the litigation privilege had to be subordinated. In ruling, the *Komarova* court emphasized that:

> We must nonetheless be mindful of the ease with which the Act could be circumvented if the litigation privilege applied. In that event, unfair debt collection practices could be immunized merely by filing suit on the debt.

1. Violation Of The HIPPA Mandate

The requirement that the law or regulation be more specific than the litigation privilege is readily met in this situation. HIPAA's privacy rule mandates are very strict protections for disclosure of medical information in the course of administrative or judicial proceedings. 45 C.F.R. § 164.512(e). HIPAA only permits disclosure pursuant to a court order, subpoena, or discovery request and only after the healthcare entity "receives satisfactory assurance from the party seeking the information that reasonable efforts have been made by such party to secure a qualified protective order." 45 C.F.R. § 164.512(e)(ii)(b). The protective order must prohibit "using or disclosing the protected health information for any purpose other than the litigation," and "[r]equire [ ] the return to the [physician] or destruction of the protected health information ... at the end of the litigation or proceeding." 45 C.F.R. §164.512(e)(v)(B). See *Crenshaw v. Mony Life Insurance* (S.D. Cal. 2004) 318 F. Supp. 2d 1015, 1028-1029; *Law v. Zuckerman* (D. Maryland 2004) 307 F. Supp. 2d 705, 711-712; *Allen v. Woodford* (E.D. Cal. 2007) 2007 WL 309485, p. 5.

For example, in *Brookdale University Hospital and Medical Center, Inc. v. Health Insurance Plan of Greater New York* (E.D. New York 2008) WL 4541014, at p. 2, the federal district court unequivocally found that

a protective order was mandatory:

> [P]rotection is mandated by federal regulations governing the "Privacy of Individually Identifiable Health Information," 45 C.F.R. § 164.500 et seq. Namely, under 45 C.F.R. 164.512(e)(1)(ii)(B), (e)(1)(iv) and (e)(1)(v), a covered entity may disclose PHI in the course of a judicial proceeding in response to a subpoena or discovery request, if the parties agree to a qualified protective order and present same to the court. The qualified protective order must include a provision "prohibit[ing] the parties from using or disclosing the protected health information for any purpose other than the litigation or proceeding for which such information was requested ...."

It is obvious that the application of the litigation privilege in California court renders HIPPA inoperable to effectuate its intended purpose. Therefore, the litigation privilege should not be applied to RCA's actions in direct violation of HIPPA.[5]

C. Public Policy: Benefit Compared To Burden And The Right Of Privacy

The purpose of CC §47(b) is to ensure that there is full and fair access to the system of justice without fear of intimidation or reprisal and that all of

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[5] The California Medical Information Act at CC §§56.05, *et seq.*, is also intended to protect personal health care information. However, HIPPA preempts state laws that are less stringent, see Section VII.B, below. Although the Appellate Division did not make a specific ruling to this effect, it did find that CMIA did not prevent RCA from attaching Appellant's medical records to the RCA complaint, an thus, it relied upon HIPPA. Leonard disagrees with this ruling, but with such law of the case, Leonard did not thereafter assert CMIA.

the evidence that is otherwise admissible is allowed. That purpose is not diminished in any way by requiring medical debt collectors to follow the specific laws enacted to protect a person's privacy. These businesses access the courts daily and they are very aware of the HIPPA mandate to obtain a protective order for all medical records so that an individual's privacy is not violated.

The evidence RCA wanted to present at trial would not have changed in any regard if RCA had complied with the privacy laws and obtained a protective order. The burden on RCA was nominal and it had no compelling "right of petition or free speech" that outweighed the compelling privacy interest of Leonard to protecting her privacy.

The use of the litigation privilege to shield them from any liability would allow medical debt collectors to threaten public disclosure of private medical information as a means of "convincing" an alleged debtor to "pay up". This result would be an outrageous, one-sided use of the litigation privilege to protect very wrongful conduct. The litigation privilege is intended to ensure the free flow of information into the judicial process: it is not intended to be used for extortion.

1. Examples Of Balancing Benefit And Burden To Protect Confidential Information Of Litigants

There is a parallel line of California decisions that is very illustrative of the balancing of competing interests concerning the right to privacy. In *Oiye v. Fox* (2012) 211 Cal. App. 4th 1036, 1068, the Court of Appeal acknowledged the right of access to the private medical information in a litigation, but ordered that the medical information be placed under seal to maintain its confidentiality during the litigation.

In *Johnson v. Superior Court* (2000) 80 Cal. App. 4th 1050, the Court of Appeal resolved a discovery dispute over the right to take a deposition of a third party regarding sensitive medical matter by ordering the trial court to allow the deposition with appropriate safeguards to maintain its confidentiality.

In *Vinson v. Superior Court* (1987) 43 Cal. 3d 833, the California Supreme Court ruled that a defendant has a right to conduct discovery on private issues raised by a plaintiff, but that did not waive the plaintiff's constitutional right to privacy. The Supreme Court balanced the right to discovery that against the right of privacy:

> A right to privacy was recognized in the seminal case of *Griswold v. Connecticut* (1965) 381 U.S. 479 ... It protects both the marital relationship (ibid.) and the sexual lives of the unmarried (*Eisenstadt v. Baird* (1972) 405 U.S. 438 ...

> More significantly, California accords privacy the constitutional status of an "inalienable right," on a par with defending life and possessing property. (Cal. Const., art. I, § 1; *White v. Davis* (1975) 13 Cal.3d 757...)
> ....
>
> Plaintiff is not compelled, as a condition to entering the courtroom, to discard entirely her mantle of privacy. At the same time, plaintiff cannot be allowed to make her very serious allegations without affording defendants an opportunity to put their truth to the test.

Simply put, RCA's argument that the litigation privilege of CC §47(b) totally "trumps" any right of privacy is misplaced. It presents a false dilemma: i.e., that respecting the right of privacy in medical records would impair the right to access to the courts for redress. RCA had a minimal burden of obtaining a protective order before using any medical records in court. It has admitted that it has engaged in this practice for 12 years. CT 119:22 to 120:4. This is not a case about employing the litigation privilege to protect witnesses from being intimidated against testifying in court; it is a case about not allowing the litigation privilege to be subverted into a tool that medical debt collectors use to intimidate alleged debtors into paying.

VII. CC §47(b) Is Preempted To The Extent It Conflicts With HIPAA

A. Preemption Analysis

The U.S. Constitution makes the laws of the United States the supreme law of the land. It has been long settled that state law that conflicts with federal law is without effect, and this includes both federal statutes and regulations. *Olszewski v. Scripps Health* (2003) 30 Cal. 4th 798, 814 ("*Scripps*"). As set forth in *Scripps*:

> A federal statute or regulation may preempt state law in three situations, commonly referred to as (1) express preemption, (2) field preemption, and (3) conflict preemption. " 'First, Congress can define explicitly the extent to which its enactments pre-empt state law.' [Citations.] 'Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively.' [Citations.] 'Finally, state law is pre-empted to the extent that it actually conflicts with federal law.'

It is settled law that HIPAA preempts state laws concerning the privacy of medical information unless a state's laws are equally or more stringent in the protection of PHI. *Crenshaw v. Mony Life Insurance* 318 F. Supp. 2d 1015 at 1029; *Law v. Zuckerman,* 307 F. Supp. 2d 705 at 709-711. However, this case presents a somewhat different question: does the litigation privilege "concern the privacy of medical information"?

In *Scripps* at 815, the Supreme Court observed that a state law will be found to actually conflict with a federal law where it is impossible for a

private party to comply with both the state and federal requirements or where the state law is an obstacle to the accomplishment and execution of congressional purposes and objectives of Congress. The subordinate question of what is a sufficient "obstacle" is a matter of judgment to be evaluated by examining the federal statute and identifying its intended purpose and effects.

Looking at the very specific HIPPA rule applicable to this case, 45 C.F.R. 164.512(e)(1)(ii)(B), (e)(1)(iv) and (e)(1)(v), there is no doubt what the intended purpose and effect of the federal law is: all PHI must be kept confidential and may only be introduced or used in a judicial proceeding if written consent is obtained or a suitable protective order is put into place. It would be impossible to accomplish the very specific intent of the HIPPA rule if the litigation privilege is asserted over HIPPA. Accordingly, it is clear that the litigation privilege is preempted to the extent that it would allow the unprotected disclosure of private medical information.

B. **Application To Appellant's FACC**

Even though Leonard's FACC is not premised upon HIPPA,[6] the application of the litigation privilege to Appellant's FACC is inappropriate

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[6] Unlike CMIA, HIPPA does not have a provision for private tort liability.

because it would protect RCA's 12 year long flagrant violation of HIPPA. RCA's 12 year course of conduct in direct violation of HIPPA was the direct cause of Leonard's injury. But for RCA's pattern of violation of patient right to privacy in their medical records, HIPPA would have safeguarded Leonard's right to privacy.[7]

If the litigation privilege is applied here, it will signal medical debt collectors that they can get around HIPPA by asserting the CC §47(b) privilege. This would be a terrible result that is not what the legislature intended when it enacted the litigation privilege.

[7] The California Supreme Court has made it very clear that the right of privacy in a person's medical information is as fundamental a right as exists under Article 1, §1. *Hill v. NCAA* (1994) 7 Cal. 4th 1, 52-53.

VIII. Argument On The Attorney's Fee Motion

A. Introduction

The trial court's decision in June 2012 gave judgment to RCA on its complaint and against Leonard on her cross complaint. RCA then made a motion for costs and attorney's fees based upon the attorney's fee provision in the medical services contract that Leonard had signed with SNMH when she sought services. See the Augmented Supplemental Clerk's Transcript on Appeal (""ASCT") ASCT 17-24. The trial court awarded attorney's fees and costs to RCA under the medical services contract. Leonard then appealed the judgment.

The Appellate Division ruled in favor of Leonard, vacated the judgment, and granted Leonard's cross complaint in substantial part by ordering her private medical information placed under seal. ASCT 81-86. Leonard was the *prevailing party* on appeal because she obtained a final, substantive ruling on the merits of her cross complaint for declaratory and injunctive relief. RCA did not challenge the decision of the Appellate Division, making it a final decision.

After remittur to the trial court, Leonard filed the FACC with new causes of action against RCA. RCA then filed the Anti-SLAPP Motion that is discussed above. Discovery, however, continued on RCA's original complaint

for medical debt. RCA decided to abandon its case in chief on October 29, 2014 and filed a dismissal of its original medical debt complaint. ASCT 67:17-20.

Appellant filed a motion seeking attorney's fees and costs on November 25, 2014. This motion sought: (a) recovery of certain costs (primarily hearing transcript fees and filing fees) and (b) attorney's fees. There were two grounds for seeking attorney's fees. ASCT 1-42. First, Leonard sought attorney's fees as the *prevailing party* pursuant to CC §1717 and the contractual provision in the original medical services contract signed by Leonard (the very same contractual provision that RCA employed for its motion for attorney's fees and costs after the June 2012 trial judgment in its favor). Second, Leonard alternatively sought attorney's fees under CCP §1021.5 because Leonard had to act as private attorney general for the seminal issues raised on appeal based upon her cross complaint. ASCT 6-12.

The trial court denied the motion for attorney's fees under CC §1717 because it found "there is no prevailing party when the complaint is voluntarily dismissed." SCT 6:23-26. As for Leonard's motion for attorney's fees under CCP §1021.5, the trial court never mentioned this code section in its decision and did not discuss it on the merits. Instead, the trial court seemed to deny the motion under CCP §1021.5 because the motion for fees

and costs was not filed within 40 days of the remittitur from the Appellate Division under CRC 8.278. SCT 7:1-23.

At oral argument on this point, Leonard argued that CRC 8.278(c) is not determinative of the time for filing a motion for attorney's fees and costs in this case because CRC 8.278 (d)(2), which is applicable to this case, expressly provides for the filing of a motion for fees and costs under CRC 3.1702. In turn, CRC 3.1702(b)(1) provides that a motion for attorney's fees incurred up to the time of a final judgment, *including fees on appeal*, must be filed within the time for the filing of a notice of appeal, which in an unlimited case is 60 days after judgment. Leonard complied with CRC 3.1702(b)(1) by filing her motion for fees and costs within 30 days of the final dismissal by RCA. SCT 7:12-28. See the Reporter's Transcript on Appeal for September 25, 2015 ("RT 9/25/15"), p. 11: 6 to 12:20. Thus, Leonard's motion for fees and costs was timely.

The trial court rejected this argument because "[a]s we do not have a final judgment, CRC 3.1702(b) does not apply. SCT 7:26-28. Leonard filed this appeal on October 30, 2015. SCT 21.

B. Mutuality Of Contractual Attorney Fee's Provisions

The Attorney Fee Provision in the medical services agreement between Leonard and SNMH is set out verbatim in the FACC, CT 9:2-5, and is also in

the record at ASCT 26. There is no dispute that RCA collected the alleged debt under this provision. Although the contractual language provides that only SNMH may recover attorney's fees, Civil Code §1717(a) makes such provisions mutual, regardless of the language. Furthermore, it provides that such attorney's fees be treated as "costs of suit" which are listed and defined under California Code of Civil Procedure §1033.5. Finally, the attorneys fees and costs on appeal are to be included in the award, just as attorneys fees for proceedings in the trial court. See *Harbour Landing-Dolfann, Ltd v. Stanley C. Anderson* (1996) 48 Cal. App. 4th 260, 264-265.

C. Appellant's CC §1717 Motion Arises Under The Medical Services Agreement

As discussed above, the language in medical services contract between Leonard and SNMH was the basis for RCA's *contractual* award of attorney's fees.[8] ASCT 17-24. That very same medical contract also contains an express promise by SNMH that it would safeguard Leonard's private medical information. This provision is set forth verbatim in the FACC in ¶ 7, CT 8:13-

[8] The attachments to the RCA complaint included copies of this very medical services contract, as well as various other medical records. The Appellate Division did not seal the services contract even though the copies of these contracts contained the name of a minor, a medical ID number, and other information that should be safeguarded. Understandably, Ms. Leonard does not want any of these materials further placed into the public domain, so copies thereof are not in the appellate record before this court. The FACC simply recited the relevant portion of these documents in ¶7. CT 8:13-17.

17 and reads as follows:

> Except in those instances where the Hospital is permitted or required by law to release information about the patient, and as explained in the Notice of Privacy Practices that will be provided (available on our hospital website as the Patient Privacy Notice), the Hospital will obtain the patient's written permission to release information about the patient.

Appellant has successfully defended against RCA's action for breach of contract in all respects. RCA took nothing. In contrast, Appellant successfully defeated RCA's action on the contract by prevailing, in large measure, on her cross complaint. Although Appellant, acting *pro se* at the time, did not reference the foregoing provision in her cross complaint as a lawyer might have done, she did allege in her original cross complaint that "Sierra Nevada Hospital is in violation of their standards of practice, policy and procedures ... " CT 52:2. A fair reading of this reference in the cross complaint is that Leonard was asking for declaratory and injunctive relief because RCA had violated the express contractual provision to safeguard her private medical information contained in the medical services contract.

The original cross complaint also talks about federal and state medical privacy laws. However, the inclusion of references to federal and state medical privacy laws is cumulative, not subtractive, and the claims for declaratory and injunctive relief were based in substantial part upon the

breach of the express provision in the medical services contract to to improperly disclose private medical records.

CCP §452 mandates liberal construction of the pleadings. A complaint is sufficient if it states a cause of action on any theory. "The test for adequacy is not absolute but 'whether the pleading as a whole apprises the adversary of the factual basis of the claim' " *Lim v. The TV Corp. International* (2002) 99 Cal. App. 4th 684, 690 (quoting from 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 403, p. 501.). There is no doubt here that Leonard's original cross complaint placed RCA on clear notice that there was a serious breach of the medical services agreement.

D. **The Court Is To Award Fees and Costs To The Prevailing Party**

CC §1717(b)(1) provides that a party shall proceed by noticed motion to recover fees and costs. See California Rule of Court 3.1702 (c)(1). Under CC §1717(b)(1), the court must determine who is the *prevailing party on the contract*, regardless of "whether or not the suit proceeds to final judgment."

The question of who is a prevailing party has been the subject of extensive appellate battles. When there is a simple and unqualified victory for one party over another, the court *must* award attorney's fees and costs to the prevailing party. When there is not such a simple decision, then the trial court has the discretion to conduct a balancing test to find out which party

obtained the greater relief. See *Hsu v. Abbara* (1995) 9 Cal. 4th 863 ("*Hsu*"); *De la Cuesta v. Benham* (2011) Cal. App. 4th 1287, 1292-1293 ("*De la Cuesta*").

However, even if a party fails to achieve an outright win and the trial court must decide who prevailed, the trial court may not abuse its discretion in making that decision. The trial court should make a comparison of *which party obtained the greater relief*. The term "greater relief" should be focused on which party *achieved its main litigation objective*. *De la Cuesta* at 1294-1295. If one party was the clear winner, they are entitled to an award of fees.

Applying the foregoing analysis to the facts of this case can only yield one result: RCA did not accomplish any of its litigation objectives while Leonard achieved the primary objective of her cross complaint, i.e., the protection of her private medical records. It was simply an abuse of discretion for the trial court in this case to conclude that Leonard was not the prevailing party.

E. RCA's Voluntary Dismissal Came After Leonard Achieved A Final Ruling Granting The Relief In Her Cross Complaint

RCA argued to the trial court in its motion to tax, ASCT 76-68, that its voluntary dismissal of its original complaint denies Leonard any recovery for attorney's fees under CC §1717(b)(2). RCA's argument misses the point:

although RCA dismissed its original complaint, *that was after* Leonard had won the appeal on her cross complaint and had obtained a *final ruling* of the Appellate Division granting the relief she requested. In other words, at the time of RCA's dismissal of its original action for debt, Leonard had already prevailed on the merits with the primary purpose of her cross complaint and *already was a prevailing party* under CC §1717. Consequently, RCA's dismissal was too late to take advantage of CC §1717(b)(2). If RCA had dismissed while the case was still on appeal before the Appellate Division, then RCA would be correct.

Appellant agrees that where the typical case is overturned on appeal and is returned to a trial court for a new trial *and there has been no affirmative and binding relief granted to either party on any claim*, then CC §1717(b)(2) would cutoff the right of a defendant to obtain any fee and cost award. See e.g., *Butler-Rupp v. Lourdeaux* (2007) 154 Cal. App. 4th 918, 928. Leonard, however, has found no authority to support RCA's position that where final, binding relief has been obtained on a defendant's cross complaint, that a plaintiff can then prevent the cross-plaintiff from obtaining an award of fees and costs by dismissing the plaintiff's original action. Such a result would be grossly unfair and would require a construction of the statute that was directly opposite to its intent and purpose of CC §1717.

F. Leonard's Fee Award Was Reasonable And Proper In Employing the Lodestar Method

Leonard's requested fee award was based upon the methodology for calculating attorney's fees set out in *Serrano v. Priest* (1977) 20 Cal. 3d 25, 48-49. As explained in *Ketchum v. Moses* (2001) 24 Cal. 4th 1122, 1132 ("*Ketchum*"), this methodology begins with a determination of the amount of fee based upon comparable services in the legal community for a case with comparable risk of recovery, novelty of issues, and quality of legal work. It may then be adjusted based upon the following factors:

(1) the novelty and difficulty of the questions involved;

(2) the skill displayed by counsel in presenting the questions;

(3) the extent to which the nature of the litigation precluded other employment by counsel; and

(4) the contingent nature of the fee award.

These four items allow the court to make an adjustment of the basic hourly rate (which is called the "lodestar") to determine the *fair market value* of the legal services. *Ibid.*

A contingent fee contract between a client and attorney involves a gamble on the result and provides a proper basis for an increased attorney's fee over the hourly rate. The purpose of this enhancement is to encourage

attorneys to take matters that they would not otherwise accept. *Ketchum* at 1132-1133. In *Ketchum*, a multiplier of 2 was allowed by the trial court to adjust the lodestar (i.e., the number of attorney hours, times the hourly billing rate, times a multiplier of 2) to adequately compensate counsel for the fact that it was a contingent case and that counsel did excellent work on the case.[9]

The "lodestar" amount in this case is the 264.3 hours of billable time at counsel's normal billing rate of $250/hr.[10] (264.3 @ $250 = $66,075), plus the time spent in preparation of the Motion (13.2 hrs. @ $250/hr. = $3,300), for a total of 277.5 hrs. @ $250 = $69,375. Declaration of Patrick H. Dwyer ("Dwyer Declaration"), ¶ 2, and Exhibit 4 thereto. ASCT 15.

1. **Contingent Case Fee Case**

Counsel for Leonard has been working on a contingent fee basis of representation. Dwyer Declaration, ¶1. ASCT 14-15. Thus, as noted in *Ketchum*, Mr. Dwyer was at total risk of receiving nothing for all of his time and effort. Very few, if any, attorneys would take a case such as this on a

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[9] The lodestar amount should normally include all of the hours reasonably spent, including the hours spent in making the fee motion. *Ketchum* at 1133-1134.

[10] This is the same billing rate as counsel for RCA requested in its Motion For Contractual Attorneys Fees. ASCT 23.

contingent fee basis.

2. **Limitation On Attorney Availability For Other Cases**

The action involved extensive time and out of pocket resources of counsel. The expenditure of counsel's time to defend and vindicate Leonard had a substantial adverse impact on his ability to take up other matters.

3. **Novel And Important Issues Of First Impression**

RCA intentionally mislabels the case as "simply a collection lawsuit". RCA's sudden "amnesia" about the year and a half battle on appeal is, frankly, unconvincing. RCA knows that the appeal over the cross-complaint involved issues of first impression with complex constitutional, statutory and regulatory legal questions. An examination of the extensive briefs filed by the parties confirm the complexity of the legal arguments on appeal.

The Appellate Division decision vacated the entire trial court decision and then ordered sensitive medical information put under seal. Contrary to RCA's assertion in its Opposition, ASCT 69-72, there were no judicial precedents for the Appellate Division to follow in making this decision – none whatsoever. That is what made this case so difficult and that is what required the extensive legal work. This was not an easy case.

RCA tries to confuse the Court with the argument that there is no

private right of action for damages for violation of HIPAA. That was not the issue on appeal. The issue was whether the *language in the contracts* and CIMA, HIPAA and/or the right of privacy under the California Constitution, forbade the attachment of medical records as exhibits to a court filing without the written authorization of the party or a suitable protective order.

RCA next tries to belittle Leonard by calling her case an insignificant "collections" case. This court surely can acknowledge that many of our most cherished rights have emerged from what was originally perceived as simple and mundane disputes. Leonard has established that a person's private medical records (i.e., her PHI under HIPPA) is to be safeguarded from the public domain. A party's medical information may not be put into the Court's public record without written authorization or a suitable protective order. *That is a very significant public benefit.*

4. **Considerable Skill Was Needed**

The level of legal skill in handling the appeal is apparent from the novelty and complexity of the issues on appeal. The result obtained for Leonard was solid.

Taking all of these factors together, Leonard's request for a multiplier of two (2) is reasonable.

IX. Leonard's Alternative Request For Attorneys Fees And Costs Under Private Attorney General Doctrine – CCP §1021.5

If this Court does not find Leonard entitled to attorney's fees and costs under CC §1717, then Leonard alternatively argues that she is entitled to an award under CCP §1021.5 as a private attorney general. This Statute permits the award of attorney fees to successful party in *any* action, limited or unlimited. The purpose of this law was aptly stated by the California Supreme Court in *Woodland Hills Residents Assn. v. City Council* (1979) 23 Cal. 3rd 917, 933 as follows:

> [T]he fundamental objective of the private attorney general doctrine of attorney fees is ' "to encourage suits effectuating a strong [public] policy by awarding substantial attorney's fees ... to those who successfully bring such suits and thereby bring about benefits to a broad class of citizens. [Citation.] The doctrine rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions, and that, without some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will as a practical matter frequently be infeasible.

A. Leonard Meets Not Just One, But All Three Categories Under §1021.5

There are three basic categories for award as a private attorney general under §1021.5. First, if there has been: "a significant benefit, whether pecuniary or nonpecuniary, ... conferred on the general public or a large class of persons". Second, if "the necessity and financial burden of private

enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate." Or third, when "such [attorney] fees should not in the interest of justice be paid out of the recovery, if any." *County of Colusa v. California Wildlife Conservation Board* (2006) 145 Cal. App. 4th 637, 648. This case fits within all three categories.

There is a threshold requirement in CCP §1021.5 cases: the party seeking the private attorney general fees must have been successful. *Colusa* at 648-649. As discussed above, Leonard was successful in not only overturning the judgment, she was successful in establishing that protected health information to be used or disclosed in a judicial tribunal in this state must either be subject to a written authorization of the patient or a protective order.[11] Leonard, in a case of first impression, involving a very complex web of state and federal laws and regulations, has prevailed and established the importance of compliance with HIPAA. This right applies to every court and to every natural citizen of this state. Accordingly, Leonard's *successful* action has established a benefit for the general public, and thus, Leonard meets the requirements for the first category for award under §1021.5.

The financial burden of establishing the requirement that a protective

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[11] The second reason for Leonard's appeal, of course, was to overturn the judgment in favor of RCA on the complaint, and this was also accomplished.

order be obtained to safeguard PHI was great and it was born by Leonard and her attorney. No one else could have or would have stepped in to assert and establish the rules pertaining to the use of PHI in a Superior Court. There was no other way to establish the important principles in this case other than for Leonard to "make a stand". Counsel for Leonard took on all of the risk and burden, despite the ridicule and disparagement of clerks, lawyers and judges along the way.

B. The Amount Awarded Should Be A Multiplier Of The Lodestone

If the court awards private attorney general fees under this section, the amount of the award is determined in substantially the same manner as under §1717. See *Cates v. Chiang* (2013) 213 Cal. App. 4th 791, 820-821, following the rules set forth in *Ketchum*.

Lastly, RCA challenges the amount of the legal fees. It does this upon the false argument that this was just a "collections" case. ASCT 71:9-11. As shown above, the legal fees were not in any way related to the complaint for medical costs: the legal fees being sought were for the litigation of Leonard's cross-complaint for declaratory and injunctive relief to enforce her contractual and legal rights. The issues were of first impression and involved an extensive array of law from constitutional questions to very difficult regulatory interpretation.

RCA fails to cite to a single time entry that it contends was excessive – not one. Moreover, it does not challenge the hourly rate for Leonard's counsel.

Although a trial court has discretion in determining reasonable attorney's fees, this discretion may not disregard typical attorney billing rates or discount amounts of time that are reasonable for the specific task. Leonard directs this court's attention to *Toll Brothers, Inc. v. Chang SU-O Lin* (N.D. Cal. 2009) 2009 WL18116993 ("Toll Bros."). *Toll Bros*. is an excellent example of a court applying California's established rules and guidelines for determining the reasonableness of legal fees and it reviews and applies the leading California authority on these questions: *PLCM Group v. Drexler* (2000) 22 Cal 4th 1084, 1095; *Enpalm, LLC v. Teitler Family Trust* (2008) 162 Cal. App. 4th 770, 774.

X. The Trial Court Wrongfully Denied Costs On Appeal

Appellant also filed an MC-010 Memorandum of Costs which asked for $1,040 in court reporter fees and §775 in filing fees. These were not deposition charges, but the charges for the court reporter during the hearings in the Appellate Division. RCA filed a motion to tax these costs, saying the reporter hearing and transcript charges were unnecessary. Appellant filed an opposition and explained that the Appellate Division relied upon the court

reporter and hearing transcripts provided by Appellant. ASCT 74-76. Indeed, the decision of the Appellate Division was set forth orally on the transcript that Appellant paid for. See ASCT 81-90.

The trial court denied all of these costs. SCT 9:17-26. This was error.

XI. Conclusion

If this Court agrees with RCA's assertion that the protected activity in the FACC is the same as that in the original cross complaint, then RCA filed its Anti-SLAPP Motion two years too late. Further, it seems clear from the chronology and the absence of any harm or prejudice that RCA's Anti-SLAPP Motion was just a tactical maneuver after having lost on appeal.

The gravamen of Appellant's original cross complaint is quite different from that in the FACC. The latter is based upon a 12 year pattern of wrongful medical debt collection practice that routinely violated HIPPA and other laws intended to protect personal health information. CCP §425.16 is intended to protect right to petition and free speech, not the tortious pattern of conduct engaged in by RCA.

Assuming, *arguendo*, that the first prong of a 425 Motion analysis is met, the litigation privilege does not bar Appellant's causes of action. The conduct complained of in the FACC is non-communicative. Moreover, extending the litigation privilege to this type of conduct would effectively make HIPPA and other laws intended to protect health information ineffective.

The public policy implications of allowing medical debt collectors to escape enforcement of HIPPA and similar laws by use of the litigation privilege will, for practical purposes, allow them to extort alleged debtors into paying whatever amount they claim is owing. Enforcing the HIPPA requirement for a protective order will allow medical debt collectors (or anyone else) to introduce the same medical evidence into the court record, but under a protective order. This will not intimidate collection agencies from using the courts to collect medical debt, it will keep the litigation process on a

level playing field.

Appellant correctly and timely filed a motion for attorney's fees and costs as the prevailing party in a contract dispute under CC §1717. RCA achieved nothing by its complaint and Appellant won her declaratory relief and injunction claims.

RCA did not dismiss its original action until after Appellant had prevailed on the merits with the Appellate Division ruling. Appellant's hard fought gains were not subject to further change in the trial court and they were the law of the case. Under these facts, CC §1717 (b)(2) does not apply.

Alternatively, Appellant is entitled to a fee award under CCP §1021.5. The case was hard fought over seminal issues. Appellant and her counsel bore serious risk and cost. The result will be of great benefit to every future litigation where PHI needs to be introduced into evidence.

The computation of the lodestar amount was correct. The hourly fee amount was the same as that for RCA's counsel.

The costs for the court reporter and transcripts of the hearings on appeal are fair, reasonable, and were necessary. Indeed, the Appellate Division relied upon the reporter provided by Appellant.

The rulings of the trial court should be vacated. Appellant requests an award of fees and costs on appeal.

Respectfully Submitted,

Dated: May 16, 2016

/s/ Patrick H. Dwyer
Patrick H. Dwyer,
Attorney for Appellant

Certificate of Word Count

I hereby certify under penalty of perjury that, to the best of my knowledge and belief, the total number of words in the body of this brief (i.e., Sections I through XI) is approximately 10,670, which is less than the14,000 words allowed by California Rules of Court, Rule 8.204(c).

/s/ Patrick H. Dwyer
Patrick H. Dwyer,
Attorney for Appellant

Date: March 16, 2016

PROOF OF SERVICE

I hereby certify under penalty of perjury that a copy of the Appellant's Opening Brief in the matter of Leonard v. RCA, Case No. CU12-78288, appeal No C79880 was served via United States first class mail to:

1. The Superior Court for the County of Nevada
   201 Church Street
   Nevada City, California 95959
   Tele.: 530-265-1294.

I declare under penalty of perjury under the laws of California that the foregoing certification is true and correct.

_/s/ Patrick H. Dwyer____
Patrick H. Dwyer,

Date: May 16, 2016

Location: Penn Valley, CA 95946