

ATTORNEY GENERAL--OFFICE COPY

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**FILED**

MAY 12 2005

LISA M. GALDOS  
CLERK OF THE SUPERIOR COURT  
DEPUTY

5 Attorneys for Governor Arnold Schwarzenegger,  
6 California Attorney General Bill Lockyer, the Office  
of the California Attorney General, Senior Assistant  
7 Attorney General James Schiavenza, Supervising  
Deputy Attorneys General Tyler B. Pon and Paul T.  
8 Hammerness

9  
10 SUPERIOR COURT OF CALIFORNIA

11 COUNTY OF MONTEREY

12 CIVIL DIVISION

13  
14 EUGENE FORTE,

15  
16 Plaintiff,

17 v.

18  
19 ROBERT O'FARRELL, et al.,

20  
21 Defendants.

CASE NO. M72599

NOTICE OF MOTION AND  
MOTION TO DECLARE  
PLAINTIFF A VEXATIOUS  
LITIGANT [CCP § 391-391.7]; FOR  
ENTRY OF PREFILING ORDER  
AND TO POST \$15,000 SECURITY;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT  
THEREOF

Date: June 3, 2005  
Time: 9:00 a.m.  
Ctrm: Law & Motion (TBA)

Action Filed: December 17, 2004

22  
23 TO PLAINTIFF IN PROPRIA PERSONA:

24 PLEASE TAKE NOTICE that June 3, 2005, at 9:00 a.m. in the Law and Motion Courtroom  
25 of this Court, defendants Governor Arnold Schwarzenegger, Attorney General Bill Lockyer, the  
26 Office of the California Attorney General, Senior Assistant Attorney General James Schiavenza,  
27 Supervising Deputy Attorneys General Tyler B. Pon and Paul T. Hammerness will move and  
28 hereby do move for an order declaring plaintiff to be a vexatious litigant pursuant to Code of

1 Civil Procedure § 391-391.7; and further:

2 1. Entering a prefiling order against plaintiff pursuant to Code of Civil Procedure section  
3 391.7, prohibiting plaintiff from filing any new litigation in the courts of this State in propria  
4 persona without first obtaining leave of the presiding judge of the court where the litigation is  
5 proposed to be filed; and

6 2. Requiring plaintiff, pursuant to Code of Civil Procedure section 391.3 to furnish security  
7 in the sum of \$15,000 for the benefit of moving defendant on the grounds that there is no  
8 reasonable probability of his prevailing, and because plaintiff is a vexatious litigant.

9 3. Requiring plaintiff to furnish said security within 10 days of the entry of the order or face  
10 dismissal of the action pursuant to Code of Civil Procedure section 391.4.

11 This motion is and shall be based upon this notice of motion and motion; the accompanying  
12 memorandum of points and authorities, declaration and exhibits and request for judicial notice  
13 (with exhibits).

14 Dated: May 11, 2005.

15 Respectfully submitted,

16 BILL LOCKYER  
17 Attorney General of the State of California  
18 JAMES SCHIAVENZA  
19 Senior Assistant Attorney General  
20 TYLER B. PON  
21 Lead Supervising Deputy Attorney General

22   
23 PAUL T. HAMMERNESSE  
24 Supervising Deputy Attorney General

25 Attorneys for Governor Arnold  
26 Schwarzenegger, California Attorney General  
27 Bill Lockyer, the Office of the California  
28 Attorney General, Senior Assistant Attorney  
General James Schiavenza, Supervising  
Deputy Attorneys General Tyler B. Pon and  
Paul T. Hammerness

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 PRELIMINARY STATEMENT

3 Plaintiff Eugene Forte is a *pro per* litigant who is misusing the Court's resources to vex and  
4 harass its judges, courtroom staff, its attorneys and other public officials - wasting large amounts  
5 of public time and taxpayer money, with the effect of interrupting and interfering with the  
6 performance of essential public duties. Fortuitously, plaintiff has conveniently provided the  
7 court with the very evidence - in his voluminous court filings in the case - which demonstrate his  
8 extreme vexatiousness.<sup>1/2</sup> Astonishingly, he has made thinly-veiled threats against the very  
9 institutions he is misusing in his misguided attempt to extract revenge. (*E.g.* continuous  
10 references in opposition papers to the Chicago and Atlanta judicial murders). In one example,  
11 plaintiff states: "A hangman's rope knows no judicial immunity." (Req. Jud. Notice, Pltf's Ex.  
12 43 to Supp. Opp. Demurrer).

13 Pro per plaintiff's unmeritorious and frivolous papers, pleadings and unnecessary discovery  
14 filed in this case include, but are not limited to, the following:

15 1. Engaging in repeated character attacks upon the State judicial defendant, other judges of  
16 this Court, the Attorney General and his attorneys, characterizing them as having been engaged in  
17 a criminal conspiracy to "fix" the results against him in his various litigations in *pro per* and in  
18 this case. (Req. Jud. Notice, Pltf's Opp. to Demurrer, pp. 4-17; Exs. 1-54 thereto);

19 2. Threatening to set the deposition of the State judicial defendant and noticing the  
20 deposition of Ms. Amanda Berkeley, Judge O'Farrell's courtroom reporter, for a State holiday,  
21 while subpoenaing her to produce her notes of the transcripts of his 2003 contempt hearing. He  
22 characterizes the reporter as engaging in the "felonious recording of a court proceedings." (Forte  
23 fax of 3/10/05 to Pres. Judge Sillman, attached to Req. Jud. Notice as Ex. 1 to Pltf's Decl. in  
24 Opp. to Demurrer, at p. 21).

25 3. Filing a Board of Control claim against Governor Schwarzenegger, the Attorney General

26  
27 1. In his various court filings, plaintiff has provided copies of his faxed correspondence with  
28 the multitude of parties which clearly evidence his abuse and harassment. The State judicial  
defendant respectfully requests the assigned judge to take judicial notice of these documents in ruling  
on this motion. Evid. Code §§ 451, 452.

1 and the deputy attorney general assigned to this case for failing to respond to his demands that  
2 they intervene in this case, or to retaliate against them for their defense of the State judicial  
3 defendant. (Req. Jud. Notice Board of Control claim of 3/3/05, Ex. 33 to Pltf's Exs. in Opp. to  
4 Demurrer).

5 4. Threatening to depose and sue Ms. Lisa Galdos, Diana Valenzuela and "other clerks" in  
6 the Monterey Superior Court clerk's office (if they do not submit to his demands for information  
7 in this case). (Req. Jud. Notice, Pltf's Second Suppl. Mem. of Ps. & As. in Opp. to Demurrer).

8 5. Peppering the Governor, the Attorney General, the Leon Panetta Institute, the Presiding  
9 Judge, the Clerk's Office, actor Clint Eastwood, the FBI and others with a multitude of faxes  
10 complaining of the "criminal conspiracy," demanding investigation and threatening legal action  
11 if plaintiff's demands for information in this case are not complied with. (Req. Jud. Notice, Exs.  
12 1-54 to Pltf's. Opp. to Dem., *passim*).

13 6. Filing requests to enter the default of the State judicial defendant, despite his pending  
14 demurrer, on the specious basis that the defendant's demurrer is not effective as to claims made  
15 against the judge in his "individual" capacity. (Decl. of Defense Counsel, at pp. 1-2; Exs. A - G  
16 thereto).

17 Now, plaintiff has taken his vexatiousness to a new level, having served a motion for leave  
18 to file a first amended complaint adding a host of government officials as new defendants in the  
19 action (Ex. "G" to Decl. of Defense Counsel):

- 20 - the Governor, Arnold Schwarzenegger
- 21 - the Chief Justice, the Honorable Ronald George
- 22 - the Attorney General
- 23 - Sixth District Appellate Court Justices Rushing, Premo and Elia
- 24 - "the entire Monterey County Superior Court bench"
- 25 - the Monterey Superior Court
- 26 - the Monterey Superior Court Executive Officer and Deputy, Lisa Galdos and Lenor
- 27 Noll, and the Court Reporter, Amanda Berkeley
- 28 - defense counsel and his supervisors.

1 The courts need not entertain, and the taxpayers need not subsidize, such activities. This  
2 pattern of abuse must be stopped, and Code of Civil Procedure sections 391 through 391.7  
3 provide the Court with a practical and applicable avenue to stop plaintiff's abusive litigation.

## 4 ARGUMENT

### 5 I

#### 6 **PRO PER PLAINTIFF FORTE IS A VEXATIOUS** 7 **LITIGANT WITHIN THE MEANING OF CCP SECTION** 8 **391(b)**

8 The term "vexatious litigant" is defined in section 391(b) of the Code of Civil Procedure.  
9 Although plaintiff may well qualify under other subsections, subsections 391(b)(2) and 391(b)(3)  
10 appear most applicable in this case at this time. Section 391(b) states:

11 "(b) 'Vexatious litigant' means a person who does any of the following:

12 (1) In the immediately preceding seven-year period has  
13 commenced, prosecuted, or maintained in propria persona at least  
14 five litigations other than in small claims court that have been (i)  
15 finally determined adversely to the person or (ii) unjustifiably  
16 permitted to remain pending at least two years without having been  
17 brought to trial or hearing.

16 (2) After a litigation has been finally determined against the  
17 person, repeatedly relitigates or attempts to relitigate, in propria  
18 persona, either (i) the validity of the determination against the  
19 same defendant or defendants as to whom the litigation was finally  
20 determined or (ii) the cause of action, claim, controversy, or any  
21 issues of fact or law, determined or concluded by the final  
22 determination against the same defendant or defendants as to  
23 whom the litigation was finally determined.

20 (3) In any litigation while acting in propria persona, repeatedly  
21 files unmeritorious motions, pleadings, or other papers, conducts  
22 unnecessary discovery, or engages in other tactics that are frivolous  
23 or solely intended to cause unnecessary delay.

23 (4) Has previously been declared to be a vexatious litigant by any  
24 state or federal court of record in any action or proceeding based  
25 upon the same or substantially similar facts, transaction, or  
26 occurrence."

#### 25 a. **Plaintiff Is A "Vexatious Litigant" Under § 391(b)(2).**

26 In the instant action, plaintiff's own complaint, his motion to file an amended complaint,  
27 and the plethora of faxed correspondence attached as exhibits to his court filings, reveal that he is  
28 attempting to relitigate the merits of his conviction for contempt before Judge O'Farrell - despite

1 having never sought appellate review of said conviction. (*See, e.g.* Pltf's. Opp. to Demurrer, at  
2 pp. 14-17). Not only does this conduct of plaintiff support the granting of the pending demurrer -  
3 it provides additional support for a finding that plaintiff is a vexatious litigant within the meaning  
4 of section 391(b)(2).

5 Plaintiff cannot avoid the effect section of 391(b)(2) by relitigating his contempt conviction  
6 in the guise of tort claims against the State judicial defendant for false imprisonment, battery and  
7 the other causes of action alleged in the complaint. *First Western Development Corp. v. Superior*  
8 *Court* (1989) 212 Cal.App.3d 860, 869-70. In the *First Western* case, a property owner who had  
9 successfully maintained an unlawful detainer action against plaintiff was sued by him in  
10 subsequent actions, in which plaintiff alleged various tort claims against the property owner.

11 The trial court found plaintiff to be a vexatious litigant pursuant to Code of Civil Procedure  
12 section 391(b)(2), and the appellate court affirmed, stating:

13 "A litigant who loses then burdens the courts with new actions and repeated  
14 appeals based on the same controversy and with no reasonable possibility of  
15 prevailing wastes valuable court time. It is axiomatic in our system of justice  
16 that every person is entitled to his day in court; however, a litigant is not  
17 entitled to two days in court. Adrisani's apparently "incurable litigation  
18 complex" has rendered him an 'unsufferable nuisance,' imposing an  
19 unreasonable burden upon the courts and our system of administration of  
20 justice. (*Stafford v. Russell, supra*, 201 Cal.App.2d at pp. 719-720.) The  
21 motive here may be to harass the other party, to postpone the result, or  
22 simply to satisfy some urge to engage in litigation. The court cannot permit  
23 such litigation to continue without offering the protection provided in the  
24 vexatious litigant statutes to the targets of the repeated attempts to relitigate  
25 the same issues."

26 212 Cal.App.3d at 870.

27 **b. Plaintiff Is A "Vexatious Litigant" Under § 391(b)(3).**

28 The stack of documents contained in plaintiff's multiple court filings, as well as the  
29 declaration and exhibits accompanying this motion, demonstrate that plaintiff is a vexatious  
30 litigant within the meaning of section 391(b)(3).

31 As summarized in the preliminary statement, plaintiff has repeatedly filed and served  
32 unnecessary discovery and voluminous, unmeritorious and scandalous pleadings and papers in  
33 this case. Most recently, he has served a motion to amend his complaint to add a slew of  
34 officials, from the Governor and Chief Justice on down, who are immune from suit. He will

1 continue to do so, it is clear, until he is stopped by a judicial declaration establishing that he is a  
2 vexatious litigant, and suitable remedies, including a prefiling order, are imposed. *See Urban*  
3 *Pacific Equities Corp. v. Superior Court* (1997) 59 Cal.App.4th 688 (can't subpoena court  
4 reporter to obtain transcript).

5 There is no likelihood that plaintiff will prevail in this action - or his planned future action  
6 against the State Governor, the Chief Justice, the Attorney General, the judges and court officials,  
7 or deputy attorney general, and the court clerks and court reporter. All these officials enjoy  
8 immunity from liability to protect against exactly what is occurring here - a vengeful assault by a  
9 disgruntled litigant fixated on harassment and retaliation. *Tagliavia v. County of Los Angeles*  
10 (1980) 112 Cal.App.3d 759, 761 (absolute judicial immunity bars tort action against judicial  
11 officer who jailed citizen); *Dellenbach v. Buchanan* (7<sup>th</sup> Cir. 1987) 889 F.2d 755 (court reporter  
12 and other court personnel entitled to absolute immunity for preparation of transcripts - immunity  
13 necessary to prevent them being a "lightning rod for harassing litigation" aimed at court); Govt.  
14 Code § 821.6 (absolute prosecutorial immunity); *Harmston v. Kirk* (1989) 216 Cal.App.3d 1410  
15 (deputy attorney general receives absolute immunity for prosecutorial duties).

16 **c. A Prefiling Order Is Necessary To Prevent Future Abuse, In Addition To A**  
17 **Security Requirement.**

18 Plaintiff has demonstrated by his own filings that unless a prefiling order is entered in this  
19 case, he will likely continue his vexatious litigation in this and successive actions - against the  
20 court clerks and reporter, the Governor, the Chief Justice, the Attorney General, appellate and  
21 trial court judges and officials, and defense counsel. (See Pltf's Motion for Leave to File Amend.  
22 Cmpl., Ex. "G" to Decl. of Defense Counsel, & Forte letters of 3/10/05, Ex. "1" to Pltf's Opp. to  
23 Demurrer, at p. 21 - accusing reporter of fraud, vowing to "make sure she gets jail time"; Req.  
24 Jud. Notice, Board of Control Claim vs. Gov., AG & DAG, Ex. "33" to Pltf's Opp. to Demurrer;  
25 Pltf's Second Supp. Opp. to Demurrer, at p. 3 - threat to depose and sue clerks and reporter).

26 Consequently, in addition to a security requirement, a prefiling order is requested as a  
27 preventative measure, as authorized by Code of Civil Procedure section 391.7, which provides in  
28 pertinent part:

1 “(a) In addition to any other relief provided in this title, the court may, on its  
2 own motion or the motion of any party, enter a prefiling order which  
3 prohibits a vexatious litigant from filing any new litigation in the courts of  
4 this state in propria persona without first obtaining leave of the presiding  
5 judge of the court where the litigation is proposed to be filed. Disobedience  
6 of the order by a vexatious litigant may be punished as a contempt of court.”

7 It is well-established law that a person need not be an actual party to a “pending” action in  
8 order to seek a prefiling order pursuant to Code of Civil Procedure section 391.7. *Bravo v. Ismaj*  
9 (2002) 99 Cal.App.4th 211, 223. It is enough that a vexatious litigant has threatened to sue a  
10 person seeking relief under the vexatious litigant law:

11 “ By its very nature, section 391.7’s prefiling order affects a vexatious  
12 litigant’s future filings. (*McColm v. Westwood Park Assn., supra*, 62  
13 Cal.App.4th at p. 1216). The remedy is directed at precluding the initiation  
14 of a meritless lawsuit and the costs associated with defending such litigation.  
15 (*Id.* at p. 1216, fns. 3 and 4; see *Medix Ambulance Service, Inc. v. Superior*  
16 *Court* (2002) 97 Cal.App.4th 109, 115 [118 Cal. Rptr.2d 249]). Thus,  
17 section 391.7 affords protection to defendants named in pleadings not yet  
18 filed with the court. If individuals named as defendants in these lawsuits  
19 were required to wait until the action was pending, the prefiling order  
20 provided for in section 391.7 would be illusory.

21 Here, Bravo specifically advised defendants of his intent to file another  
22 lawsuit based on essentially the same factual allegations as his dismissed  
23 suit, this time expanding the list of defendants to include counsel. Nothing  
24 in the vexatious litigant statutory scheme prevents a defendant in this  
25 circumstance from taking immediate advantage of the protection afforded by  
26 section 391.7. Requiring a prospective defendant to wait until a new lawsuit  
27 is pending would defeat the very purpose of section 391.7.”

28 99 Cal.App.4th at 222-23

29 **d. Plaintiff Should be Required to Post Security Pursuant to Section 391.1 as a**  
30 **Condition for Proceeding with the Instant Action.**

31 To curb the misuse of the court system by individuals acting in propria persona who  
32 repeatedly file unmeritorious lawsuits and appeals, the Legislature enacted section 391.1, which  
33 provides in relevant part that:

34 “[i]n any litigation pending in any court of this state, at any time until final  
35 judgment is entered, a defendant may move the court upon notice and  
36 hearing, for an order requiring the plaintiff to furnish security.”<sup>2/</sup>

37 2. “Security” is defined as set forth in Section 391(c) of the Code of Civil Procedure and  
38 pursuant to this section means “an understanding to assure payment, to the party for whose benefit  
the undertaking is required to be furnished, of the party’s reasonable expenses, including attorney’s

1 *Bravo v. Ismaj* (2002) 99 Cal.App.4th 211, 224. The moving party must only show that the  
2 plaintiff is a vexatious litigant and that there is no reasonable probability that the plaintiff will  
3 prevail in the litigation. Code Civ. Proc. § 391.1. In *Devereaux v. Latham and Watkins* (1995)  
4 32 Cal.App.4th 1571, 1582, the court held that defendant can satisfy his burden that the plaintiff  
5 has no reasonable possibility of prevailing by showing that “the plaintiff’s recovery is foreclosed  
6 as a matter of law or that there are insufficient facts to support recovery by the plaintiff on its  
7 legal theories, even if all the plaintiff’s facts are credited.” Once this showing has been made, the  
8 trial court “shall order the plaintiff to furnish, for the benefit of the moving defendant, security in  
9 such amount and within such time s the court shall fix.” Code Civ. Proc. § 391.3; *McColm*,  
10 *infra*, 62 Cal.App.4th at p. 1215. It is of no relevance that the plaintiff may financially be unable  
11 to post security. *Devereaux, supra*, 32 Cal.App.4th at 1588. To preclude further game playing  
12 by the litigious pro per, section 391.4 provides that if the security is not furnished as ordered,  
13 then the litigation shall be dismissed as to the party “for whose benefit it was ordered furnished.”  
14 Code Civ. Proc. § 391.4; *McColm v. Westwood Park Assn.* (1998) 62 Cal.App.4th 1211, 1215.

15 As discussed above, it is abundantly clear that plaintiff meets the statutory definition of a  
16 “vexatious litigant”. As set forth in state defendant’s concurrently filed demurrer, plaintiff has  
17 no reasonable probability of prevailing in his pending action, as the lawsuit is barred by absolute  
18 judicial immunity and the Supreme Court’s decision in *Heck v. Humphrey* (1994) 512 U.S. 477.

19 The putative state defendants thus request that this Court order plaintiff to post security in  
20 an amount to be determined by the Court, as set forth in section 391.3. Furthermore, the pending  
21 lawsuit should be stayed until plaintiff posts this security. In the event that he fails to post this  
22 security in the amount and by the date so ordered by this Court, then the pending action should be  
23 dismissed with prejudice in accordance with section 391.4.

24 //

25 //

26 //

27

28 fees and not limited to taxable costs, incurred or in connection with a litigation instituted, caused to  
be instituted, or maintained or caused to be maintained by a vexatious litigant.”

1 **CONCLUSION**

2 As set forth above, plaintiff has shown himself to be a classic vexatious litigant, who is  
3 misusing the court system in precisely the manner which section 391 of the Code of Civil  
4 Procedure is designed to prevent. Accordingly, the moving parties pray for an order from the  
5 court providing all available relief under those provisions, including an order requiring Forte to  
6 furnish security in the amount of \$15,000, and a prefiling order prohibiting Forte from filing any  
7 new litigation unless and until he first obtains leave to do so from the presiding judge of the court  
8 in which he seeks to file.

9 Dated: May 11, 2005.

10 Respectfully submitted,

11 BILL LOCKYER  
12 Attorney General of the State of California  
13 JAMES SCHIAVENZA  
14 Senior Assistant Attorney General  
15 TYLER B. PON  
16 Lead Supervising Deputy Attorney General

17 

18 PAUL T. HAMMERNESS  
19 Supervising Deputy Attorney General

20 Attorneys for Governor Arnold  
21 Schwarzenegger, California Attorney General  
22 Bill Lockyer, the Office of the California  
23 Attorney General, Senior Assistant Attorney  
24 General James Schiavenza, Supervising  
25 Deputy Attorneys General Tyler B. Pon and  
26 Paul T. Hammerness

27 20014738.wpd

**DECLARATION OF SERVICE BY U.S. MAIL**

Case Name: **Eugene Forte v. Robert O'Farrell, et al.**

No.: **M72599**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar which member's direction this service is made. I am 18 years of age and older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On May 12, 2005, I served the attached **Notice of Motion and Motion to Declare Plaintiff a Vexatious Litigant [CCP § 391-391.7]; For Entry of Prefiling Order and to Post \$15,000 security; Memorandum of Points and Authorities in Support Thereof** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Patrick McGreal  
County Counsel  
Office of the County Counsel  
230 Church Street, Building 1  
Salinas, CA 93901-5101

Eugene Forte  
Plaintiff  
1631 Fir Drive  
Los Banos, CA 93635

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 12, 2005, at San Francisco, California.

Rosalinda Asuncion

Declarant



Signature