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10 SUPERIOR COURT OF CALIFORNIA
11 COUNTY OF MONTEREY
12 MONTEREY DIVISION
13

14 **EUGENE FORTE,**
15
16 Plaintiff,
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18 **ROBERT O'FARRELL, et al.,**
19 Defendants.
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CASE NO. M72599

**STATE DEFENDANTS' REPLY
TO OPPOSITION TO MOTION
TO DECLARE PLAINTIFF A
VEXATIOUS LITIGANT;
MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT
THEREOF**

**Date: June 30, 2005
Time: 9:00 a.m.
Dept: Law & Motion (TBA)**

23 COME NOW the State defendants herein and submit the following memorandum of points
24 and authorities in reply to plaintiff's opposition to the motion to declare plaintiff a vexatious
25 litigant, for entry of prefiling order and for an order requiring plaintiff to post security.

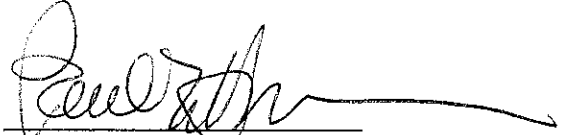
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Dated: June 15, 2005

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California



PAUL T. HAMMERNESSE
Supervising Deputy Attorney General

Attorneys for Governor Arnold
Schwarzenegger, California Attorney General
Bill Lockyer, the Office of the California
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General James Schiavenza, Supervising
Deputy Attorneys General Tyler Pon and Paul
Hammerness

1 **REPLY MEMORANDUM OF POINTS AND AUTHORITIES**

2 **PRELIMINARY STATEMENT**

3 Pro per plaintiff Forte's behavior since the filing of the CCP § 391 motion has not only
4 confirmed the fact that he is, indeed, a vexatious litigant, but has amply demonstrated the urgent
5 necessity for the imposition of a prefiling order and an order requiring the posting of a large
6 security in this case. In opposition to the motion, plaintiff has provided no argument or evidence
7 disputing the need for security in the amount requested.

8 In flagrant disregard of the stay provision of Code of Civil Procedure 391.6, plaintiff has
9 persisted in filing a wholly-frivolous motion to enter a default judgment against the State judicial
10 defendant, while continuing to pepper government officials from the Chief Justice and Attorney
11 General on down with letters demanding intervention, and threatening litigation and other
12 unspecified retaliation, if his requests are not met.

13 Plaintiff's opposition continues his threats: "Plaintiff assures Mr. Lockyer that he will
14 regret what he has done in this manner until his dying days. . . ." (Opp. at p. 2.) Coupling the
15 threat with incongruous wishes for the Attorney General's longevity do little to cushion the
16 impact of the threat. Indeed, he has warned the newly-assigned judge that he will be
17 "explaining" his actions for the "rest of his retirement" if he declares plaintiff a vexatious
18 litigant. (Fax of 5/26/05, Ex. "A" to plaintiff's declaration of 5/27/05 in opposition to motion).

19 In his opposition, plaintiff has advanced no valid basis controverting the basis for the
20 finding under Code of Civil Procedure section 391. Instead, plaintiff disingenuously points to
21 the fact that he has not been involved in 5 prior litigations, and has "only" filed one pleading (the
22 motion to amend and one deposition subpoena (to the court reporter). No valid explanation or
23 excuse is given for the pending motion to enter default, or the previous attempts to have the
24 clerk's office enter default against Judge O'Farrell, despite his pending demurrer. Plaintiff
25 studiously avoids, likewise, any explanation or excuse for the fact that all of his "new" tort
26 causes of action seek merely to relitigate the merits of his unappealed contempt conviction.
27 Now, in an implied admission of the vexatiousness of the actions, plaintiff has taken his motion
28 to amend off calendar, and has never served defense counsel with his OSC re contempt regarding

1 the court reporter's deposition.^{1/}

2 At the conclusion of the hearing at which plaintiff was held in contempt by Judge O'Farrell,
3 plaintiff did not profess the slightest remorse for his conduct. Rather, he warned the court, "It's
4 not over." Plaintiff's actions in pursuit of this litigation have amply shown that he has proceeded
5 not as an innocent, inexperienced pro per litigant, but as a vexatious litigant whose obvious goal
6 is to harass and annoy in order to carry out his proclaimed motive - to retaliate against Judge
7 O'Farrell for convicting him of contempt. For example, despite the knowledge that Judge
8 O'Farrell is represented by the Attorney General's Office, he continues to send pleadings and
9 correspondence directly to judge, whom he addresses as "Mr. O'Farrell," and whom he
10 designates a "pro per". Although the litigation privilege may insulate plaintiff from a libel suit, it
11 cannot protect him from a section 391 determination.

12 It is clear that plaintiff will continue relentlessly with his vexatious litigation unless a
13 prefiling order, coupled with an order requiring the posting of security are imposed in this case.

14 ARGUMENT

15 I

16 **PLAINTIFF'S FAILURE TO FILE SEPARATE, REPETITIVE** 17 **ACTIONS DOES NOT INSULATE HIM FROM A FINDING OF** 18 **VEXATIOUSNESS UNDER CCP § 391(b)**

19 Plaintiff tries to distinguish his conduct because he has not yet filed 5 prior separate actions
20 (although he warns that a federal action is forthcoming). This distinction is irrelevant. As the
21 wording of Code of Civil Procedure sections 391(b)(2) and 391(b)(3) readily indicates, the
22 finding that a person is a vexatious litigator can be based upon his or her behavior in a single
23 action. Forte's behavior in just this single case before the court is clearly within the purview of
24 the vexatious litigant statute. *McColm v. Westwood Park Assn.* (1998) 62 Cal.App.4th 1211,
25 1221. In *McColm*, the appellate court observed that a number of courts have applied section 391

26 1. The clerk's office mistakenly calendared an OSC re contempt regarding the deposition,
27 even though plaintiff has never served defense counsel with his "ex parte" request. Again, plaintiff's
28 conduct provides further evidence of his vexatiousness. See Code Civ. Proc. § 391(b)(3). The filing
of the § 391 motion, as plaintiff bitterly complained, prevented any new filings. Yet, he filed
anyway.

1 to ongoing trial proceedings and appeals, based upon the statute's broad definition of the terms
2 "litigation", "plaintiff" and "defendant". Indeed, these broad definitions allow even potential
3 defendants to seek relief under section 391, when litigation is not yet filed but threatened. *Bravo*
4 *v. Ismaj* (1999) 99 Cal.App.4th 211, 222.

5 II

6 **PLAINTIFF'S TORT CLAIMS, WRITTEN THREATS AND MOTION** 7 **TO ADD AS DEFENDANTS THE GOVERNOR, ATTORNEY** 8 **GENERAL, CHIEF JUSTICE, AND A VARIETY OF JUDICIAL AND** 9 **EXECUTIVE OFFICERS CONSTITUTES VEXATIOUS CONDUCT** 10 **WITHIN THE MEANING OF CCP § 391(b)**

11 Since the inception of this lawsuit, and continuing to the present, pro per plaintiff has
12 barraged the Governor, the Attorney General, the Chief Justice, justices of the Sixth District
13 Court of Appeal, the entire Monterey Superior Court bench, court clerks and the court reporter
14 and defense counsel with written demands and threats of litigation, Board of Control claims and
15 a motion seeking to add them as defendants in this action (and in a subsequent federal court
16 lawsuit).

17 The gist of plaintiff's correspondence, filings and motion is that plaintiff is the victim of a
18 vast criminal conspiracy on the part of the judiciary to wrong him—although the only proffered
19 evidence of the "conspiracy" is the fact that plaintiff was held in contempt by Judge O'Farrell.
20 Plaintiff never bothered to seek appellate review of the conviction, and it is now res judicata and
21 final. Plaintiff's filings, moreover, seek to relitigate the merits of his contempt conviction. (See
22 *Opp. to Demurrer*, at pp. 13-20). This litigation attempt constitutes vexatious conduct within the
23 meaning of Code of Civil Procedure section 391(b)(2).

24 This evidence overwhelmingly demonstrates that plaintiff is a vexatious litigant within the
25 meaning of Code of Civil Procedure section 391(b). As discussed by the appellate court in *First*
26 *Western Development Corp. v. Andrisani* (1989) 212 Cal.App.3d 860, 869:

27 "A litigant who loses then burdens the courts with new actions and repeated
28 appeals based on the same controversy and with no reasonable possibility of
prevailing wastes valuable court time. It is axiomatic in our system of justice
that every person is entitled to his day in court; however, a litigant is not
entitled to two days in court. Andrisani's apparently 'incurable litigation
complex' has rendered him as 'insufferable nuisance,' imposing an
unreasonable burden upon the courts and our system of administration of
justice. [Citation.] The motive here may be to harass the other party, to

1 postpone the result, or simply to satisfy some urge to engage in litigation.
2 The court cannot permit such litigation to continue without offering the
3 protection provided in the vexatious litigant statutes to the targets of the
4 repeated attempts to relitigate the same issues.”

4 Taking the motion to amend off-calendar does not insulate plaintiff from a finding of
5 vexatiousness. Plaintiff provided no explanation for his action, and it in no way impairs his
6 ability to proceed by way of a later motion or separate action against the State defendants (in
7 state and/or federal court). However, the plaintiff’s taking the motion off-calendar is a powerful
8 implied admission on plaintiff’s part of his improper and vexatious motivation for his seeking to
9 add these officials as defendants.

10 III

11 **PLAINTIFF’S CONTINUED EFFORTS TO TAKE THE DEFAULT** 12 **OF THE STATE JUDICIAL DEFENDANT WHILE THE** 13 **DEMURRER WAS PENDING CONSTITUTES FRIVOLOUS,** 14 **MERITLESS CONDUCT WITHIN THE REACH OF CCP § 391(b)**

14 Plaintiff has made numerous attempts to take the default of the State judicial defendant in
15 his “private” capacity, and has a pending motion to enter default, based on the frivolous theory
16 that the demurrer brought by the judge was only made in his “public” capacity. No such
17 distinction exists for purposes of liability under the California Tort Claims Act, Govt. Code
18 section 810, et seq. See, e.g., Govt. Code § 815.2 (public entity liability for injury caused by
19 public employee within scope of employment); § 810.2 (employee for purposes of CTCA
20 included judicial officer); § 995 (public employee entitled to defense of action brought against
21 him in official or individual employment). A judge is entitled to the full benefit of a defense for
22 his actions done in the scope of public, private, official or public. *Id.*

23 Moreover, the plaintiff’s threats against the newly-assigned judge if he rules against him on
24 this motion are hollow, for the same reasons. See 68 Ops. Cal. Atty. Gene. 127 (1985 (retired
25 judge entitled to defense and indemnification at public expense).

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1 IV

2 **PLAINTIFF'S CONTINUED FILING OF MERITLESS,**
3 **THREATENING PAPERS, INCLUDING THREATENING THE**
4 **NEWLY-ASSIGNED JUDGE, CONSTITUTES VEXATIOUS**
5 **CONDUCT UNDER CCP § 391(b) AND FURTHER JUSTIFIES**
6 **IMPOSITION OF A PREFILING ORDER AND A SECURITY**
7 **REQUIREMENT**

8 In just the latest of several recent examples, plaintiff makes an improper ex parte
9 communication to the newly-assigned judge, demanding that the court intervene to order the
10 Chief Justice and the Attorney General via the Judicial Council to copy and furnish him
11 videotapes of plaintiff's appearance at the confirmation hearings of Justice Wendy Duffy to the
12 Sixth District Court of Appeal. (Fax of May 26, 2005, attached as Ex. "9" to Pltf's Decl. of May
13 27, 2005). Moreover, in closing his improper ex parte request, plaintiff warns that "if for any
14 reason I am declared a vexatious litigant, it will ultimately lead to the retirement of the three of
15 you [the Chief Justice, the Attorney General and Presiding Justice Conrad Rushing] and Judge
16 John Golden will be explaining the rationale of his ruling for the rest of his retirement." (*Id.* at p.
17 2.) "It will come back to haunt all who turn their backs on this." (*Id.* Ex. 29.)

18 In addition to his frivolous and harassing court filings, such extrajudicial faxes have a direct
19 applicability to the vexatious litigation determination, as plaintiff has not only copied them to
20 participants in the litigation, but has attached them to his court filings seeking to "persuade" the
21 court to rule in his behalf. Plaintiff has never disowned himself from the thinly-veiled threats
22 contained in his earlier pleadings (e.g., "a hangman's rope knows no judicial immunity," and the
23 dedication of his brief to the perpetrator of the Chicago judicial murders).

24 This conduct provides additional grounds for a finding that plaintiff is a vexatious litigant
25 pursuant to section 391(b)(3), as well as demonstrating the imminent necessity for imposition of
26 a prefiling order and security requirement. As the courts have held, these prospective remedies
27 are appropriate where a pro per litigant, such as plaintiff here, has demonstrated a continuing
28 pattern of filings on issues already decided against him, and where he continues to congest the
judicial process and hinder the judiciary's lawful duties. Plaintiff's persistent and tedious
grievances, inserted into every pleading and file as attachments to his declarations, have

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 June 15, 2005, I served the attached **State Defendants' Reply to Opposition to Motion to Declare Plaintiff A Vexatious Litigant; 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 June 15, 2005, at San Francisco, California.

Rosalinda Asuncion

Declarant



Signature