**Tentative Rulings for November 16, 2023**
**Department 403**

**For any matter where an oral argument is requested and any party to the hearing desires a remote appearance, such request must be timely submitted to and approved by the hearing judge. In this department, the remote appearance will be conducted through Zoom. If approved, please provide the department's clerk a correct email address. (CRC 3.672, Fresno Sup.C. Local Rule 1.1.19)**

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**There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)**
***The above rule also applies to cases listed in this "must appear" section.***

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**The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.**

**21CECG00013** ***Tony Romero v. The BNSF Railway Company*** **is continued to Thursday, November 30, 2023, at 3:30 p.m. in Department 403**

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**(Tentative Rulings begin at the next page)**

# Tentative Rulings for Department 403

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(20) **Tentative Ruling**

Re: ***R.J. Reynolds Tobacco Co. v. Bonta et al.***
Superior Court Case No. 23CECG01734

Hearing Date: November 16, 2023 (Dept. 403)

Motion: Special Motion to Strike Complaint

**Tentative Ruling:**

To deny.

**Explanation:**

A special motion to strike provides a procedural remedy to dismiss non-meritorious litigation meant to chill the valid exercise of the constitutional rights to petition or engage in free speech. (Code Civ. Proc., §425.16, subd. (a); see *Martinez v. Metabolife Intern., Inc*. (2003) 113 Cal.App.4th 181, 186.)

The court engages in a two-step process in determining whether an action is subject to the anti-SLAPP statute: first, the court decides whether defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. If the court finds such a showing has been made, it then determines whether plaintiff has demonstrated a probability of prevailing on the claim. (Code Civ. Proc., §425.16; *Cross v. Facebook, Inc*. (2017) 14 Cal.App.5th 190, 198.)

The Complaint alleges plaintiff R.J. Reynolds Tobacco Company ("RJRT") manufactures cigarettes. Until last year, RJRT sold menthol-flavored cigarettes in California. Since December 21, 2022, California has prohibited retailers from selling tobacco products with a characterizing flavor – a distinguishable taste or aroma other than that of tobacco. In response to the ban, RJRT stopped making menthol-flavored Camel and Newport cigarettes available for sale in California. RJRT introduced several new styles of non-menthol, tobacco-flavored Camel and Newport cigarettes ("New Products"). RJRT contends none of these new cigarettes imparts any distinguishable taste or aroma other than that of tobacco.

On April 25, 2023, Attorney General Rob Bonta ("the AG") sent RJRT four Notices of Determination (the "Notices") asserting that RJRT's new products are "presumptively FLAVORED" under Health & Safety Code, section 104559.5, subdivision (b)(1), for purposes of the characterizing flavor ban. The Complaint contends that relying on a "rebuttable presumption" provision that governs evidentiary burdens in judicial proceedings, the AG contended that the packaging and promotional materials of RJRT's new products imply that they impart a characterizing menthol flavor, despite the products' "NON-MENTHOL" labeling. The AG promised to post the Notices on the Department of Justice's public website, and apparently the Notices were leaked to the media, resulting in some major retail outlets pulling RJRT's products.

RJRT is joined as plaintiff by American Petroleum and Convenience Store Association, an association of independent California gasoline and convenience store owners; JGB Properties Inc., which owns and operates two convenience stores in Fresno: Bulldog Gas & Mart and Abby Arco; and Fresno Elite Carwash, Inc., a car wash that also operates a convenience store in Fresno. The Complaint asserts causes of action for (1) Declaratory Relief; (2) Injunctive Relief; and (3) Writ of Mandate.

**Prong 1: Does Plaintiff's Action Arises From Defendants' Constitutionally Protected Speech**

The moving party first has the burden of showing that the action against it arises from the exercise of free speech rights and/or right to petition. (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658.) A protected activity is "any act" that is completed "in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue …" (Code Civ. Proc., § 425.16, subd. (b)(1).)

"The sole inquiry" under the first prong of the test is whether the plaintiff's claims arise from protected speech or petitioning activity. (*Castleman v. Sagaser* (2013) 216 Cal.App.4th 481, 490.) In making this determination, the court "does not consider the veracity of [the plaintiff's] allegations" (*id*. at p. 493) or "[m]erits based arguments." (*Freeman v. Schack* (2007) 154 Cal.App.4th 719, 733.)

"The [anti-SLAPP] statute's definitional focus is ... [whether] the defendant's activity giving rise to his or her asserted liability ... constitutes protected speech or petitioning. [Citation.]" (*Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1232.)

The AG argues that plaintiffs' three causes of action—for declaratory, injunctive, and writ relief—are rooted in the AG's Notices, which constitute a "writing made before" an executive proceeding, a "writing made in connection with an issue under consideration … by an executive … body," a "writing made in a place open to the public," and which were made "in connection with a public issue or an issue of public interest." (Code Civ. Proc., § 425.16, subd. (e)(1)-(4).)

The AG's arguments all center on the contention the Notices are at the center of this litigation. However, plaintiffs' central claims are not based on the Notices, though the Notices provide some evidence the dispute is ripe. The Notices are among the events that "informed [Plaintiffs] of the existence of an actual controversy justifying declaratory relief, not that" the Notices themselves "constituted that controversy." (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79.)

The core objective of this action is to obtain a determination that the rebuttable presumption does not apply. This action is a challenge to the AG's determination it does. Plaintiffs' principal claim seeks "a declaration that the sale … of the New Products is not within the scope of [the ban]." (Complaint, ¶ 163.) This is a classic declaratory relief claim that does not implicate the anti-SLAPP statute. (See *City of Cotati, supra*, 29 Cal.4th at p. 79.) Other claims in the declaratory relief cause of action do not arise from or depend on the Notices. See Complaint ¶¶ 159 (seeking "declaration that the rebuttable presumption

…violates the Due Process Clause"); 160 (seeking declaration that the rebuttable presumption cannot be applied in a civil proceeding that incorporates the substantive standards of the characterizing flavor ban); 161 (seeking "declaration that the New Products … and promotional materials identified in the Notices do not trigger … the … rebuttable presumption"); and 166 (requesting "injunctions prohibiting Defendants from enforcing the characterizing flavor ban … regarding the sale of RJRT's New Products").

So too with certain aspects of the cause of action for injunctive relief. (See Complaint ¶¶ 166 (seeking injunctions prohibiting enforcement of the characterizing flavor ban; 166 (seeking injunctions prohibiting enforcement actions or filing lawsuits premised on violation of the characterizing flavor ban); and 166 (seeking injunctions prohibiting enforcement actions or filing lawsuits premised on the notion that the characterizing flavor ban's rebuttable presumption has been triggered)).

Other parts of the causes of action address the Notices, and request relief related to the Notices. (Complaint ¶¶ 158 (seeking declaration that it is improper for the AG to make a determination regarding the rebuttable presumption outside the context of a judicial proceeding); 162 [seeking declaration that the Notices have no legal effect or evidentiary value and are not binding in any judicial or administrative proceeding. From the cause of action for injunctive relief: ¶¶ 166 (seeking injunctions prohibiting enforcement or filing any lawsuits based on the Notices); 168 (seeking order requiring rescission of the Notices); 169 (seeking order requiring AG to issue corrective notices); 170 (seeking order precluding defendants from posting the Notices online). The claim for writ of mandate seeks the same relief relating to the Notices. (See Complaint ¶ 181.)) However, "[t]hat a cause of action arguably may have been triggered by protected activity does not entail that it is one arising from such." (*City of Cotati, supra,* 29 Cal.4th at p. 78.)

In *Cotati*, the Supreme Court held that a special motion to strike should not have been granted in a state court declaratory relief action that was filed in response to a federal declaratory relief action between the same parties, raising the same issues. The court reasoned that the state court action arose from the underlying controversy that had prompted the federal litigation, rather than from the filing of the federal litigation itself, and thus did not fall within the scope of the anti-SLAPP statute. (*Cotati, supra*, 29 Cal.4th at pp. 74, 80.)

Plaintiffs challenge as arbitrary, erroneous, and unlawful the AG's determination, as expressed in the Notices, that the New Products are "presumptively FLAVORED" pursuant to the statutory flavor ban.

> Acts of governance mandated by law, without more, are not exercises of free speech or petition. "[T]he defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech. [Citation.]" (*Cotati, supra,* 29 Cal.4th at p. 78, 124 Cal.Rptr.2d 519, 52 P.3d 695, italics in original.)

(*San Ramon Valley Fire Protection Dist. v. Contra Costa County Employees' Retirement Assn.* (2004) 125 Cal.App.4th 343, 354.)

In issuing the Notices the AG acted pursuant to his mandate "to see that the laws of the State are uniformly and adequately enforced." (Cal. Const. art. V, § 13; see Reply 10:1-2.) While perhaps not required by law, issuing the Notices was done in the AG's role as the state's top attorney and law enforcement official. The core of this action, even with regards to the allegations specifically directed at the Notices, is a dispute as to the proper interpretation of a statute by a government body. The AG contends, "Plaintiffs are bringing a pre-enforcement as-applied challenge to a criminal statute …" (AG's MPA 12:18-19.) While there does not appear to be a criminal statute at issue in this action, the AG is correct that the core of this action is to challenge the rebuttable presumption statute (Health & Saf. Code, § 104559.5, subd. (b)(1)), and the AG's application of the statute to RJRT's New Products.

In *Graffiti Protective Coatings, Inc. v. City of Pico Rivera* (2010) 181 Cal.App.4th 1207, a plaintiff's reliance on communications between city officials did not warrant application of the anti-SLAPP statute because liability was not "based on the communications themselves"—even though those communications "may be of evidentiary value" to the plaintiff's claims. (*Id.* at p. 1224.) Here, Plaintiffs' claim that the New Products are lawful, or that the rebuttable presumption is unlawful, are not "based on" the Notices, which merely have "evidentiary value" in establishing ripeness.

It is troubling to this court that the AG seeks to apply the anti-SLAPP statute to a classic declaratory relief / petition for writ of mandate action. As the opposition points out, one prominent treatise explains that anti-SLAPP motions cannot "defeat a lawsuit (such as a petition for mandamus) that challenges the propriety of action by a government agency." (Links, Cal. Civ. Prac. Civil Rights Litigation (2023), § 14:16.) Another treatise, surveying a range of cases, observes that the anti-SLAPP statute "has no application when the defendant's conduct was something other than protected speech or petitioning" and is thus inapplicable to "an action to enforce, interpret or invalidate government laws and regulations." (Carr & Schwing, 1 Cal. Affirmative Def. (2d ed. 2022) § 12:37.)

"Actions to enforce, interpret or invalidate governmental laws generally are not subject to being stricken under the anti-SLAPP statute. If they were, efforts to challenge governmental action would be burdened significantly." (*USA Waste of California, Inc. v. City of Irwindale* (2010) 184 Cal.App.4th 53, 65, citing *Graffiti Protective Coatings, Inc. v. City of Pico Rivera* (2010) 181 Cal.App.4th 1207, 1224-1225:

> Were we to hold otherwise, we "would significantly burden the petition rights of those seeking mandamus review for most types of governmental action. Many of the public entity decisions reviewable by mandamus or administrative mandamus are arrived at after discussion and a vote at a public meeting.... If mandamus petitions challenging decisions reached in this manner were routinely subject to a special motion to strike—which would be the result if we adopted the [City's] position in this case—the petitioners in every such case could be forced to make a prima facie showing of merit at the pleading stage. While that result might not go so far as to impliedly repeal the mandamus statutes, ... it would chill the resort to legitimate judicial oversight over potential abuses of legislative and administrative power, which is at the heart of those remedial statutes. It

> would also ironically impose an undue burden upon the very right of petition for those seeking mandamus review in a manner squarely contrary to the underlying legislative intent behind [the anti-SLAPP statute]." (*San Ramon, supra,* 125 Cal.App.4th at pp. 357–358, 22 Cal.Rptr.3d 724, fn. omitted.) The same may be said of a declaratory relief action that challenges the validity of governmental conduct. And the chilling effect of requiring the plaintiff in an action for a writ of mandate or declaratory relief to make a prima facie showing of merit at the pleading stage is of particular concern because a defendant who prevails on an anti-SLAPP motion is entitled to an award of attorney fees. (See § 425.16, subd. (c).)

(*Graffiti Protective Coatings, Inc., supra,* 181 Cal.App.4th at pp. 1224–1225.)

Here, the court intends to find plaintiffs attack the substance of the AG's action—the alleged arbitrary and erroneous determination and application of the rebuttable presumption—not protected speech. For that reason, the anti-SLAPP statute does not apply even to allegations that directly address the Notices.

Because the AG did not meet its burden of establishing that the Complaint constitutes a SLAPP suit, the court need not consider whether plaintiffs failed to demonstrate that the action is likely to succeed on the merits. (*Cotati, supra*, 29 Cal.4th at pp. 80–81.)

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

**Tentative Ruling**
**Issued By: JS on 8/7/2023 .**
(Judge's initials) (Date)