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8

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

14 **EUGENE FORTE,**  
15  
16 Plaintiff,  
17  
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)**

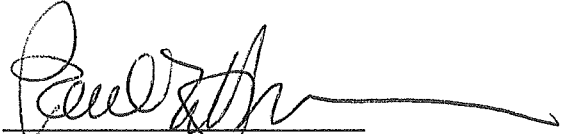
23 COME NOW the State defendants herein and submit the following memorandum of points  
24 and authorities in reply to plaintiff's opposition to the motion to declare plaintiff a vexatious  
25 litigant, for entry of prefilng order and for an order requiring plaintiff to post security.  
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Dated: June 15, 2005

Respectfully submitted,

BILL LOCKYER  
Attorney General of the State of California



PAUL T. HAMMERNESS  
Supervising Deputy Attorney General

Attorneys for Governor Arnold  
Schwarzenegger, California Attorney General  
Bill Lockyer, the Office of the California  
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1 the court reporter's deposition.<sup>1/</sup>

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)**

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

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

### 11 III

#### 12 **PLAINTIFF’S CONTINUED EFFORTS TO TAKE THE DEFAULT 13 OF THE STATE JUDICIAL DEFENDANT WHILE THE 14 DEMURRER WAS PENDING CONSTITUTES FRIVOLOUS, 15 MERITLESS CONDUCT WITHIN THE REACH OF CCP § 391(b)**

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

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

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IV

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

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

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

This conduct provides additional grounds for a finding that plaintiff is a vexatious litigant pursuant to section 391(b)(3), as well as demonstrating the imminent necessity for imposition of a prefiling order and security requirement. As the courts have held, these prospective remedies are appropriate where a pro per litigant, such as plaintiff here, has demonstrated a continuing 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

1 amounted to an unnecessarily massive record.<sup>2/</sup>

2 “The unreasonable burden placed upon the courts by groundless litigation  
3 prevents the speedy consideration of proper litigation and the tremendous time and effort  
4 consumed by unjustified suits makes it imperative that the courts enforce the  
5 vexatious litigant statutes enacted by the Legislature. “[T]he trial courts  
6 should be alert to an abuse of our judicial system and should take firm action  
7 . . .” (*Stafford v. Russell* (1962) 201 Cal.App.2d 719, 722.”

8 *First Western Development Corp., supra*, 212 Cal.App.3d at 870.

## 9 CONCLUSION

10 Plaintiff has abundantly demonstrated his intent to continue to misuse the court system to  
11 harass and intimidate. On a multitude of occasions, he has threatened the judiciary, this Court,  
12 and other governmental officials with retaliatory litigation and inferentially, with bodily harm.  
13 Plaintiff’s actions are a sham, frivolous in nature, and deserving of appropriate remedial orders.

14 Dated: June 15, 2005

15 Respectfully submitted,

16 BILL LOCKYER  
17 Attorney General of the State of California



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 Pon and Paul  
26 Hammerness

27 20018741.wpd

28 2. Plaintiff will doubtless file “supplemental” oppositions to the motion, in violation of the  
Code of Civil Procedure and Rules of Court.

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