**Case No. B254094**

**CALIFORNIA COURT OF APPEAL**

**FOR THE SECOND APPELLATE DISTRICT - DIVISION SIX**

CHARLES TENBORG,

*Plaintiff and Respondent,*

v.

CALCOASTNEWS/UNCOVEREDSLO.COM, KAREN VELIE, and DANIEL BLACKBURN

*Defendants and Appellants.*

---

On Appeal from the Superior Court of San Luis Obispo
Case No. CV130237
THE HONORABLE MARTIN J. TANGEMAN

---

# RESPONDENT'S BRIEF

---

JAMES M. WAGSTAFFE (95535)
KEVIN B. CLUNE (248681)
**KERR & WAGSTAFFE LLP**
101 Mission Street, 18th Floor
San Francisco, CA 94105
Tel: (415) 371-8500
Fax: (415) 371-0500
wagstaffe@kerrwagstaffe.com
clune@kerrwagstaffe.com

Attorneys for Plaintiff and Respondent
CHARLES TENBORG

## CERTIFICATE OF INTERESTED PARTIES

Pursuant to California Rule of Court 8.208, I certify that Respondent is not aware of any person or entity that must be listed on this certification pursuant to California Rule of Court 8.208(e)(1) or (2).

DATED: December 15, 2014

**KERR & WAGSTAFFE LLP**

By 

KEVIN B. CLUNE
*Attorneys for Respondent*
CHARLES TENBORG

## TABLE OF CONTENTS

***Page***

## TABLE OF AUTHORITIES

***Pages***

### Cases

**Statutes**



**Other Authorities**

## I. INTRODUCTION

Respondent Charles Tenborg has offered admissible evidence definitively demonstrating that the Article "Hazardous Waste Chief Skirts Law" contains numerous outright lies.[1] But he was not required to *prove* anything to defeat the instant anti-SLAPP motion. Instead, Tenborg only needed to put forth admissible evidence from which a jury could reasonably conclude that the muckraking Article contained false and otherwise defamatory statements, and note that Appellants failed to meet *their burden* of demonstrating that any privilege applies. As the trial court properly held, he more than satisfied his obligations here such that his claims can proceed to discovery and beyond.

First, the Article—which explicitly accuses Tenborg of widespread illegal activity and collusion in corruption and abuse of power—is manifestly *capable* of defamatory meaning. That is particularly the case when the Article is read as a whole for its probable effect on the average reader, as this Court must do here. Although Appellants now try to distance themselves from the obvious import of their own words, the Article is just too brazen with its sweeping accusations of misconduct for those arguments to carry any serious weight.

---

[1] For the sake of brevity, this brief will simply refer to this article as "the Article."

Second, the Article is also clearly "of and concerning" Tenborg. It mentions him by name, specifically says that he is engaging in illegal conduct, says that he in particular was fired from a previous job, and even includes a picture of him (alongside a drum of "radioactive" waste no less). The fact that the Article's false allegations might *also* impugn the good reputations of others—including his company Eco Solutions—does not somehow relieve Appellants from liability for the harm they caused Tenborg himself.

Third, the Article contains numerous obvious falsehoods. More importantly, Tenborg has demonstrated at the very least a factual dispute for trial regarding the falsity of numerous statements contained in it, which is all he needed to do to overcome Appellants' anti-SLAPP motion here. Indeed, indicative of the utter indefensibility of Appellants' so-called reporting, their Opening Brief barely even attempts to defend the truth of the vast majority of the Article's content. Indeed, even in the *only* concrete instance in their brief in which they allege Tenborg failed to comply with manifesting requirements (and thus committed supposedly "illegal" acts), they simply misunderstand the relevant underlying laws and then falsely accuse him of illegal activity based on that incorrect understanding, just as they did in the Article itself.

Fourth—and perhaps most importantly—Appellants have not come close to meeting *their burden* of demonstrating as a matter of law that any

"fair and true" reporting privilege applies. Initially, even if Appellants had properly attributed their lies and innuendo to the 2010 Stormwater Management Team meeting, there are still deep factual disputes between the parties about what actually happened in that meeting that preclude judgment in their favor here. Moreover, even if Appellants' version was taken at face value despite Tenborg's evidence to the contrary—as this Court is emphatically not allowed to do at this early stage—there is *still* a factual dispute as to whether the Article is really a "fair and true" report under Appellants' version of events because the Article goes far beyond what even they claim was discussed at that meeting. Finally, the privilege cannot possibly apply here because the Article never once even mentions the nearly three-year-old meeting of the City of San Luis Obispo's Stormwater Management Team that Appellants retroactively claim was the basis of *some* of the Article's bombastic accusations.

In short, Tenborg has more than met his burden of demonstrating that his case has "minimal merit" sufficient to allow it to proceed despite the instant anti-SLAPP motion, and Appellants have not met their burden of demonstrating as a matter of law that they can hide behind any privilege. As such, the trial Court's order denying Appellants' motion should be affirmed in full.

## II. BACKGROUND AND FACTS

### A. DEFENDANTS PUBLISH AN ARTICLE DEFAMING TENBORG EVEN THOUGH THEY KNEW ITS CONTENTS WERE FALSE

Plaintiff Charles Tenborg is an environmental scientist who at all relevant times was the president and owner of Eco Solutions. (AA 392.) Over the course of many years, Eco Solutions provided hazardous-waste removal and related services to private and public entities, as well as other services such as spill cleanups, contaminated-debris removal, and pressure washing. (Id.)

Eco Solutions was a small company with only 10 employees statewide and Tenborg was its public face in the relatively tight-knit waste-management community, both in San Luis Obispo County and throughout California. (AA 403.) Over sixteen years in business, Tenborg earned his hard-fought reputation as a premier and trustworthy provider of such services through Eco Solutions, and neither he nor his company was ever once the subject of an enforcement action by the state entity regulating such businesses. (AA 392, 403.)

On November 14, 2012, Appellants published an article titled "Hazardous Waste Chief Skirts Law" that threatened to change all of that. (AA 011-14.) That Article repeatedly defamed Tenborg by accusing him of illegal activity and corruption. Citing no source other than their own "investigation," Appellants falsely reported, among other things, that

Tenborg had been fired from a past job with the County of San Luis Obispo, that he was illegally transporting hazardous waste for the County's Integrated Waste Management Authority ("IWMA"), that he "exposed taxpayers to huge fines by encouraging member public agencies to ignore state law" with respect to the Conditionally Exempt Small Quantity Generator ("CESQG") program, that he was using public funds to support his private interests, and that a key reason he was able to get away with it (despite supposed procurement rules requiring competitive bidding that were intended to prevent such graft) was because of his conspiratorial relationship with IWMA manager William Worrell, who the Article went on to accuse of numerous other illegal and unethical acts. (AA 011-14.)

None of this information was remotely true. Tenborg had never been fired from his prior job at the San Luis Obispo County Certified Unified Program Agency ("CUPA"). (AA 395.) Tenborg never illegally hauled hazardous waste for the IWMA, nor did he encourage member agencies to ignore state law. (AA 395-401.) Indeed, Tenborg had stopped hauling hazardous waste under the relevant program with the IWMA entirely in 2010—and thus it was not possible that he could have been doing so illegally in 2012. (AA 398, 476-77.) Finally, it was also flatly untrue that Tenborg had conspired with Worrell to obtain a "no-bid" contract in violation of the relevant procurement law that supposedly required contracts over $15,000 to go out for public bidding. (AA 402-403,

481 ¶ 44, 486.) In reality, no such law existed, and the IWMA Board awarded the contracts to Tenborg as a result of merit—not any personal connection to Worrell. (AA 011, 511, 513.)

Gallingly, Appellants knew that much—if not all—of this information was false even before the Article ran, but nevertheless unleashed their invective accusations anyway. For example, Appellant Karen Velie, the identified co-author of the article, was explicitly told by Tenborg's former employer that he had not been fired. (AA 673.) Similarly, she asked the Supervising Environmental Health Specialist for the CUPA whether Tenborg possessed all relevant certifications to perform the work he was doing, and she was told that he did. (AA 678.) She was also told before the Article ran that Tenborg did not haul hazardous waste for the IWMA as part of the Conditionally Exempt Small Quantity Generator Program—and indeed had not done so since 2010. (AA 398.)

### B. THE DEFAMATORY ARTICLE RICOCHETS AROUND THE WEB, HARMING TENBORG'S BUSINESS REPUTATION

The Article was initially posted on a muckraking website that Appellants Velie and Daniel Blackburn (the other co-Author of the Article), had invented themselves, dubbed CalCoastNews, and operated under the auspices of CalCoastNews/UncoveredSLO.com LLC. (AA 046.) Appellants also simultaneously posted the Article to Facebook and Twitter. (AA 052.) The Article was subsequently picked up and republished by an

intranet list-serv called "Morning Coffee" that was operated by the state of California's Department of Resources Recycling and Recovery and then widely distributed to (and read by) the waste management community around the entire state. (AA 394, 411-12.) As the Article circulated through the World Wide Web, Tenborg received numerous calls and emails from current and potential customers who were deeply concerned about the allegations, suggesting that they should no longer work with Tenborg or his company. (See, e.g., AA 468.)

Recognizing a direct threat to his business reputation, Tenborg wrote Appellants a request for a retraction, which they ignored. (AA 394-95, 414-18, 486.) Seeing no choice but to protect his good name, Tenborg filed the instant lawsuit, asserting a single cause of action for libel based on the numerous false and otherwise defamatory statements and implications in the Article.

### C. APPELLANTS FILE THE INSTANT ANTI-SLAPP MOTION, ASSERTING THAT THE ORIGINAL SOURCE OF *SOME* OF THE ARTICLE'S DEFAMATORY CONTENT WAS A NEVER-BEFORE-MENTIONED PUBLIC MEETING

After Appellant Velie spent some months evading service of the summons and complaint, Appellants responded by filing the present anti-SLAPP motion on September 13, 2013. (AA 022, 376.) In that motion, Appellants revealed for the very first time that *some* of the information for the Article's sweeping accusations of misconduct had supposedly—and

clandestinely—come from Douglas Dowden, a disgruntled employee of the City of San Luis Obispo. (AA 033.) Dowden provided a declaration in support of Appellants' motion that discussed an internal meeting of the City-wide Stormwater Management Team that he had attended almost three years earlier on January 12, 2010. (AA 205-06.) Dowden claimed that a participant named Kerry Boyle had said during the meeting that Tenborg's company, Eco Solutions, had not been properly licensed to haul hazardous waste. (AA 206.) He also claimed that Kerry Boyle stated that "Eco Solutions was improperly classifying entities as exempt small quantity [hazardous waste] generators and they did not have the authority to do that." (AA 206.) To corroborate his account of what happened at the meeting, Dowden attached to his Declaration never-before identified "Meeting Notes," which he asserted were authentic documents constituting the official record of what occurred at the meeting. (AA 206, 213-14.) Dowden gave these "Notes" to Velie, who now claimed to have used them as the basis of her story, without ever so much as mentioning them beforehand—in the Article itself or otherwise. (AA 049, 052.) Appellants then argued that, because Velie secretly relied on these items *related to* a "public meeting," it simply did not matter whether what she was saying was true because the statements were absolutely privileged. (AA 040.)

### D. THE TRIAL COURT ALLOWS LIMITED DISCOVERY, WHICH REFUTES APPELLANTS' CHARACTERIZATION OF THE PUBLIC MEETING

After Appellants first revealed the supposed source of their accusations, Tenborg moved for the ability to conduct some minimal discovery regarding these new factual contentions concerning the underlying sources for the Article. (AA 364.) The Court granted Tenborg's motion for discovery over Appellants' strenuous objection. (AA 830-31, 842.) That discovery painted a vastly different picture of Dowden's supposed evidence.

Tenborg provided the declaration of Kerry Boyle himself, who Appellants had claimed made the hearsay statements Dowden referenced from the meeting. With respect to the statements in Dowden's declaration, Boyle stated:

> I did not make these statements at the January 12, 2010 Storm Water Management Team meeting, or anywhere else, ever. I also do not recall anyone else making these or similar statements at that meeting. . . . . So I want to confirm very strongly and with 100% certainty that I never made that statement, it was not made at the January meeting,- basically, I believe the statement as written is a false or inaccurate statement.

(AA 682.) Tenborg also provided the declaration of Ronald Munds, another participant at the meeting, who corroborated Boyle's testimony as to what happened at the meeting and likewise rejected Dowden's account. (AA 717-18.) Tellingly, both Boyle and Munds even disputed the notion

that any official "minutes" were ever taken at Stormwater Management Team meetings and stated that the purported document relied on by Dowden and Appellants was inauthentic and factually wrong in its characterization of the meeting. (AA 682, 717-18.)

In addition to contesting what happened at that specific meeting, Tenborg provided substantial additional evidence from both himself and Worrell, methodically rejecting each of the Article's contentions. For example, Tenborg submitted evidence that the Article displayed a deeply flawed understanding of "the complex and overlapping regulatory framework regarding hazardous waste," that caused it to "get[] facts regarding these waste streams wholly wrong, and in the process of doing so make[] inaccurate factual statements regarding Tenborg and his company's handling of them." (AA 473.) Tenborg also provided his own sworn testimony refuting the truth of each of the Article's many defamatory allegations, including the utterly false assertion that either he or his company ever illegally hauled hazardous waste or encouraged others to violate state law. (AA 391-404.)

### E. THE TRIAL COURT REJECTS APPELLANTS' ANTI-SLAPP MOTION IN A DETAILED AND RIGOROUS OPINION

After receiving supplemental briefing based on the parties' additional factual submissions, the Honorable Martin J. Tangeman issued a detailed and thoughtful order denying Appellants' anti-SLAPP motion in

full. (AA 828-35.) Judge Tangeman first rejected Appellants' contention that the Article was privileged under Civil Code Section 47(d) as a fair and true report of an official proceeding because "the subject article makes no reference to or report of what transpired during the January 12, 2010 [Stormwater Management Team meeting]." (AA 831.) Judge Tangemen also noted that Appellants had not met their burden of demonstrating, as a matter of law, that the Article fairly and truly reported on what occurred at that meeting because "there is admissible evidence that creates a triable issue of fact as to what transpired at the January 12, 2010 [meeting]." (AA 831.) Judge Tangeman also held that numerous statements in the Article were defamatory as a matter of law, held that Tenborg had presented ample evidence to demonstrate a material dispute for trial concerning the falsity of a significant number of the Article's factual assertions, and rejected Appellants' contention that the Article only defamed Eco Solutions and not Tenborg. (AA 832-35.)

## III. ARGUMENT: TENBORG HAS SHOWN A PROBABILITY OF PREVAILING ON HIS CLAIM

To determine whether the sole cause of action for libel at issue in this matter should be stricken, the Court must apply the familiar two-step analysis applicable in all anti-SLAPP cases. First, the Court must determine whether the cause of action arises from protected activity. Cal. Civ. Proc. Code § 425.16(b)(1). Second, Tenborg must make both a legal

and an evidentiary showing "that there is a probability that the plaintiff will prevail on the claim." Id. "Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even ***minimal merit***—is a SLAPP, subject to being stricken under the statute." Soukup v. Law Offices of Herbert Hafif, 39 Cal. 4th 260, 278-79 (2006) (bolded emphasis added). Here, Tenborg does not contest that the cause of action for libel falls within the ambit of the anti-SLAPP statute. As such, this appeal is concerned solely with whether the trial court properly held that Tenborg's claims cannot be decided against him as a matter of law at this juncture.

Although courts consider evidentiary submissions to determine whether the case has minimal merit sufficient to withstand an anti-SLAPP motion, they "neither 'weigh credibility, [nor] compare the weight of the evidence.'" Id. at 269 n.3; Oasis W. Realty, LLC v. Goldman, 51 Cal. 4th 811, 820 (2011). Instead, courts must "accept as true the evidence favorable to the plaintiff and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law." Id. This is essentially the same standard courts employ at summary judgment. Grewal v. Jammu, 191 Cal. App. 4th 977, 990 (2011).

To prevail on his claim for libel, Tenborg must show "intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage." Smith v.

Maldonado, 72 Cal. App. 4th 637, 645 (1999).[2] Thus, for purposes of this anti-SLAPP motion, he need only prove that there is a triable issue as to each of these elements of his claim. Further, unlike the other elements, it is Appellants' burden to prove that the Article is privileged. Hawran v. Hixson, 209 Cal. App. 4th 256, 278-79 (2012). As Judge Tangeman properly ruled below, Tenborg has more than met his burden of demonstrating that the Article was defamatory, and Appellants have not met their burden of demonstrating that any privilege applies.

### A. AS AN INITIAL MATTER, THE DEFAMATORY CHARACTER OF THE ARTICLE MUST BE CONSIDERED BY LOOKING AT THE ARTICLE AS A WHOLE

Before discussing the disputed elements of Tenborg's defamation claim here, it is important to note that Appellants are simply incorrect in

---

[2] Appellants' state of mind is not at issue in this appeal. In their original motion, Appellants never argued that Tenborg had failed to establish the requisite degree of fault. (See AA 030-044.) Tenborg's opposition pointed this out and argued that Tenborg was only required to show Appellants' negligence because he was not a public figure and that he readily satisfied that burden under these facts. (AA 387.) Tenborg further argued that, even if an "actual malice" standard applied, his showing here met that standard as well. (Id.) In reply, Appellants *again* ignored this issue of intent in their brief. (See AA 552-61.) When they later tried to raise it for the first time in their supplemental reply brief, the trial court properly refused to consider these new arguments. (AA 834-35.) On appeal, Appellants neither sought to overturn the trial court's refusal to consider their new arguments in their supplemental reply, nor attempted to contest the merits of the underlying argument that Tenborg was only required to show negligence (even though he had also, in fact, shown actual malice) or that he had done so as a factual matter here where Appellants knowingly and recklessly published false facts. As such, Appellants' intent is not at issue here.

their assertion that each statement of a single libelous publication must be considered independently from one another. (See AOB 51-58.) As the California Supreme Court has long held "[s]uch hair-splitting analysis of language has no place in the law of defamation, dealing as it does with the impact of communications between ordinary human beings." MacLeod v. Tribune Pub. Co., 52 Cal. 2d 536, 550 (1959). Instead, each libelous publication is to be examined as a "whole" based on its "natural and probable effect upon the mind of the average reader." Id. at 547.

> The publication in question may not be divided into segments and each portion treated as a separate unit; it must be read as a whole in order to understand its import and the effect that it was calculated to have on the reader, and construed in the light of the whole scope and apparent object of the writer, considering not only the actual language used, but the sense and meaning that may be fairly presumed to have been conveyed to those who read it.

Selleck v. Globe Int'l, Inc., 166 Cal. App. 3d 1123, 1131 (1985). Thus, the Article here must be evaluated for its defamatory nature in its entirety and it would be incorrect as a matter of law to excise certain words or phrases from it to determine whether, when considered in a vacuum, they might not have defamatory meaning.[3]

---

[3] Appellants also contend that—apparently unbeknownst to California—individual statements in a single article must be examined individually for their defamatory content under the First Amendment because that is required by New York Times Co. v. Sullivan, 376 U.S. 254, 285-86 (1964). But that case comes nowhere near such a holding, nor do any of the cases Appellants cite on this issue. (See AOB 52, 57 & n.20.)

Appellants offer a convoluted argument that, because the anti-SLAPP statute supposedly allows for the striking of "partial" causes of action, the trial court therefore erred in refusing to examine the statements in a vacuum here. That argument is misplaced for at least three reasons. First, generic assertions about how anti-SLAPP motions function in general do not answer the substantive-law requirement *specific to defamation* that libelous publications must be considered as a whole. Second, even in the specific context of anti-SLAPP motions regarding defamation claims, courts routinely require that the libelous publications be examined as a whole. Bently Reserve L.P. v. Papaliolios, 218 Cal. App. 4th 418, 427 (2013) (denying a special motion to strike and noting that "[t]he contextual analysis requires that courts examine the nature and *full content* of the particular communication, as well as the knowledge and understanding of the audience targeted by the publication." (emphasis added) (quoting Overstock.com, Inc. v. Gradient Analytics, Inc., 151 Cal. App. 4th 688, 701 (2007)); Burrill v. Nair, 217 Cal. App. 4th 357, 384, 398 (2013).[4] Third, as Appellants reluctantly concede, the California Supreme Court's most recent decision on this issue holds that partial striking of claims is *not* allowed. Oasis W. Realty, LLC, 51 Cal. 4th at 820 ("If the plaintiff 'can show a

[4] See also McGarry v. Univ. of San Diego, 154 Cal. App. 4th 97, 116-17 & n.12 (2007); Summit Bank v. Rogers, 206 Cal. App. 4th 669, 695 (2012); Balzaga v. Fox News Network, LLC, 173 Cal. App. 4th 1325, 1338-39 (2009).

probability of prevailing on *any part of its claim*, the cause of action is not meritless' and will not be stricken; 'once a plaintiff shows a probability of prevailing on any part of its claim, the plaintiff *has established* that its cause of action has some merit and the entire cause of action stands.'" (emphasis in original) (quoting Mann v. Quality Old Time Serv., Inc., 120 Cal. App. 4th 90, 106 (2004); See also A.F. Brown Elec. Contractor, Inc. v. Rhino Elec. Supply, Inc., 137 Cal. App. 4th 1118, 1124 (2006) ("The anti-SLAPP statute authorizes the court to strike a cause of action, but unlike motions to strike under section 436, it cannot be used to strike particular allegations within a cause of action."). Other California courts have routinely followed Oasis on this exact point, including a case Appellants incorrectly cite as holding the opposite. See Wallace v. McCubbin, 196 Cal. App. 4th 1169, 1211-12 (2011); AOB 54.[5] Thus, even in the context of anti-SLAPP motions in general, partial causes of action cannot be stricken.

Moreover, Appellants are incorrect that "Plaintiff strategically framed his complaint as alleging a single claim for libel" for purposes of "gamesmanship." (AOB 58.)[6] Plaintiff was *required* to plead just one

---

[5] See also Burrill, 217 Cal. App. 4th at 379-82; M.F. Farming, Co. v. Couch Distrib. Co., 207 Cal. App. 4th 180, 198 (2012).

[6] In this regard, Appellants' citation to a case from a lower appellate court in Colorado regarding slander, which holds that two different statements made to two different individuals constitute two separate

cause of action stemming from a single libelous publication under the single-publication rule, and Defendants could have successfully demurred to the duplicative causes of action had he not done so. Cal. Civ. Code § 3425.3. ("No person shall have more than one cause of action for damages for libel . . . upon any single publication or exhibition or utterance, such as any one issue of a newspaper or book or magazine . . . .") Accordingly, this Court must examine the Article in question as a whole to see whether or not it is defamatory, and Appellants are incorrect to suggest that statements should be considered individually and devoid of context.

### B. TENBORG HAS CREATED A TRIABLE ISSUE AS TO WHETHER THE ARTICLE IS AT LEAST CAPABLE OF DEFAMATORY MEANING

No one who reads the Article titled "Hazardous Waste Chief Skirts Law" could seriously contend that it is not the type of publication that exposes Tenborg to "hatred, contempt, ridicule, or obloquy, . . . or which has a tendency to injure him in his occupation" (Cal. Civ. Code § 45), particularly when the Article is read as a whole from the perspective of an average reader, as this Court must.

Importantly, a publication can be defamatory either by making a false statement of fact explicitly or by merely implying false facts under

---

publications, is unavailing. (AOB 57, citing Pittman v. Larson Distrib. Co., 724 P.2d 1379, 1387 (Colo. Ct. App. 1986).) Here, we have the publication of a *single* written article that forms the sole basis for Respondent's defamation claim.

any reasonable interpretation of its contents. Hawran, 209 Cal. App. 4th at 289; see also Weller v. Am. Broad. Companies, Inc., 232 Cal. App. 3d 991, 1002-03 (1991). Thus, it is emphatically not the case—as Appellants incorrectly contend in their brief—that "California courts reject attempts to draw a defamatory implication from true facts." (See AOB 44-45.)[7]

To create a triable issue of fact on whether the statements are defamatory, it is only necessary for Tenborg to demonstrate that the relevant statements are *capable* of defamatory meaning—not that they are necessarily defamatory as a matter of law. "It is error for a court to rule that a publication cannot be defamatory on its face when by *any reasonable interpretation* the language is susceptible of a defamatory meaning." Selleck, 166 Cal. App. 3d at 1131 (emphasis added). "The fact that an implied defamatory charge or insinuation leaves room for an innocent

---

[7] The cases Appellants cite for the dubious proposition that false implications are not actionable merely stand for the straightforward proposition that *unambiguously* truthful statements cannot constitute defamation. Smith v. Maldonado, 72 Cal. App. 4th 637, 650 (1999) ("Because, by definition, an accurate and unambiguous statement of true facts cannot under any circumstances convey a defamatory meaning, no innuendo can make such a statement defamatory as a matter of law."); Francis v. Dun & Bradstreet, Inc., 3 Cal. App. 4th 535, 540 (1992) (credit report that accurately described two bankruptcies that plaintiff was indisputably involved with was not defamatory). Further, if Appellants were correct that false implications from true facts were not actionable, there would be no "false light" tort, which there obviously is. See Fellows v. Nat'l Enquirer, Inc., 42 Cal. 3d 234, 236 (1986).

interpretation as well does not establish that the defamatory meaning does not appear from the language itself." MacLeod, 52 Cal. 2d at 549.

California courts have consistently held that false statements impugning a person's professional reputation are defamatory per se. MacLeod, 52 Cal. 2d at 548; Barnes-Hind, Inc. v. Super. Ct., 181 Cal. App. 3d 377, 384 (1986). Of course, it is also well settled that wrongful accusations of criminal conduct "are among the most clear and egregious types of defamatory statements" recognized by law. Weinberg v. Feisel, 110 Cal. App. 4th 1122, 1136 (2003).

***1. The Article As A Whole is Defamatory***

While the defamatory statements and implications of the Article are almost too numerous to count, several obvious defamatory statements are worth highlighting. The Article begins by noting that "[a] contractor paid more than $400,000 annually by San Luis Obispo County's Integrated Waste Management Authority (IWMA) illegally transports hazardous wastes and has exposed taxpayers to huge fines by encouraging member public agencies to ignore state law." (AA 011.) The Article then immediately identifies that contractor as "Charles Tenborg . . . [who] *also* owns ECO Solutions, a private waste disposal and management company recommended as a hazardous waste transporter by the IWMA." (Id. (emphasis added).) The Article then states that "Tenborg was fired for undisclosed reasons from his job with the San Luis Obispo County

Environmental Health Certified Unified Program Agency," suggesting that the purportedly "illegal" activity being reported on in the Article was somehow related to this prior firing. (Id.)

The Article then claims that Tenborg was "awarded a no-bid contract," even though "the IWMA is required by law to put work of more than $15,000 out to bid." (Id.) The implication that Tenborg only obtained the contract through corrupt means is further solidified by the Article's suggestion that Tenborg obtained the contract not because "he was the most qualified for the job" but instead due to his fifteen-year relationship to the "Hazardous Waste Chief" William Worrell, who the Article also (incorrectly) accuses of numerous illegal misdeeds. (AA 011-13.) It then goes on to note that "Tenborg encourages municipalities to ignore reporting protocols . . . ; then, Tenborg transports the loads himself in violation of state law." (AA 012.) The Article then accuses Tenborg about lying to the CalCoastNews "reporters" about whether he transports the waste. (Id.)

Adding further color to the alarmist tone, the Article attempts to tap into readers' fears of toxic exposure by prominently picturing a drum of apparently "radioactive" waste alongside a picture of Tenborg, directly implying that Tenborg's conduct involves mishandling of radioactive waste and therefore imperils the health and safety of the entire community. (Id.)

The average reader would readily conclude from the Article that Tenborg was engaging in numerous and widespread illegal activities

concerning disposal of highly hazardous waste, that he was doing so as part of a conspiracy with others who were intentionally violating state law, that his conduct was posing a grave danger to the health and safety of the community, that he was bilking the taxpayers for substantial sums of money for these services (not to mention putting them at risk for fines) despite his alleged failure to adhere to the legal requirements, and that the only reason he was able to get away with it (particularly in light of his past employment record) was because of his personal relationship to the "Hazardous Waste Chief" who himself was complicit in Tenborg's attempts to "skirt [the] law."

Accordingly, the trial Court properly concluded in the context of these bombastic assertions that it was not necessary for Tenborg to demonstrate that each and every statement is defamatory by itself (though it turns out that he can, in fact, do that here). Instead, as long as he can demonstrate a triable issue regarding at least *some* of the statements, that is sufficient to withstand Appellants' motion to strike.

### *2. Appellants Do Not Contest The Defamatory Character Of The Vast Majority Of Statements Contained Within The Article*

Appellants do not contest the defamatory character of the vast majority of the statements in the Article, such as those explicitly alleging that Tenborg engaged in illegal activity or that he encouraged others to do so. Instead, they merely argue that two types of statements are not

defamatory per se: (i) statements that he currently transports hazardous waste as part of the Conditionally Exempt Small Quantity Generator program and (ii) the statement alleging that he had been fired from the County CUPA. Neither argument has merit, as discussed in detail below.

### *3. The Claim That Tenborg Hauled Hazardous Waste In 2012 Is Capable Of Defamatory Meaning In The Context Of The Article*

It is defamatory to state that Tenborg still transports waste for the IWMA's Conditionally Exempt Small Quantity Generator program when he does not. The entire thrust of the Article is that any such transportation is subject to strict manifesting requirements that Tenborg failed to comply with and, in so doing, he exposed taxpayers to "huge fines."[8] For example, the Article contends that illegal conduct on the part of Tenborg can be inferred because there is an *absence* of such manifests which one would expect to find if he were hauling the waste properly. (AA 013.) Thus, statements that he transported such waste when read together with statements that the proper manifests do not exist further support the other defamatory accusations in the Article: that Tenborg was illegally transporting hazardous waste. Therefore, these statements clearly imply defamatory meaning without looking beyond the four corners of the document and, as such, are defamatory per se. Selleck, 166 Cal. App. 3d at

[8] These allegations are contained in what Appellants label as statements 5, 7, and 9. (See AA 011-12.)

1130. At the very least, whether these statements contain such a defamatory implication is a question of fact that cannot be resolved on Appellants' anti-SLAPP motion. Id. at 1131 ("It is error for a court to rule that a publication cannot be defamatory on its face when by any reasonable interpretation the language is susceptible of a defamatory meaning.").

#### *4. The Assertion That Tenborg Was Fired Is Defamatory In The Context Of The Article*

The false statement that Tenborg was fired is likewise defamatory. As discussed above, this statement regarding his termination must be read in context of the overall Article. And here, where the false statement regarding Tenborg's termination is made in the context of an article alleging widespread illegal activity and corruption, the statement that he was fired is clearly meant to impugn his reputation by painting him as someone who was presumably fired for similar misdeeds in the past. Indeed, one of the very cases Appellants cite on this issue, Davis v. Ross, 754 F.2d 80, 84 (2d Cir. 1985), proves this very point. It holds that "[w]hile it is true that the mere statement of discharge from employment does not constitute libel . . . publication of a discharge *would be defamatory if 'the publication contains an insinuation that the discharge was for some misconduct.'*" Id. (emphasis added). Indeed, it was this second part of the holding—conveniently omitted from Appellants' brief—that forms the basis of the Second Circuit's holding that the relevant statements *were*

susceptible of defamatory meaning when read in context of the other statements. Id. Here, as in Davis, the statements in the Article have precisely such an insinuation because they attempt to connect Tenborg's alleged illegal activity discussed elsewhere in the Article with the specter of past misdeeds or incompetence which may have led to his termination at the San Luis Obispo County CUPA. Indeed, Appellants affirmatively intended these statements to have such an implication. After all, if Tenborg's past termination was truly irrelevant to his supposed illegal activities, why then did Appellants mention this "fact" in the Article at all?

Indeed, the suggestion that Tenborg was fired for "undisclosed reasons" is also at least *capable* of a defamatory meaning in the context of this Article because it insinuates that he was fired for misconduct.[9] That is all that is required to defeat Appellants' motion here. Selleck, 166 Cal. App. 3d at 1131. It does not matter that it is possible for this statement to be read innocuously. "The fact that an implied defamatory charge or insinuation leaves room for an innocent interpretation as well does not establish that the defamatory meaning does not appear from the language itself." MacLeod, 52 Cal. 2d at 549; see also Selleck, 166 Cal. App. 3d at 1130.

---

[9] Of course, as shown above, Tenborg was never fired at all (AA 395), further emphasizing that the only reason to include this blatant lie in the Article was to lower his reputation in the eyes of the readers.

In their single citation to a California opinion, Appellants egregiously misrepresent the case's holding (or lack thereof). See Lesperance v. N. Am. Aviation, Inc., 217 Cal. App. 2d 336, 342 (1963). In Lesperance, the court did not reach the issue of whether a mere statement that a plaintiff was fired could, by itself, be defamatory. And the court certainly did not hold that statements about an employee being fired can never be defamatory irrespective of context. Instead, the quotation Appellants cite—improperly—is merely a quotation from the *defendants' brief*, which the court never adopted. Id. Because the common interest and litigation privileges applied, the court did not need to reach that issue. Id.[10]

While in other contexts it may not *necessarily* be defamatory merely to state *truthfully* that one has been terminated, plainly it is defamatory to (1) state falsely that someone was fired when they were not, and (2) to imply falsely that the firing was based on incompetence or malfeasance.

Thus, Tenborg has more than created a triable issue regarding whether the statement that he was fired is capable of defamatory meaning in the context of this Article.

---

[10] Further, and unlike here, the statement in Lesperance that the plaintiff was fired was true. Lesperance, 217 Cal. App. 2d at 340.

### *5. The Assertion That Tenborg Was Awarded A No-Bid Contract In Violation Of Applicable Procurement Rules Harms Tenborg's Reputation*

Similarly defamatory is the contention that Tenborg and his company improperly obtained the contract with the IWMA in violation of relevant procurement laws and other rules. Indeed, because it directly asserts Tenborg's complicity in a violation of a (non-existent) law, the Article is necessarily defamatory per se. Weinberg, 110 Cal. App. 4th at 1136.

Further, when read in the context of the Article, the statement is obviously meant to suggest that Tenborg was using that relationship improperly to line his own pocket at public expense, despite any applicable procurement laws intended to prevent such corruption and graft. Further, that implication is not an accident. It is precisely the reason that Appellants mentioned this purported procurement law in the first place.

Appellants contend that because the contract was actually awarded without competitive bidding, the statement that this was a "no bid" contract is substantially true and thus cannot form the basis of a defamation claim. (AOB 45.) But, as stated above, even half-truths can give rise to defamation claims if they imply false statements of fact as they do here. Further, even if the statement regarding the lack of a competitive bidding process was true, the statement that the *absence* of such a process violated

relevant law is clearly false.[11] Thus, the Article explicitly alleges unlawful activity where there is none, which is the clearest form of defamation per se there is. Weinberg, 110 Cal. App. 4th at 1136.

### C. THE ARTICLE IS CLEARLY "OF AND CONCERNING" TENBORG

Although Appellants wishfully assert that the Article is not "of and concerning" Tenborg and instead merely deals with the closely held company of which he was the sole owner, that position is simply unsupportable under any reading of this Article. It identifies Tenborg by name and includes his picture in the Article (right next to a picture of a drum of "radioactive" waste). It states that he is the "contractor" who "illegally transports hazardous wastes" and "*also* owns Eco Solutions." (AA 011) (emphasis added). The Article also directly states that "Tenborg encourages municipalities to ignore reporting protocols . . . [t]hen, Tenborg transports the loads himself in violation of state law." (AA 012.) The Article notes that it was Tenborg—and not his company—who was fired from his job with the San Luis Obispo County CUPA. Thus, the Article could not be clearer in its attempt to attack Tenborg's reputation and not just that of his company. That is particularly true because, as discussed above, the Article must be read as a whole.

---

[11] The fact that no such law exists is discussed in detail in the falsity section of this Brief below on page 31.

While it is true that the Article *also* unfairly impugns the reputation of others, that does not mean that defamatory statements regarding these other natural and corporate persons are not simultaneously "of and concerning" Tenborg as well. For example, although allegations that Tenborg was improperly awarded a no-bid contract and transported hazardous waste in violation of state law does in fact defame the IWMA (because it actually awarded the contract) it *also* tends to expose Tenborg himself to ridicule by suggesting that he obtained public contracts through corrupt means and that he illegally transported hazardous waste.

Similarly, the average reader would obviously conclude that Tenborg himself was involved in the identified misconduct by his closely held company Eco Solutions, of which he was the sole owner. Indeed, that would be true whether or not Tenborg himself was expressly named in the Article, as long as it clearly implicated him. Di Giorgio Fruit Corp. v. Am. Fed'n of Labor & Cong. of Indus. Organizations, 215 Cal. App. 2d 560, 569 (1963) ("There is no requirement that the person defamed be mentioned by name."); Dewing v. Blodgett, 124 Cal. App. 100, 102-04 (1932); see also Gen. Motors Acceptance Corp. v. Howard, 487 S.W.2d 708, 712-13 (Tex. 1972) (defamatory statements about a corporation were of and concerning the individual who was the corporation's sole owner, president, and person responsible for its actions). Here, of course, Tenborg *was* explicitly named, and he was directly implicated in the illegal activity

associated with his company. Thus, there is simply no question that the statements are about him.

As such, there is no serious dispute that the defamatory content of the Article is "of and concerning" Tenborg, and he has therefore more than met his burden of demonstrating that there is at least a triable issue with respect to this element of his libel claim.

### D. TENBORG HAS MORE THAN CREATED A TRIABLE ISSUE AS TO THE FALSITY OF THE ARTICLE

Although he was not required to do so (because the Article must be considered as a unified whole, and thus one false statement would be enough to defeat Appellants' motion), Tenborg has demonstrated a triable issue with respect to the defamatory nature of each and every individual statement identified in the Complaint.

But before discussing the disputed factual allegations, it is important to note that Appellants have the standard of proof exactly backwards. It is not the case that they can prevail, for example, if a "statement is not false at any point in time" such that it is possible to derive a potentially truthful (and therefore non-defamatory) interpretation of their allegations. (See AOB 40-41.) As long as "*any reasonable interpretation* of the language is *susceptible* of a defamatory meaning" then "[i]t is error for a court to rule that a publication cannot be defamatory on its face." Selleck, 166 Cal. App. 3d at 1131. Keeping this standard it mind, Tenborg has readily

demonstrated that reasonable interpretations of the Article imply false and otherwise defamatory statements of fact and that, as such, Appellants cannot prevail on their anti-SLAPP motion.

### *1. Tenborg Was Not Fired From the San Luis Obispo County CUPA*

Perhaps the most straightforward defamatory statement in the Article is the wholly unsubstantiated accusation that Tenborg was "fired for undisclosed reasons from his job with the San Luis Obiospo County Environmental Health Certified Unified Program Agency (CUPA)." Tenborg provided ample evidence that this was demonstrably false, and certainly enough evidence to at least create a triable issue of fact. He provided a declaration from his former boss with the CUPA, Curtis Batson, who testified that Tenborg was not fired. (AA 673.) He also provided his own sworn declaration stating that he was not fired, that he instead decided to resign from that entity to start his own business, and that he did so on good terms with the CUPA. (AA 395.) Amazingly, Appellants knew that their statements were false because Mr. Batson told them as much before the Article ran. (AA 673.) Thus, there is clearly a triable issue as to the falsity of this statement.

### *2. Tenborg Was Not Improperly Awarded A No-Bid Contract*

Similarly false and defamatory is the Article's statement that Tenborg was awarded a no-bid contract in violation of relevant law. The

Article stated that "Worrell said Tenborg got the no-bid contracts because he was the most qualified for the job. *However*, as a public entity, the IWMA is required by law to put work of more than $15,000 out to bid and *to avoid using public resources to support private business*." (AA 011 (emphasis added).) Thus, this portion of the Article incorrectly states that Tenborg received the relevant contract in violation of a "law" that requires that such bids to be part of a competitive bidding process, implying that he obtained the contract through corrupt and illegal means. It also falsely implies that Tenborg did not get the contract "because he was the most qualified for the job" but instead because of his personal relationship with Worrell.

Appellants' brief doubles-down on the Article's false accusations and brazenly assert that the statement that any contract with the IWMA over $15,000 must undergo competitive bidding is true or, at least, that Tenborg has failed to prove that it is false. But *there is simply no law* that requires the IWMA to send out contracts for more than $15,000, and Appellants have never once pointed to one because none exists. (AA 486.) Amazingly, Appellants merely cite to *the Complaint* for the proposition that there is such a law in their opening brief (AOB 45) even though the Complaint states the exact opposite—that there is no such requirement. (AA 006.)

To the extent Appellants are asking this Court to put the burden on Tenborg to prove a negative—that no such unknown law exists that the Article vaguely accuses him of violating—such a Kafkaesque approach is impractical, unfair, and contrary to California law. Putting such a burden on Tenborg to prove the absence of such a law "would be impractical and inefficient because it would require the [party opposing a SLAPP motion] to identify and address every conceivable statute that might have had some bearing on the underlying action and then prove a negative—that the underlying action did not violate any of these laws."[12] See Soukup, 39 Cal. 4th at 286 (discussing similar burdens in the context of a SLAPPback suit). In addition, at worst there is a triable issue on whether there is any such law, particularly in light of statements from Worrell, who stated that there is no reason to believe that any such law exists. (AA 486.)[13]

---

[12] Incidentally, the only reference to a $15,000 limit that counsel for Tenborg can find anywhere involves certain rules relating to contracts with school districts. Cal. Pub. Contract Code § 20111. Obviously, nothing in this case relates to school districts.

[13] While the trial court admittedly struck some (but not all) of Worrell and Tenborg's testimony on the issue of the existence of such a law as an "improper legal conclusion" (see, e.g., AA 402, 588-89, 835), that does not free Appellants from having to identify such a law or prevent this Court from determining as a matter of law that no such fictitious statute exists. Further, the trial court did not strike Worrell's statement that, based on his years of experience in the industry, he has no reason to believe that such a requirement exists. (AA 481 ¶ 44.) Worrell provided more than enough information regarding his extensive background to qualify him as an expert in the field competent to testify on this issue given his decades of experience in the industry. See Cal. Evid. Code § 720.

Further, Appellants do not even address the other defamatory suggestions behind these words—that Tenborg obtained the contract because of a personal relationship based on cronyism and in an effort to pad his own pockets at public expense. And Tenborg provided sufficient admissible evidence to create a triable issue on those matters as well. (AA 402-403 ¶ 52, 481 ¶ 44, 486.)

### *3. Tenborg Did Not Illegally Haul Hazardous Waste*

Tenborg submitted reams of admissible evidence demonstrating the falsity of the Article's vague, sweeping, and constantly-shifting theories as to why Tenborg was "illegally transport[ing] hazardous waste." But he did not have to do so to defeat Appellants' anti-SLAPP motion here. All that was required was that he demonstrate that there was a genuine issue for trial as to the falsity of *any* of the numerous defamatory statements and implications of the Article regarding his purported "illegal" hauling of such waste. See Oasis W. Realty, 51 Cal. 4th at 820. That he readily did, as explained in detail below.

#### *a) Tenborg Was Properly Licensed At All Times*

Appellants have previously asserted that Tenborg was "illegally hauling" hazardous waste because he did not have the proper licenses to haul such waste. (See AOB 21-23.) But, Tenborg provided sufficient admissible evidence in the form of his testimony stating that he was properly licensed at all times. (AA 395-97, 690.) Although he did not need

to submit *any* evidence in addition to this sworn testimony to create a genuine issue for trial, he nevertheless did so by providing his actual licenses and corroborating statements from Kerry Boyle. (AA 423- 429, 683, 694-715).

Interestingly, Appellants do not still appear to maintain that Tenborg was, in fact, unlicensed. Although Appellants' repeatedly point to the six words "Eco Solutions No Longer Licensed to Haul" in the supposed minutes of the Stormwater Management Team meeting in an effort to hide behind the *privilege*, they never once actually attempt to defend the veracity of this statement. Indeed, Appellants knew that the statement was false even *before* the Article ran in November of 2012 because the Supervising Environmental Health Specialist for the CUPA in San Luis Obispo told Velie as much. (AA 676, 678.) Appellants therefore cannot point to any evidence showing that Tenborg lacked the proper licenses such that he somehow "illegally transported hazardous waste."

*b) Tenborg Never Illegally Transported Hazardous Waste Or Encouraged Small Quantity Generators To Violate State Law*

Tenborg likewise has presented sufficient evidence to demonstrate that he never "encourage[d] municipalities to ignore reporting protocol by filling out IWMA forms that allege the municipality is a small generator." (AA 011-12.) Again, Tenborg provided his own declaration definitively saying that neither he, nor his company, ever did that (AA 397-98), which

is sufficient to create an issue for trial. While Appellants contend this admissible evidence is not credible because it is "self serving," that issue is for a jury—and not this Court—to decide.[14]

Tenborg also provided the declarations of Worrell and Boyle, which not only prove the assertion is false but also nonsensical. That is because the municipalities *self-certify* that they are small quantity generators (because they are the only ones who can know, as a practical matter, how much waste they generate), and thus it would never be the case that Tenborg, his company, or the IWMA filled out the relevant forms for them. (AA 397, 475-76, 484-85, 683.) While Appellants point to certain forms that supposedly demonstrate that Tenborg, Worrell, and Boyle are simply wrong as a factual matter (see AOB 43-44),[15] again that sort of factual dispute merely means that there is an issue for trial.

---

[14] Appellants slyly note that Tenborg "made no attempt to depose Velie or UCT Dowden" despite the automatic discovery stay applicable to anti-SLAPP motions and suggest that it is "telling[]" of the lack of merit to Tenborg's claims. (AOB 28 & n.8.) Appellants neglect to mention that they vigorously contested even the most minimal and non-invasive discovery directed solely towards third parties and clearly would have opposed their own depositions. (AA 830-31; 842.) Nevertheless, as the actual result below shows, Tenborg was able to present more than enough admissible evidence to withstand Appellants' anti-SLAPP motion here even without this additional discovery.

[15] Incidentally, Appellants are incorrectly reading the document purportedly showing the IWMA's involvement in approving entities as conditionally exempt generators. (See AOB 42-43.) First, there is no testimony from anyone with any personal knowledge tending to show what the relevant handwriting actually means. Second, at the very worst, the

Appellants' contentions fare no better when examining the specific allegations of supposedly illegal conduct here. In contrast to the Article's sweeping accusations of ongoing and repeated violations of the law and Tenborg's encouraging others to do so as well, by the time Appellants file their Opening Brief they are left with just the anemic argument that Tenborg violated relevant law with respect to ***just one single shipment*** from early 2010. With respect to that single shipment, Appellants contend that Tenborg purportedly transported a mere 7 gallons of latex paint over the 27 gallon limit allowed for transporting such waste without a manifest.[16] (AOB 39.)

As an initial matter, even if Appellants were correct that this single shipment was not transported in compliance with all the relevant

---

document shows that, *given the generator's self-certification of how much waste they generate*, someone at the IWMA agreed that they met the relevant criteria for the CESQG program. (See AA 397, 475-76.) That does not mean somehow that Tenborg—or even the IWMA itself—certified how much waste a generator produced in a given month or, by extension, whether such entities therefore qualified for the program.

[16] As Worrell explained in his declaration, overlapping federal and state laws created the conditionally exempt small quantity generator designation to "allow[] small quantity generators to transport their hazardous waste without complying with the same burdensome reporting and other regulatory requirements applicable to larger-scale generators in transporting such waste." (AA 474.) Appellants' brief contends (incorrectly) that, in one instance, Tenborg shipped waste for an entity that could not have qualified as a small quantity generator because it generated 31 gallons of latex paint, and 4 gallons of batteries in a month—which they claim was "7 gallons in excess of the '27 gallon' small quantity waste generator requirements." (AOB 39.)

manifesting regulations (which, as we shall see in a moment, is false), the Article goes *far* beyond alleging that *one* shipment of common paint was seven gallons over the technical limit for non-manifested shipments nearly *three years* before the Article ran. Instead, the Article conjures up a vast conspiracy between Tenborg, Worrell, and various municipal entities to brazenly and repeatedly violate state laws and, in so doing, expose taxpayers to "huge" fines and presumably harm public safety as well. Thus, even if Appellants were correct about what this manifest said (which they are not), the Article would *still* be defamatory because it falsely alleged and implied far more extensive and egregious instances of misconduct by Tenborg.

But, in their rush to manufacture a scandal where none existed, Appellants (and their attorneys) simply got the applicable waste regulations dead wrong again. That is because "a person may transport recyclable latex paint *without the use of a manifest* or obtaining registration as a hazardous waste hauler. . . ." See Cal. Health & Safety Code § 25217.3 (2010).[17]

---

[17] The above-cited language comes from the statute as it read as of February 11, 2010, when the shipment in question was supposedly transported. See 1991 Cal. Legis. Serv. Ch. 364 (A.B. 2178) (West); AA 196. The statute was subsequently amended in 2011 to apply exemptions similar to those already applicable to latex paint to oil-based paint as well. 2011 Cal. Legis. Serv. Ch. 603 (A.B. 408) (West). Further, while it is true that the statute sill requires a basic bill of lading, "which is far less burdensome and expensive than using a manifest" (AA 478), Tenborg offered admissible evidence that he always had such basic documents for each of his shipments. (AOB 401 ("Both my company and I have always

Similar exemptions apply to transportation of batteries. Id. §§ 25216.1(a)(3), 25218.4; see also AA 479 (discussing same). Thus, it was not illegal for Tenborg to transport 31 gallons of latex paint and 4 gallons of batteries without a manifest, and Appellants' assertion that this *one* shipment was transported illegally is wrong. Thus, even in the *only* instance they attempt to point to of supposedly unlawful conduct, Tenborg has affirmatively demonstrated the falsity of Appellants' accusations.

Then, in a tactic eerily reminiscent of the way in which Appellants themselves twisted the language of those they interviewed for the Article, Appellants' brief likewise contends in a conspiratorial manner that Tenborg's Declaration focused solely on him "as an individual" while coyly avoiding affirmative statements that his company Eco Solutions did not engage in illegal activity. (AOB 40.) That assertion is false. For example, Tenborg presented testimony that:

- "[N]either my company nor I 'designated' anyone as a CESQG . . . nor could we have." (AA 397.)
- "[T]he Article alleges without any basis in fact that my company and I were engaging in widespread fraud, corruption, and illegal activity on a systematic basis as part of

---

complied with the applicable regulations regarding this program, such as completing any necessary bills of lading, and any assertion to the contrary by Defendants is wholly false.").)

a scheme to violate the law in order to pad my personal bank account, which could not be further from the truth." (AA 400.)

- "Eco Solutions has never illegally transported or dumped hazardous waste." (AA 691.)

Thus, Tenborg has presented admissible evidence that neither he nor Eco Solutions engaged in such illegal activity *ever*—and they certainly did not engage the repeated violations of the law that the Article alleges.

*c) Tenborg Could Not Have Illegally Hauled Hazardous Waste For The IWMA In 2012 Because He Did Not Even Haul Any Such Waste During That Time*

Further, the Article did not merely allege that Tenborg had one instance from 2010 where he had not complied with the relevant state laws regarding the handling of certain waste. Instead, the Article was written in the present tense and accused him of *ongoing* and *repeated* illegal activity almost three years later in November of 2012.[18]

But no such violations could have occurred at that time because, as both Tenborg and Worrell testified, neither Tenborg nor his company were hauling waste then for the IWMA under the Conditionally Exempt Small

[18] For example, the Article repeatedly states that he currently "transports" hazardous waste for the IWMA and that he collects money for such efforts in the form of $2,000 to $3,000 payments for such services, and then accuses him of lying in an interview with CalCoastNews about continuing to perform such hauling services. (AA 011-012.)

Quantity Generator program. (AA 398, 476-77.) Thus, it cannot be the case that Tenborg illegally hauled such waste without the proper manifests because "[n]either Tenborg nor his company is required to have manifests for the transportation of such materials because they are not the ones doing the transporting" for such waste streams. (AA 477.)

*d) Tenborg Did Not Illegally Transport Universal Waste, Household Hazardous Waste, Or Waste Associated With The Cleanup Of Homeless Encampments*

Although not discussed anywhere in their appellate brief, Appellants have previously contended that Tenborg illegally transported certain types of hazardous waste known as universal waste, household hazardous waste, as well as waste associated with the cleanups in homeless encampments. But Tenborg affirmatively testified that he did no such thing (AA 398-401), and therefore Appellants likewise cannot base their sweeping allegations of misconduct on his activities in this regard.

## E. NONE OF THE STATEMENTS IN THE ARTICLE WERE PRIVILEGED, AND IT IS CERTAINLY NOT THE CASE THAT ALL OF THEM WERE PRIVILEGED AS A MATTER OF LAW

None of the statements in the Article alleging widespread illegal activity, corruption, and threats to public safety through illegal disposal of hazardous waste are even remotely privileged. But even if *some* of them arguably were, Appellants still would not have met *their burden* of demonstrating that *all* of them are privileged as a matter of law—as they

must do to demonstrate that the trial court improperly denied their anti-SLAPP motion.

Appellants assert that their entire Article is wholly cloaked in the "fair and true" report privilege under Civil Code 47(d). That statute privileges "a fair and true report in . . . a public journal, of (A) a judicial, (B) legislative, or (C) other public official proceeding, or (D) of anything said in the course thereof, or (E) of a verified charge or complaint made by any person to a public official, upon which complaint a warrant has been issued." Cal. Civ. Code § 47(d). "Defendants bear the burden of proving the privilege's applicability." Hawran, 209 Cal. App. 4th at 278; Carver v. Bonds, 135 Cal. App. 4th 328, 348-49 (2005). The privilege was "developed as an exception to the common law rule that the republisher of a defamation was subject to liability similar to that risked by the original defamer." Medico v. Time, Inc., 643 F.2d 134, 137 (3d Cir. 1981). Its purpose was to allow the public to "fulfill its supervisory role over government" by allowing reporters to publish what occurs at official proceedings such that the proceedings themselves can be scrutinized. McClatchy Newspapers, Inc. v. Super. Ct., 189 Cal. App. 3d 961, 975 (1987).

"Whether or not a privileged occasion exists is for the court to decide, while the effect produced by the particular words used in an article or broadcast and the fairness of the report is a question of fact for the jury."

Burrill, 217 Cal. App. 4th at 398 (quoting Handelsman v. San Francisco Chronicle, 11 Cal. App. 3d 381, 386 (1970) (alterations in original omitted)). "In assessing this question, the publications are to be measured by the natural and probable effect they would have on the mind of the average reader." Kilgore v. Younger, 30 Cal. 3d 770, 777 (1982) (alterations and quotations in original omitted). While "[t]he news article need not track verbatim the underlying proceeding," "if the deviation is of such a 'substantial character' that it 'produce[s] a different effect' on the reader" then the privilege does not apply. Carver, 135 Cal. App. 4th at 351.

Here, Tenborg has more than demonstrated that there is at least a genuine issue of material fact concerning the applicability of the privilege, as discussed in detail below.

### *1. There Is A Factual Dispute As To What Happened At The Stormwater Management Team Meeting*

Initially, there is a triable issue with regard to what actually occurred at the City of San Luis Obispo Stormwater Management Team Meeting on January 12, 2010. Appellants contend that one of the participants at that meeting, Kerry Boyle, stated "that Eco Solutions was not licensed to transport hazardous waste and that Mr. Tenborg was filling out improper IWMA forms that incorrectly identified the City as an exempt small quantity hazardous waste generator." (AOB 21-22.) They claim to have learned this from an attendee of the meeting, Douglas Dowden, who also

provided purported "minutes" of that meeting to back up his assertions of what occurred there. (Id.; see also AA 206.) Appellants then argue that the Article is absolutely privileged because it accurately reported the "gist" or "sting" of the conversations that occurred at the meeting. (AOB 22-24.)

Putting aside for a moment whether the Article actually "truly and fairly" characterizes Dowden's hearsay statements about what occurred at the meeting, Tenborg put forth admissible evidence tending to show that Dowden was simply wrong (or lying) as a factual matter about what actually occurred at the meeting. Respondent submitted the sworn declaration of Kerry Boyle—the very person Dowden and Appellants claim made these statements. He stated unequivocally that neither he nor anyone else at that meeting made these statements. Boyle testified:

> I did not make these statements at the January 12, 2010 Storm water Management Team meeting, or anywhere else, ever. I also do not recall anyone else making these or similar statements at that meeting … So I want to confirm very strongly and with 100% certainty that I never made that statement, it was not made at the January meeting,- basically, I believe the statement as written is a false or inaccurate statement.

(AA 682).

Tenborg also provided a second declaration from yet another participant in that meeting, Ronald Munds, who entirely corroborated Mr. Boyle's account of the meeting and otherwise denied the veracity of Appellants and Dowden's characterization of what occurred there. (AA

718.) Boyle and Munds likewise contested the authenticity of the document Appellants point to as the supposed official "minutes" of that meeting, stating that no such minutes were ever taken. (AA 682, 717-18.) As Munds testified, "[t]he Stormwater Management Team meetings simply are not that formal." (AA 718.)

While Appellants may believe these individuals are lying or misremembering what occurred at that January 2010 meeting, that is simply irrelevant at this juncture. It is not the role of this Court when evaluating an anti-SLAPP motion to resolve such disputed issues of fact. See, e.g., Burrill, 217 Cal. App. 4th at 398; Mann, 120 Cal. App. 4th at 105 ("A plaintiff is not required 'to *prove* the specified claim to the trial court'; rather, so as to not deprive the plaintiff of a jury trial, the appropriate inquiry is whether the plaintiff has stated and substantiated a legally sufficient claim." (emphasis in original) (quoting Rosenthal v. Great W. Fin. Sec. Corp., 14 Cal. 4th 394, 412 (1996)).

Appellants also seem to claim that, as long as they accurately conveyed what Dowden told them about the meeting, they are absolutely immune for repeating such statements. (AOB 24.) But that is not the law. The privilege requires that the report be a "fair and true" report *of the official proceeding itself.* Hawran, 209 Cal. App. 4th at 280-81. It does not shield reporters from liability simply because they parrot incorrect and

otherwise defamatory information provided by others about what might have happened at public official proceedings.[19]

### *2. The Far-Reaching Allegations Reported In The Article Go Well Beyond Merely Capturing The "Gist" Or "Sting" Of What Appellants Claim Happened At The Meeting*

Even if Appellants could somehow show that their characterization of what happened at the Stormwater Management Team meeting was correct, the Article *still* would be defamatory as a whole despite the privilege because the allegations in the Article go well beyond reporting what Appellants claim happened in that meeting.

Appellants point to just six words from the disputed minutes of that meeting stating "Tenborg no longer licensed to haul" as justification for the litany of illegal and corrupt actions supposedly taken by Tenborg and his cohorts discussed in the Article. (AA 206, 213.) They also point to a

---

[19] As courts in numerous jurisdictions have held, unofficial statements, particularly by anonymous sources, are not generally protected by the privilege. Phillips v. Evening Star Newspaper Co., 424 A.2d 78, 89 (D.C. 1980); Lewis v. NewsChannel 5 Network, L.P., 238 S.W.3d 270, 286-87 (Tenn. Ct. App. 2007). Even in jurisdictions that do cover anonymous statements, they do so only to the extent the statements *accurately* report on the governmental action in question and do not stray beyond what actually occurred in the public proceeding. See Howell v. Enter. Publ'g Co., LLC, 920 N.E.2d 1, 19 (Mass. 2010) ("If, however, the source is an unofficial or anonymous one, a report based on that source runs a risk that the underlying official action will not be accurately and fairly described by the source, and therefore will not be protected by the privilege, or that the information provided will go beyond the bounds of the official action and into unprivileged territory.").

hearsay statement of Dowden, who claims that Boyle said at that meeting that "Eco Solutions was improperly classifying entities as exempt small quantity [hazardous waste] generators and they did not have the authority to do that." (AA 206). But, even if these two disputed statements were made, Appellants go well beyond these rather banal claims to allege, among other things, that Tenborg:

- ***was fired from his job with the CUPA*** when he was not, implying that his termination was connected with the illegal behavior discussed the Article;
- ***"illegally transports hazardous waste"*** for the IWMA under the conditionally exempt small quantity generator waste program (even though, in reality, he had not transported any such waste for the IWMA since 2010 and did not ever do so illegally) ;
- ***"Exposed taxpayers to huge fines by encouraging member public agencies to ignore state law"*** (when he did no such thing); and
- ***Improperly obtained a no-bid contract*** from the IWMA, implicitly due to his relationship with Worrell, which allowed him to profit privately from public funds (when in fact the entire Board voted on the contract because Tenborg was the best person for the job).

Thus, even under Appellants' version of what happened at the Stormwater Management Team meeting, none of these defamatory statements and implications would be privileged. At the very least, there is a triable issue of fact as to whether a "different effect" would be produced in the average reader if, instead of reading what Appellants now claim happened at the meeting (or showing them the purported "minutes" of that meeting), they instead read the far-reaching accusations in the Article.[20] That alone precludes victory on Appellants' anti-SLAPP motion. See Carver, 135 Cal. App. 4th at 351.

---

[20] Appellants attempt to argue that all of these defamatory statements are covered by the "literary license" afforded to them. But this "literary license" formulation is no different than the general requirement that the publication not "alter the substance of the privileged material such that a reader would be affected differently." See, e.g., Sipple v. Found. For Nat. Progress, 71 Cal. App. 4th 226, 245 (1999). Further, this is not a case like Sipple, for example, where the vast majority of the relevant accusations were explicitly made in the relevant public record. Id. at 231, 245. It is also not a case where a plaintiff relied on a hyper-technical reading of legal terminology that would not have had a different effect on the average reader than an accurate description of the facts, and thus it is not like Hayward v. Watsonville Register-Pajaronian & Sun, 265 Cal. App. 2d 255, 261 (1968), Jennings v. Telegram-Tribune Co., 164 Cal. App. 3d 119, 127 (1985), Glenn v. Gibson, 75 Cal. App. 2d 649, 658 (1946), or Colt v. Freedom Commc'ns, Inc., 109 Cal. App. 4th 1551, 1560 (2003). Nor is this a case like Carver, where the plaintiff had admitted to being sued 13 times for malpractice, and had at least 6 (and likely more) medical complaints lodged against him, such that a slight misstatement of the number of medical complaints filed with the Medical Board did not convey a different "gist" or "sting" to an average reader. 135 Cal. App. 4th at 352; see also Burrill, 217 Cal. App. 4th at 398 ("[T]here is a substantial difference between recommending that a licensed physician prescribe a certain medication and illegally prescribing that medication without a license.")

### *3. Appellants Cannot Claim The Privilege Because They Did Not Attribute The Statements To Any Official Public Meeting*

As the trial court properly ruled, Appellants also cannot invoke the protections of the privilege because they never attributed the Article to the proceeding about which they now claim, in retrospect, they were reporting on. "[I]n order to qualify as privileged [as a fair and true report] such an article must state the source of its information." Hayward, 265 Cal. App. 2d at 259 (citing Prosser, Torts, 3rd ed. (1964) § 110, p. 819).[21]

Thus, for example, in Hawran, a company issued a defamatory press release in connection with events that also happened to be the subject of an SEC investigation. 209 Cal. App. 4th at 256. Nevertheless, because the press release did not purport to be reporting on the SEC investigation—and even though the press release did reference the SEC and state that the company would be making a presentation to it—the Court held that the privilege did not apply under the attribution rule:

> Indeed, the September press release does not mention the subject SEC investigation, much less "capture[ ] [its] substance, . . . 'gist' or 'sting' . . . ." . . . Having reviewed the

---

[21] Appellants meekly argue that no attribution requirement exists because it is not expressly mentioned in the literal text of Section 47(d). That is, of course, no answer to case law squarely holding that such a requirement exists (particularly in the absence of any contrary authority). See, e.g., Hawran, 209 Cal. App. 4th at 256; Burrill, 217 Cal. App. 4th at 399. Nor does it explain why it would make sense for the "fair and true" report privilege to apply when an article does not even mention—let alone report on—the proceeding in question.

> entirety of the two-page press release . . . we cannot say the press release purports to report on, summarize or describe the SEC proceeding or investigation, the history of the SEC proceeding or investigation, or any communications made "in the course of" that investigation. Rather, it is plain from the face of the document that the September press release is reporting the results and consequences of Sequenom's own internal investigation. Though the press release explains that a presentation to the SEC would be forthcoming, it does not purport to characterize or describe the contents of that presentation. Nothing in the September press release gives us the "gist" of the SEC's charges, if any, or the proceedings before it.

Hawran, 209 Cal. App. 4th at 280-81 (citation omitted).

In a similar vein, the Hawran court held that it also did not matter that the same information from the defamatory press release was also submitted directly to the SEC in the form of a legally required financial filing because that "does not transform the press release into a report *about* the SEC proceeding or about statements made in the course of that proceeding." Id. at 281 (emphasis in original); see also Burrill, 217 Cal. App. 4th at 399 (rejecting the claim that the privilege applied to online postings concerning a governmental investigation, even though the postings covered the same subject matter, because the postings did not "state the source of its information") (quoting Hayward, 265 Cal. App. 2d at 259).

Here, Appellants also utterly failed to attribute anything in the Article to the sources they now claim in retrospect that they relied upon as the source of their defamatory content. Indeed, they are even poorer candidates for the privilege than the unsuccessful defendant in Hawran

because, whereas the Hawran defendant at least mentioned the SEC and stated they would be making a presentation to it about these very allegations, the Article here never once mentioned the Stormwater Management Team whatsoever, let alone suggested that it was reporting about a meeting of that specific committee held almost *three years* beforehand. Further, as in Hawran, the fact that certain contentions referenced in the Article were *also* supposedly discussed during a governmental meeting does not transform the Article into a report *about* that meeting. Indeed, just like Hawran, the Article here purported to be about Appellants' "own internal investigation"—and not about an investigation conducted by some governmental entity. (AA 011 ("A contractor paid more than $400,000 annually . . . illegally transports hazardous wastes and has exposed taxpayers to huge fines by encouraging member public agencies to ignore state law, *a CalCoastNews investigation shows*." (emphasis added).)

Appellants are also incorrect that they can claim the privilege as to anything they assert happened at the Stormwater Management Team meeting simply because the Article vaguely avers that *some* of the information contained in it comes from certain anonymous sources identified only as "city employees." As an initial matter, the only attribution to "city employees" in the Article relates to the claim that Tenborg hauls waste and supposedly encouraged municipalities to ignore

reporting protocols relating to small quantity waste generators. (AA 012.) None of the other relevant statements are attributed to anyone other than CalCoastNews's own investigation.

More importantly, a vague reference to the fact that anonymous sources happen to work for the city provide nowhere near enough specificity to invoke the fair reporting privilege about a public meeting. After all, the entire purpose of the privilege is to allow the public to supervise the workings of government by allowing reporters to publicize what happens at public meetings. McClatchy Newspapers, Inc., 189 Cal. App. 3d at 974-75. But, if it is impossible for the public to know that the information they are learning about comes from a public meeting, then that rationale no longer applies. Indeed, under Appellants' logic, there was no need for the Article here to even mention that the supposed source of their information was a governmental employee whatsoever. It would have been enough that *any* anonymous source merely have been talking about something that, unbeknownst to the reader, somehow "related to" a public meeting.

Allowing such a loose attribution requirement would provide a perverse incentive for reporters to be as vague as possible in their sourcing of information. That way, if they end up getting sued, they could scour the public record to find some public document or meeting to hide behind, claiming in retrospect that it was the basis of their anonymous sources.

Indeed, unscrupulous defendants seeking cover under the privilege could easily find protection even if the public source was not actually the basis of the statements in question. Such a loose requirement would allow irresponsible journalism to run rampant while doing nothing to actually inform the public, destroying countless reputations in the process. The entire body of defamation law counsels against such an approach.

Finally, at worst, whether the Article properly attributed the source of its information with sufficient specificity such that the Article would have had the same effect on the average reader as merely attending the proceedings themselves is a factual question on which there is a material dispute between the parties. As such, Appellants' anti-SLAPP motion has to be denied even if there is a conceivable argument that they properly attributed their sources. Burrill, 217 Cal. App. 4th at 398.

#### *4. Nothing In The Article Comprises The "History" Of Any Proceeding Before The Stormwater Management Team*

Similarly specious is Appellants' contention that, through the loophole of providing "background," they can drive the truck that is the vast illegal conspiracy detailed in the Article. Appellants reach this incorrect conclusion by arguing that the "privilege applies to comments illuminating the background and context of a proceeding." (AOB 22-23.) The two cases Appellants cite for this proposition—Dorsey v. Nat'l Enquirer, Inc., 973 F.2d 1431, 1437 (9th Cir. 1992), and Braun v. Chronicle

Publ'g Co., 52 Cal. App. 4th 1036, 1051 (1997)—merely stand for the proposition that "reports which comprise a history of the proceeding come within the privilege." Braun, 52 Cal. App. 4th at 1050. Thus, for example, in Braun, where the San Francisco Chronicle reported on an official State Auditor's report concerning the misuse of state funds, it did not matter that the Chronicle could not literally have read the "actual investigative audit because that investigation was privileged." Id. It was enough that the Chronicle was reporting on the governmental investigation itself, and any comments about the actual audit were considered to be the history of the investigation, even if the Chronicle itself had never seen them. Id. at 1050-51.

Here, as explained above. Nothing in the Article even purports to be reporting on the Stormwater Management Team meeting, much less on the history of that proceeding. And, as explained in Hawran, the fact that the Article happens to share facts that are allegedly in common with facts supposedly discussed an official proceeding does not make the Article a report *about* the proceeding.

Further, none of the defamatory facts alleged here are, in fact, a history of the January 2010 Stormwater Management Team meeting. Even under Appellants' incorrect rendition of what happened at the meeting, the team was not even purportedly investigating why Tenborg supposedly was fired from the CUPA (perhaps because he was not), how it was that he

came to obtain any contracts with the IWMA, or Tenborg's purportedly improper relationship with Worrell. Moreover, the Article could not possibly have been reporting on the "history" of what happened at a January 2010 meeting, because it repeatedly (and incorrectly) claimed that, at the time the Article was published nearly three years later in November of 2012, Tenborg was *still* transporting hazardous waste for the IWMA as part of its conditionally exempt small quantity generator program (which he had stopped doing in 2010), and that he was doing so illegally at that time because CalCoastNews was unable to locate certain required manifests for any such shipments. (AA 013, AOB 39-40.)

Indeed, the Article could not have been reporting on the "history" of the Stormwater Management Team meeting because the *sole* instance in which Appellants contend (incorrectly) that Tenborg hauled waste illegally "took place a *month after* the January 2010 meeting," as Appellants' brief itself admits. (AOB 39-40 (emphasis added).) Thus, the statements here cannot possibly comprise the history of the relevant Stormwater Management Team meeting, and they therefore cannot be privileged on that basis.[22]

---

[22] Similarly inapposite is Appellants' citation to Dorsey, 973 F.2d at 1437. There, the Ninth Circuit merely held that a report about an affidavit filed in court was not limited to literally regurgitating the statements in the affidavit, but instead could include additional facts directly related to that filing such as an out-of-court statement from the declarant that she would not have filed the document unless she was 100% sure it was true. Id. The

Finally, the Court need not even consider Appellants' specious argument that certain statements were merely the "history" of the meeting in question because they never raised this argument below. Martinez v. Scott Specialty Gases, Inc., 83 Cal. App. 4th 1236, 1249 (2000) (new arguments cannot be made on appeal).

### *5. The Article Is Likewise Not Privileged Under Civil Code 47(e)*

In addition to claiming the privilege under Civil Code Section 47(d) for a fair and true report of a public official proceeding, Appellants also claim protection under Civil Code Section 47(e) as a fair and true report of a public meeting. Cal. Civ. Code § 47(e). But Appellants offer no reason why the analysis would be materially different under this other subdivision of the statute, and indeed it would not be different under the circumstances at issue here. The "fair and true" requirement for both subdivisions of the statute is "identical." Dorsey, 973 F.2d at 1436 n.4 (discussing the same substantive provisions when they were labeled 47(4) and 47(5), respectively); see also Kilgore, 30 Cal. 3d at 777 (citing decisions, such as Handelsman, 11 Cal. App. 3d at 386, concerning what is now known as

---

statements in question here come nowhere near such a close relationship to the underlying official proceeding about which an article was explicitly covering. Hayward likewise involved police reports that themselves are part of the crime reports supporting an underlying criminal complaint and thus likewise were covered by the privilege as the history of such complaints. 265 Cal. App. 2d at 260.

47(d) as authority for what constitutes a "fair and true" report under Section 47(e).) And, while it is true that *in addition to* all of the elements required under 47(d), Appellants would *also* have to demonstrate that this meeting was either open to the public or that the publication was "for the public benefit" under either of 47(e)'s subsections, the fact that Appellants here assert the privilege under 47(d) makes any such analysis superfluous. Thus, the Court need not separately analyze the privilege under 47(e) here, because it is inapplicable for all the same reasons that 47(d) is inapplicable here.

## IV. CONCLUSION

There are triable issues of fact with respect to each and every element of Tenborg's libel claim, particularly when the Article is considered as a whole for its probable effect on the average reader. Indeed, if anyone is entitled to judgment as a matter of law based on the admissible evidence submitted thus far, it would be Tenborg and not Appellants. As such, Tenborg has more than demonstrated that his case has minimal merit, and this Court should affirm the trial court's ruling allowing him to proceed to discovery and beyond.

DATED: December 15, 2014

**KERR & WAGSTAFFE LLP**

By 

KEVIN B. CLUNE

*Attorneys for Respondent*
CHARLES TENBORG

## CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

Pursuant to Rule of Court 8.204(c)(1), I certify that this Brief is proportionately spaced, has a typeface of 13-point, proportionally-spaced font, and contains 13,937 words.

DATED: December 15, 2014

**KERR & WAGSTAFFE LLP**

By _____
KEVIN CLUNE

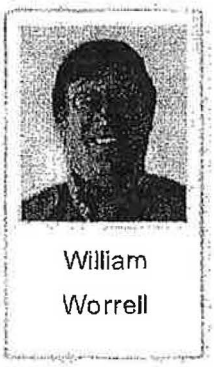
*Attorneys for Respondent*
CHARLES TENBORG

# ATTACHMENT A

# Hazardous waste chief skirts law

## November 14, 2012

By KAREN VELIE and DANIEL BLACKBURN


William Worrell

A contractor paid more than $400,000 annually by San Luis Obispo County's Integrated Waste Management Authority (IWMA) illegally transports hazardous wastes and has exposed taxpayers to huge fines by encouraging member public agencies to ignore state law, a *CalCoastNews* investigation shows.

Charles Tenborg, the IWMA's hazardous waste disposal site manager, also owns ECO Solutions, a private waste disposal and management company recommended as a hazardous waste transporter by the IWMA.

In the mid-1990's, Tenborg was fired for undisclosed reasons from his job with the San Luis Obispo County Environmental Health Certified Unified Program Agency (CUPA), which licenses the five household hazardous waste facilities.

He then formed ECO Solutions. His relationship with the IWMA started in 1997 when he was awarded a no-bid contract by IWMA manager William Worrell for $21,000 a year to run the Household Hazardous waste facilities at Cold Canyon and Chicago Grade landfills. Each year since, the IWMA board has voted to approve a new no-bid contract, with the latest totaling more than $400,000 for the management of the five county hazardous waste facilities.

In a recent interview with *CalCoastNews*, Worrell said Tenborg got the no-bid contracts because he was the most qualified for the job. However, as a public entity, the IWMA is required by law to put work of more than $15,000 out to bid and to avoid using public resources to support private business.

IWMA is a joint powers authority formed in 1994 to deal with state regulation of hazardous waste disposal requirements. All seven San Luis Obispo County cities, the county, and eight special districts are members, and officials of each entity are represented on its board of directors.

A primary responsibility of the authority is to plan for, suggest, and offer solutions to common waste problems through the creation and management of waste and recycling facilities. Currently, the IWMA asks generators of hazardous waste to utilize its transportation services.

"If you are a conditionally exempt small business and generate less than 27 gallons or 220 pounds of hazardous waste per month, we can provide hazardous waste collection and disposal service

for you," the IWMA says on its website.

However, staff at the IWMA said the public agency does not transport waste, though it does serve as a work generator for Tenborg's private transport company.

Charles Tenborg

State regulators require documentation of cradle-to-grave movement of waste materials of more than 50 pounds in any month, unless the entity is given a "small generator" status. This is designed to prevent the illegal disposal of hazardous wastes by transporters or waste facilities that fail to properly manage the waste.

The city of San Luis Obispo does not haul its own hazardous waste and regularly utilizes ECO Solutions as a transporter, city employees said.

Under reporting requirements, a "small" load of hazardous waste material — less than 220 pounds per month — can be exempted from state reporting regulations if it is hauled by a municipality itself after certification of the load's weight.

City employees said Tenborg encourages municipalities to ignore reporting protocols by filling out IWMA forms that allege the municipality is a small generator because it self-transports; then, Tenborg transports the loads himself in violation of state law. He charges the city $2,000 to $3,000 for each load, and takes them to one of IWMA's five household hazardous waste facilities — all managed by Tenborg. The materials are then supposed to be transported ultimately to a hazardous waste facility like the one located near Kettleman City.

Tenborg contends he stopped hauling hazardous waste for municipalities two years ago when IWMA manager Worrell said they needed to make sure cities claiming to be conditionally-exempt small waste generators moved their own waste.

Nevertheless, employees in San Luis Obispo, one of whom said his departments did not utilize Eco Solutions, said that the city does not transport hazardous waste because of the liability involved. City officials, however, still claim conditionally-exempt small waste generator status and rarely send reports to the state.

In this way, municipalities get bargain-basement pricing on their hazardous waste loads.

Keeping track of the hazardous waste and assuring that it is handled properly is difficult and time-consuming.

Data showing how much hazardous waste San Luis Obispo produces is convoluted, because the city also utilizes the services of more than 10 other haulers.

When asked, as manager of the county's five hazardous waste facilities,

how much waste the city of San Luis Obispo self-transported during the past month, Tenborg said he did not know and went on to explain what happens to waste after it arrives at the IWMA facilities.

"We manage it, pack it in drums and then transport it to the appropriate facility," Tenborg said.

San Luis Obispo management's response to a records request for hazardous waste manifests resulted in dozens of documents bearing the names of those transporters.

Of those manifests, only five had been sent to regulators during a three-year period of time, according to the Department of Hazardous Substance Control. Three other manifests the city delivered to regulators were not part of the city's response to *CalCoastNews*' records request — demonstrating the city's failure to properly keep records in a specific file as required by law.

Tenborg's and Worrell's relationship dates back at least 15 years, and Worrell's professional history has been similarly controversial.

Dozens of newspaper reports by the *San Diego Union-Tribune* and the *Los Angeles Times* detail a long list of questionable activities by Worrell during his tenure in San Diego County. Some of those activities nearly bankrupted the county.

In 1990, Worrell arrived in California from Florida to become the deputy director of San Diego County's solid waste division. He quickly began advocating for a $140 million "super-sized" recycling facility to be built in San Marcos. That facility was funded with taxpayer-backed bonds, and was conceived as a multi-jurisdictional destination point for refuse from numerous communities in the San Diego region.

A key feature of that plant was its supposed ability to handle disposal of plastic refuse. In the recycling of plastics, materials are first separated into types of plastics, ground into small pieces and then placed into a furnace so that it can be melted down and reused.

Construction of the plant was hugely controversial, and its approval came on the barest of vote margins by San Diego County's Board of Supervisors.

Following its completion, costs to individual waste haulers rose rapidly, in part because of massive budget overruns. In addition, it was later discovered that Worrell had not even purchased a furnace to melt the plastic. During daylight hours, while members of the public looked on, workers sorted recyclables, but in the evening, plastics were shredded and later simply disposed in a landfill, said several waste company officials in San Diego County.

In less than 13 months, the plant was closed and subsequently dismantled, its parts sold for 10 cents on the dollar, according to a long series of articles in the *Union-Tribune*. San Diego County taxpayers continue to shoulder the bond indebtedness for that project.

In December 1993, Worrell was placed on administrative leave after auditors discovered a pattern of questionable management practices and the apparent misappropriation of county funds, according to the results of two investigations initiated by San Diego County officials.

Among the problems discovered by San Diego County was Worrell's routine approval of fraudulent claims filed by private contractors working on the San Marcos "super dump."

One top county official referred to Worrell's shortcomings as "a pervasive default of responsibility through all levels of management in its solid waste division."

The county's controller's office discovered that taxpayers had doled out $1.2 million to local businesses to develop innovative recycling programs, and that Worrell had failed to follow contractual requirements or monitor the grants' expenditures.

Investigators also found that Worrell, who oversaw the recycling grant program, showed "little or no fiduciary responsibility" for the public funds he administered.

Worrell, faced with the threat of demotion, resigned his post in April 1994 amid a firestorm of controversy.

"I told them demotion was unacceptable, and I resigned instead," Worrell said at the time.

But several county officials told the *Union-Tribune* that Worrell would have been fired had he not chosen to leave voluntarily.

Worrell was never charged with criminal activity and soon left for friendlier climes – San Luis Obispo County, where he was handed the top spot in the IWMA despite the controversy surrounding his stint in San Diego.

**PROOF OF SERVICE (Court of Appeal)**
**Mail, Electronic Service or Personal Service**

Case Name: Charles Tenborg v. CalCoastNews/UncoveredSLO.com, et al.
Court of Appeal Case Number: B254094
Superior Court Case Number: CV130237

1. At the time of service I was at least 18 years of age and **not a party to this legal action.**

2. My ☐ residence ☒ business address is *(specify):* 101 Mission Street, 18th Floor
San Francisco, CA 94105

My electronic service address is: phan@kerrwagstaffe.com

3. I mailed, electronically served or personally delivered a copy of the **Stip. Extending Time to File Answering Brief** as indicated below *(complete either a, b or c):*

a. ☒ **Mail.** I mailed a copy of the document identified above as follows:

b. ☒ **Electronic service.** I electronically served a copy of the document identified above as follows:

c. ☐ **Personal delivery.** I personally delivered a copy of the document identified above as follows:

Date mailed, electronically served or personally served: Dec 15, 2014

(1) Name of Person served: Thomas Burke, Rochelle L. Wilcox, Jeanne M. Sheahan
On behalf of (*name or names of parties represented, if person served is an attorney):*
Defendant and Appellants, CalCoastNews/UncoveredSLO.com, et al.
(a) Address:
505 Montgomery Street, Suite 800, San Francisco, CA 94111
(b) E-Mail Address: RochelleWilcox@dwt.com; JeanneSheahan@dwt.com

(2) Name of Person served: Hon. Judge Martin J. Tangeman
On behalf of (*name or names of parties represented, if person served is an attorney):*
San Luis Obispo Superior Court
(a) Address:
1050 Monterey Street, San Luis Obispo, CA 93408
(b) E-Mail Address: n/a

(3) Name of Person served:
On behalf of (*name or names of parties represented, if person served is an attorney):*
(a) Address:
(b) E-Mail Address:

4. I am a resident of or employed in the county where the mailing occurred. The document was served from *(city and state):* San Francisco, CA

☐ Additional persons served are listed on the attached page *(See page 3).*

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

Date: Dec 15, 2014

Ginie Phan
(TYPE OR PRINT NAME OF PERSON COMPLETING THIS FORM)

(SIGNATURE OF PERSON COMPLETING THIS FORM)

| | |
|---|---|
| Case Name: | Charles Tenborg v. CalCoastNews/UncoveredSLO.com, et al. |
| Court of Appeal Case Number: | B254094 |
| Superior Court Case Number: | CV130237 |

(4) Name of Person served:
On behalf of (*name or names of parties represented, if person served is an attorney):*

(a) Address:

(b) E-Mail Address:

(5) Name of Person served:
On behalf of (*name or names of parties represented, if person served is an attorney):*

(a) Address:

(b) E-Mail Address:

(6) Name of Person served:
On behalf of (*name or names of parties represented, if person served is an attorney):*

(a) Address:

(b) E-Mail Address:

(7) Name of Person served:
On behalf of (*name or names of parties represented, if person served is an attorney):*

(a) Address:

(b) E-Mail Address:

(8) Name of Person served:
On behalf of (*name or names of parties represented, if person served is an attorney):*

(a) Address:

(b) E-Mail Address: