Josh D. Gruenberg (SB #163281)
Daphne A.M. Delvaux (SB #292345)
Joshua P. Pang (SB #296371)
GRUENBERG LAW
2155 FIRST AVENUE
SAN DIEGO, CALIFORNIA 92101-3542
TELEPHONE: (619) 230-1234
TELECOPIER: (619) 230-1074

Attorneys for Plaintiff,
SANDRA MAAS

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO, CENTRAL DIVISION

SANDRA MAAS, an individual, Plaintiff, v. MCKINNON BROADCASTING CO. KUSI-TV 51, a California corporation; and DOES 1 through 25. Defendants.	Case No. 37-2019-00032336-CU-OE-CTL **PLAINTIFF SANDRA MAAS'S OPPOSITION TO DEFENDANT'S MOTION FOR ANTI-SLAPP ATTORNEYS' FEES AND COSTS**

Plaintiff Sandra Maas (hereinafter "Plaintiff" or Ms. Maas") respectfully submits the following Opposition to the Motion for Anti-SLAPP Attorneys' Fees and Costs filed by Defendant McKinnon Broadcasting Co. KUSI-TV 51 ("Defendant" or "KUSI").

///

///

///

///

///

///

///

I. INTRODUCTION / SUMMARY OF ARGUMENT

This is an employment Equal Pay Act case, which also became a discrimination and retaliation case after Plaintiff Sandra Maas opposed Defendant KUSI's gender pay disparity. Although the legislative purpose of section 425.16 is to unmask SLAPP actions "masquerading as ordinary lawsuits," Defendant KUSI has cunningly utilized the underlying Anti-SLAPP Motion to masquerade its free shot at an early motion for summary judgment. See, e.g., Kenne v. Stennis, 230 Cal.App.4th 953, 963 (2014) ("The standard for determining the merits of a defendant's special motion to strike a complaint is similar to that for determining the merits of a defendant's motion for summary judgment.").

KUSI lost – or at least it *did not win*. On the final day before the Covid-19 pandemic forced court closures, the Court heard oral argument[1]; later that day, it confirmed the tentative ruling. Although the Court technically granted the motion, it permitted leave to amend to the verbiage from "termination" to "failure to rehire" – based on the exact same underlying facts – because *Plaintiff established a probability of prevailing on the merits.* Exh. 1, 3/13/2020 Minute Order. The result, as the Court made clear, is that Defendant's discriminatory and retaliatory adverse employment actions against Plaintiff will continue through litigation and ultimately be tried, because unlawful workplace discrimination and retaliation falls outside the protection of California's anti-SLAPP statute. If anyone had an incentive to appeal, it would be *Defendant*.

Nevertheless, Defendant audaciously claims victory and seeks over $100,000 in attorneys' fees and costs.[2] Of course, **Defendant is not the prevailing party.** Nguyen-Lam v. Cao, 171 Cal.App.4th 858, 870-71 (2009) (order granting leave to amend to show probability of prevailing on merits was tantamount to denial of anti-SLAPP motion). Additionally, strong public policy protects discrimination victims from the sanctions Defendant seeks. Defendant is clearly pressing its luck by testing the Court. The motion should be denied in its entirety.

[1] The motion/oral argument date was Friday, March 13, 2020. On Monday, March 16th, the San Diego Superior Court announced immediate suspension of non-emergency services.

[2] Undoubtedly, by filing this frivolous motion *and* inflating its attorneys' stated hours, Defendant KUSI *hopes* to trick the Court into a compromise at some "reduced" dollar figure. The Court should decline to bail Defendant out one bit. Defendant fails to meet the threshold showing of being a prevailing party.

GRUENBERG LAW
2155 FIRST AVE.
SAN DIEGO, CA 92101

II. RELEVANT BACKGROUND

A. Plaintiff's Employment with Defendant KUSI

Ms. Maas was a 15-year news anchor for KUSI. Even Defendant KUSI begrudgingly admits she was excellent at her job. 14 years into her employment, Plaintiff discovered she was being paid at least $90,000 less *annually* than her male co-anchor, who had comparable qualifications and performed the exact same job. Upon this discovery, Plaintiff opposed this discriminatory practice, writing: "There is no reason my compensation should be less than multiple male counterparts at KUSI." These complaints agitated Defendant's General Manager who stated he "did not like the tone of [her] email" and asked her, "Why are you still working?"

Not surprisingly, Defendant abruptly decided to end the employment relationship within a year (and likely much sooner). In doing so, Defendant's management told Plaintiff, "This is not about your performance. We are bringing in a new generation of people."

B. Defendant's Underlying Anti-SLAPP Motion

Even today, the target of Defendant's underlying Anti-SLAPP Motion is still vague and baffling. Indeed, Defendant used that vagueness to its benefit, morphing its argument in its moving papers through its reply brief. Defendant's moving papers sought to strike Plaintiff's discrimination and retaliation causes of action "to the extent these causes of action are predicated on the allegation that Plaintiff's employment with McKinnon Broadcasting Company was wrongfully terminated." See ROA #11, Defendant's Notice. Of course, *none* of Plaintiff's causes of actions are predicated on the allegation she was wrongfully terminated. While Plaintiff *labeled* it as a "wrongful termination," her causes of actions were (and *are*) predicated on the existence of *adverse employment actions*. See ROA #45, Plaintiff's Anti-SLAPP Oppo at pp. 8-13 (header asserting "Maas Was Subjected To An Adverse Employment Action"); CACI 2500 ("That [*name of Defendant*] subjected [*name of Plaintiff*] to an adverse employment action").[3]

In its Reply Brief, perhaps realizing it was on the losing side, Defendant proposed –

[3] To streamline the Court's decision and cut down on the potential appellate slowdowns that plagued the Hunter v. CBS litigation, Plaintiff conceded the first prong (the "First Amendment" prong), and only addressed the second prong (i.e., the "probability of prevailing" prong). See ROA #45, Plaintiff's Anti-SLAPP Oppo at p. 1.

GRUENBERG LAW
2155 FIRST AVE.
SAN DIEGO, CA 92101

without citation to legal authority – that the Court "could, of course, conceivably grant the motion but permit Ms. Maas to amend..."[4] ROA #49, Def's Anti-SLAPP Reply, p. 4, fn. 3. The Court did just that, finding "the evidence is sufficient to conclude Plaintiff's assertion that she suffered an adverse employment action, i.e., Defendant's failure to rehire her on the basis of a discriminatory motive, has at least minimal merit." Exh. 1, 3/13/2020 Minute Order.

As it turns out, Defendant's uncited legal authority arises from two appellate court cases: (1) Nguyen-Lam v. Cao, 171 Cal.App.4th 858 (2009), and (2) Martin v. Inland Empire Utilities Agency, 198 Cal.App.4th 611 (2011). Not surprisingly, both cases support the proposition that the granting of an anti-SLAPP motion with leave to amend "is the functional equivalent of an order denying the motion."

Nevertheless, Defendant filed the instant motion seeking over $100,000 in fees and costs for its work on its losing anti-SLAPP motion, as well as Defendant's work for losing Plaintiff's motion to conduct basic discovery before the anti-SLAPP motion.

III. DEFENDANT IS NOT THE "PREVAILING PARTY" UNDER *MARTIN* and *NGUYEN-LAM*

Of course, Defendant KUSI cannot claim be awarded fees because it was *not the prevailing party*. The purpose of the anti-SLAPP procedure is to unmask SLAPP actions "masquerading as ordinary lawsuits." Kajima Engineering & Const., Inc. v. City of Los Angeles, 95 Cal.App.4th 921, 927 (2002). To that end, amendments to complaints are typically not permitted if an anti-SLAPP motion is granted, as that could frustrate the Legislature's objective of providing a "quick and inexpensive method of unmasking and dismissing such suits." Simmons v. Allstate Ins. Co., 92 Cal.App.4th 1068, 1073 (2001).

As Defendant's underlying Reply Brief alluded to, however, the Court of Appeals crafted an exception to that general rule. An amendment may be allowed to show the probability of plaintiff prevailing on the merits, *based on evidence submitted* in opposition to the anti-SLAPP motion. Such an amendment has nothing to do with whether defendant was engaged in protected

[4] As the Court can deduce, at that point Defendant's moving target anti-SLAPP motion became indistinguishable from an ordinary run-of-the-mill CCP § 430.80 general demurrer. The Code awards no attorneys' fees for defendants who file successful general demurrers.

GRUENBERG LAW
2155 FIRST AVE.
SAN DIEGO, CA 92101

activity and thus does not thwart the purpose of the anti-SLAPP statute. Nguyen-Lam v. Cao, 171 Cal.App.4th 858, 870-871 (2009) (order granting leave to amend to show probability of prevailing on merits was tantamount to denial of anti-SLAPP motion). Indeed, when a plaintiff demonstrates a probability of prevailing at trial if she could amend her complaint to cure the pleadings, "disallowing an amendment would permit [the] defendant to gain an undeserved victory, undeserved because it was not what the Legislature intended when it enacted the anti-SLAPP statute." Id. at 873.

That exception squarely applies here. Defendant KUSI is not the prevailing party in the underlying Anti-SLAPP Motion because **"an order granting an anti-SLAPP motion with leave to amend is the functional equivalent of an order denying the motion."** Martin v. Inland Empire Utilities Agency, 198 Cal.App.4th 611, 629 (2011) ("Finally, because the court's order granting defendants' anti-SLAPP motion with leave to amend was the functional equivalent of a denial, defendants were not "prevailing parties" entitled to attorney fees.").

The Martin court "granted" the defendant's anti-SLAPP motion with leave to amend in order to cure a pleading deficiency. As the Court of Appeals in Martin reasoned, "where the results of the [anti-SLAPP] motion are 'minimal' or 'insignificant,'" a court can find the defendant was not a prevailing party. Id. (quoting Mann v. Quality Old Time Service, Inc., 139 Cal.App.4th 328, 340 (2006)). If "the results of the motion were so insignificant that the party did not achieve any practical benefit from bringing the motion," the trial court acts within its discretion in denying a motion for attorney fees. Id.

As in Martin, this Court granted Defendant's motion with leave to amend to cure a pleading deficiency – namely, the *verbiage* of the adverse employment action, from "wrongful termination" to a "failure to rehire." But Defendant KUSI **achieved no practical benefit from the motion.** The Court's ruling did not change or dismiss Plaintiff's underlying legal authority for her discrimination and retaliation causes of action (i.e., Cal. Gov't Code §12940, and Cal. Lab. Code §1102.5 and §1197.5). Notably, each of Plaintiff's discrimination and retaliation claims merely require an *adverse employment action*, and do not require the further specificity of either a "termination" or "failure to rehire." And the Court's ruling did not change or dismiss the

GRUENBERG LAW
2155 FIRST AVE.
SAN DIEGO, CA 92101

adverse employment action (i.e., Defendant's decision not to continue the 15-year employment relationship). On the contrary, the Court found "the evidence is sufficient to conclude Plaintiff's assertion that she suffered an adverse employment action, i.e., Defendant's failure to rehire her on the basis of a discriminatory motive, has at least minimal merit." See Exh. 1, 03/13/2020 Minute Order.

The March 13th oral argument solidified the fact Defendant did not achieve any practical benefit from bringing the anti-SLAPP motion. After reviewing the tentative ruling, Defendant's counsel spoke first, pleading the Court reconsider its decision that there was indeed a triable adverse employment action. Exh. 2, 03/13/2020 Oral Arg. Transcript ("I would like Your Honor to revisit the retaliation issue ... because ... there needs to be this connection between whatever the protected activity is and whatever the decision here is, apparent failure to hire, whatever it is."). In contrast, Plaintiff's counsel was thrilled with the ruling but requested the Court just change the ruling's wording from "granted" to "denied," leaving everything else the same. Id. ("I called Ms. Maas yesterday after we got the tentative and I said 'Hey, we have great news for you.' Their motion failed, but there's this one thing that the Court granted the motion.").

Furthermore, KUSI's fee motion is **unsupported by the First Amendment-related public policy interest** the anti-SLAPP statute is intended to serve. When a plaintiff whose complaint is subject to a special motion to strike has been granted leave to amend, the underlying reason must arise from the complaint not being a SLAPP subject to California's Anti-SLAPP statute. Nguyen-Lam v. Cao, 171 Cal.App.4th 858, 873 (2009). In Nguyen-Lam, the court held that it was the legislature's intent when enacting section 425.16 "to protect the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." Id. Accordingly, permitting a plaintiff leave to amend when plaintiff had made the requisite showing of a probability of success on the merits, *the complaint falls outside the purpose of the anti-SLAPP statute.* Id. (emphasis added) ("[W]here the strike opponent has demonstrated the requisite probability of success [on the merits], her complaint falls outside the purpose of the anti-SLAPP statute—**indeed, it is not a SLAPP suit at all.**"). Simply put, Defendant's inevitable allusions to "constitutional principles" are inapposite; as in Nguyen-Lam, the

GRUENBERG LAW
2155 FIRST AVE.
SAN DIEGO, CA 92101

Legislature did not intend to shield adverse employment actions taken by Defendant KUSI shown to be discriminatory (based on Plaintiff's gender and/or age) and retaliatory (based on Plaintiff's opposition to Defendant's discriminatory pay practices).

Finally, as the Nguyen-Lam court articulated, "[a] plaintiff authorized to amend would have... **no incentive to appeal an order granting the strike motion.**" Id. at 869-70. This is also the case here, where Maas would have no incentive to appeal an order that validates her contention that KUSI was motivated by discrimination and/or retaliation in ending the employment relationship. Maas filed her complaint to have her day in court; KUSI sought to summarily dismiss her claims early in litigation. If anything, as the defendant in Nguyen-Lam, *Defendant KUSI* would be the sole party incentivized to appeal.

Importantly, Plaintiff Maas has an even stronger case for effective denial than the plaintiffs in Martin and Nguyen-Cao, because this Court, echoing the anti-SLAPP motion standard, has *already determined* the submitted evidence is sufficient "to conclude Plaintiff's assertion that she suffered an adverse employment action, i.e., Defendant's failure to rehire her on the basis of a discriminatory motive, has at least minimal merit." See Exh. 1, 03/13/2020 Minute Order. In so doing, the Court determined Plaintiff's discrimination and retaliation claims would *not* be struck by any subsequent (post-amendment) anti-SLAPP motion, as she has proven a probability of prevailing on the merits.

When considering the precise on-point holdings in Martin and Nguyen-Lam, together with the obvious practical realities in the instant case after the Court's ruling, Defendant KUSI cannot reasonably argue it is somehow a "prevailing party."

IV. ADDITIONALLY, PUBLIC POLICY STRONGLY DISFAVORS PUNISHING A PLAINTIFF WITH FEHA DISCRIMINATION CLAIMS

In addition to Defendant not being the "prevailing party," sanctioning the Plaintiff with Defendant's attorneys' fees and costs runs *directly counter* to public policy articulated by the Legislature, as well as the high courts. ***Even if Plaintiff loses at trial***, she would not be faced with the penalty of paying for Defendant's fees and costs; she certainly should not be subject to paying those fees and costs for *any* intra-litigation motion. This is true *regardless* of the

GRUENBERG LAW
2155 FIRST AVE.
SAN DIEGO, CA 92101

outcome, but particularly so for a motion which *Defendant lost*.

Plaintiff's discrimination and retaliation claims are brought under the Fair Employment and Housing Act ("FEHA"). The FEHA's statutory language itself makes clear that attorneys' fees and costs shall not be levied *against* a plaintiff unless her claims are found frivolous: "In civil actions brought under this section, ... a prevailing defendant shall not be awarded fees and costs unless the court finds the action was frivolous, unreasonable, or groundless... ." Cal. Gov't Code § 12965(b).

This rule was explicitly added in 2018 by Senate Bill 1300 to codify the Supreme Court's holding in Williams v. Chino Valley Indep. Fire Dist., 61 Cal. 4th 97 (2015). In Williams, the high court conducted a comprehensive review into the statutory language and legislative history of the FEHA, observing *costs* – of course, along with much more substantial *attorneys' fees* – are normally unrecoverable by defendants: "In FEHA cases, even ordinary litigation costs can be substantial, and the possibility of their assessment could **significantly chill the vindication of employees' civil rights**. Statutory language and legislative history thus point in the same direction." Id. at 114. Moreover, in federal counterpart Title VII cases, to award *fees* to a defendant simply because the plaintiff was ultimately unsuccessful "would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII." Id. (quoting Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978)). Based on those reasons, the high court concluded a prevailing defendant "should not be awarded fees and costs unless the court finds the action was objectively without foundation when brought, or the plaintiff continued to litigate after it clearly became so." Id. at 115 (applying the federal Christianburg standard to FEHA cases).

Along with Defendant not being the "prevailing party" for a variety of reasons, public policy strongly disfavors award fees and/or costs to employment discrimination plaintiffs, as doing so would "significantly chill the vindication of employees' civil rights."

///

///

///

GRUENBERG LAW
2155 FIRST AVE.
SAN DIEGO, CA 92101

V. CONCLUSION

For all of the foregoing reasons, Plaintiff Sandra Maas respectfully requests that Defendant's Motion for Anti-SLAPP Attorneys Fees and Costs be dismissed in its entirety.

DATED: July 17, 2020

GRUENBERG LAW

JOSH D. GRUENBERG
DAPHNE A.M. DELVAUX
JOSHUA P. PANG
Attorneys for Plaintiff,
SANDRA MAAS

GRUENBERG LAW
2155 FIRST AVE.
SAN DIEGO, CA 92101

Josh D. Gruenberg (SB #163281)
Daphne A.M. Delvaux (SB #292345)
Joshua P. Pang (SB #296371)
GRUENBERG LAW
2155 FIRST AVENUE
SAN DIEGO, CALIFORNIA 92101-3542
TELEPHONE: (619) 230-1234
TELECOPIER: (619) 230-1074

Attorneys for Plaintiff,
SANDRA MAAS

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO, CENTRAL DIVISION

SANDRA MAAS, an individual,

Plaintiff,

v.

MCKINNON BROADCASTING CO. KUSI-TV 51, a California corporation; and DOES 1 through 25.

Defendants.

Case No. 37-2019-00032336-CU-OE-CTL

DECLARATION OF JOSHUA P. PANG, ESQ. IN SUPPORT OF PLAINTIFF SANDRA MAAS'S OPPOSITION TO DEFENDANT'S MOTION FOR ANTI-SLAPP ATTORNEYS' FEES AND COSTS

Date: September 18, 2020
Time: 8:30 a.m.
Dept.: C-65
Judge: Hon. Ronald F. Frazier

Action Filed: June 25, 2019
Trial Call: April 30, 2021

///
///
///
///
///
///
///
///
///
///
///
///
///
///

GRUENBERG LAW
2155 FIRST AVENUE
SAN DIEGO, CALIFORNIA 92101

I, JOSHUA P. PANG, declare and certify:

1. I am an attorney at law duly licensed to practice law before all of the Courts of the State of California with Gruenberg Law, attorneys of record for Plaintiff Sandra Maas ("Plaintiff"). I am familiar with the facts and law in this case and have personal first-hand knowledge of the facts stated herein. As to those matters stated upon information and belief, I believe them to be true. If called as a witness, I could and would competently testify to the following.

2. Lodged with the accompanying Notice of Lodgment in support of this motion as **Exhibit 1** is a true and correct copy of the Court's March 13, 2020 Minute Order confirming it's earlier tentative ruling.

3. Lodged with the accompanying Notice of Lodgment in support of this motion as **Exhibit 2** is a true and correct copy of excerpts from the March 13, 2020 Anti-SLAPP Motion Oral Argument.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration is executed in San Diego, California.

Executed this 17th day of July 2020 in San Diego, California.

By: _____
JOSHUA P. PANG

GRUENBERG LAW
2155 FIRST AVENUE
SAN DIEGO, CALIFORNIA 92101

EXHIBIT 1

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

DATE: 03/13/2020 TIME: 01:43:00 PM DEPT: C-65

JUDICIAL OFFICER PRESIDING: Ronald F. Frazier
CLERK: Lori Urie
REPORTER/ERM:
BAILIFF/COURT ATTENDANT:

CASE NO: **37-2019-00032336-CU-OE-CTL** CASE INIT.DATE: 06/25/2019
CASE TITLE: **MAAS vs Mckinnon Broadcasting Co KUSI-TV 51 [IMAGED]**
CASE CATEGORY: Civil - Unlimited CASE TYPE: Other employment

APPEARANCES

The Court, having taken the above-entitled matter under submission on 03/13/20 and having fully considered the arguments of all parties, both written and oral, as well as the evidence presented, now rules as follows:

The Court CONFIRMS the tentative ruling as follows:

Defendant McKinnon Broadcasting Company's Anti-SLAPP Special Motion to Strike is GRANTED with leave to amend. (ROA 11.)

Defendant seeks to strike *portions of* Plaintiff's Second, Third, Fourth, Fifth, and Sixth causes of action, to the extent they are predicated on the allegation that Plaintiff's employment with Defendant was wrongfully terminated. Aside from this generalized assertion, Defendant does not identify which allegations it seeks to have stricken.

Defendant asserts its conduct at issue – the alleged wrongful termination of Plaintiff's employment – arises from protected activity, citing Hunter v. CBS Broadcasting, Inc. (2013) 221 Cal.App.4th 1510. In opposition, Plaintiff does not dispute the conduct at issue arises from protected activity. Accordingly, the first prong of the anti-SLAPP analysis is met. (Code Civ. Proc. § 425.16(b)(1); § 425.16(e)(4).)

With regard to the second prong of the anti-SLAPP analysis, it is Plaintiff's burden to establish, with admissible evidence, Plaintiff has a probability of prevailing on the challenged causes of action. (Code Civ. Proc. § 425.16(b)(1).) To survive the motion, Plaintiff must show her claims have at least minimal merit. (Navellier v. Sletten (2002) 29 Cal.4th 82, 89.)

Plaintiff's challenged causes of action are for (2) Gender and/or Age Discrimination (Gov. Code § 12940(a)); (3) Failure to Prevent Discrimination (Gov. Code § 12940(k); (4) Retaliation (Gov. Code § 12940(h)); (5) Retaliation (Lab. Code § 1102.5); and (6) Retaliation (Lab. Code § 1197.5(j)(1).)

To prove discrimination, "the plaintiff must provide evidence that (1) he was a member of a protected class, (2) he was qualified for the position he sought or was performing competently in the position he

held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive." (Guz v. Bechtel Nat. Inc. (2000) 24 Cal.4th 317, 355.)

To prove retaliation, "a plaintiff must show (1 he or she was engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse employment action, and (3) a causal link exists between the protected activity and the employer's action." (Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal.4th 1028, 1042.)

For both discrimination and retaliation claims, Plaintiff must prove she suffered an adverse employment action. Plaintiff identifies two types of adverse employment actions in her Complaint: unequal pay and wrongful termination. In its motion, Defendant does not challenge Plaintiff's claims to the extent they are based on unequal pay. Thus, the court evaluates only whether Plaintiff's causes of action have at least minimal merit with regard to her allegations of wrongful termination.

Defendant argues Plaintiff cannot show she suffered any adverse employment action because her one-year contract simply ended, and as a matter of law this is not "wrongful termination." However, a refusal to rehire a person is considered an adverse employment action. (Gov. Code § 12940(a).)

The court finds the evidence is sufficient to conclude Plaintiff's assertion that she suffered an adverse employment action, i.e. Defendant's failure to rehire her on the basis of a discriminatory motive, has at least minimal merit. The facts indicate that after Plaintiff sought to bring her own pay on par with those of her male peers, Defendant opted not to rehire her. Mr. Cohen's comments, particularly, in suggesting Defendant was seeking to bring on a "new generation" because Plaintiff's "cycle" had run out, suggest a discriminatory motive, whether it be gender or age or a mix of the two.

Regarding her retaliation claims, Plaintiff must also show a causal link between her complaint of unequal pay and Defendant's decision not to rehire her. The court finds there is sufficient evidence to conclude Plaintiff's retaliation claims have at least minimal merit as well. Here, there is some evidence to support Plaintiff's assertion that after Plaintiff would not accept three years of pay at a much lower rate than her male peers, Defendant decided not to rehire her.

Although there is sufficient evidence to support Plaintiff's claims on the basis of failure to rehire, Plaintiff has not made any allegations of Defendant's failure to rehire her in her Complaint. Instead, her Complaint characterizes the adverse employment action as "wrongful termination." Defendant concedes the court "could conceivably grant the motion but permit Ms. Maas to amend," and the court agrees.

Accordingly, the allegations of wrongful termination in Plaintiff's second, third, fourth, fifth, and sixth causes of action are stricken, and Plaintiff is granted leave to amend these causes of action to state facts of Defendant's alleged failure to rehire her.

Plaintiff is to file a First Amended Complaint on or before April 3, 2020.

EXHIBIT 2

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO, CENTRAL DIVISION

DEPARTMENT 65 HON. RONALD F. FRAZIER, JUDGE

SANDRA MAAS, an individual,

Plaintiff,

vs.

McKINNON BROADCASTING CO. KUSI-TV 51, a California corporation; and DOES 1 through 25,

Defendants.

Case No.: 37-2019-00032336-CU-OE-CTL

REPORTER'S TRANSCRIPT OF PROCEEDINGS

SAN DIEGO, CALIFORNIA

FRIDAY, MARCH 13, 2020

APPEARANCES:

FOR PLAINTIFF:

GRUENBERG LAW
BY: JOSHUA GRUENBERG, ESQ.
DAPHNE DELVAUX, ESQ.
JOSHUA PANG, ESQ.
2155 First Avenue
San Diego, California 92101
619.230.1234
josh@gruenberglaw.com

FOR DEFENDANTS:

PAUL, PLEVIN, SULLIVAN & CONNAUGHTON, LLP
BY: E. JOSEPH CONNAUGHTON, ESQ.
101 West Broadway
Ninth Floor
San Diego, California 92101
619.744.3645
jconnaughton@paulplevin.com

REPORTED BY:
A. DESIREE TIPPER, CSR NO. 13806

SAN DIEGO, CALIFORNIA;

FRIDAY, MARCH 13, 2020; 8:56 A.M.

-oOo-

THE COURT: Maas vs. McKinnon Broadcasting.

MR. CONNAUGHTON: Good morning, Your Honor. Joe Connaughton on behalf of McKinnon Broadcasting.

THE COURT: Good morning.

MR. GRUENBERG: Josh Gruenberg for the plaintiff, who is present.

THE COURT: Good morning.

MR. PANG: Good morning. Josh Pang for the plaintiff.

MS. DELVAUX: Daphne Delvaux for the plaintiff.

THE COURT: Good morning.

Who would like to be heard?

MR. CONNAUGHTON: I would, Your Honor, briefly.

THE COURT: Okay.

MR. CONNAUGHTON: I just wanted to ask Your Honor for two things. One, to potentially revisit the tentative to grant the motion without leave. Given the importance of the constitutional issues and the admitted application of the constitutional principles, I would think that granting without leave would be more appropriate and plaintiff could always then move to amend or something like that. So that would be the first issue.

The second issue, if Your Honor is disinclined to revisit the amendment part, I wouldn't -- I would like

Your Honor to revisit the retaliation issue, just that -- that small issue because in any retaliation case there needs to be this connection between whatever the protected activity is and whatever the decision here is, apparent failure to hire, whatever it is. And here there's no evidence of anything happening between the -- the protected activity in, call it, May of 2018 and then this apparent decision not to rehire in May of 2019. And that gap, that one-year gap would seem to be enough under any construction of any of the laws to be a break, if you will, to break that causal connection.

So merely -- let's assume there's protected activity, and then let's assume there's this decision not to hire or whatever -- whatever it's going to be postured as. That huge gap would seem to be enough.

THE COURT: Isn't that a question of fact?

MR. CONNAUGHTON: It's not. It is if --

THE COURT: Do you have authority to say that once you have a gap of that period of time, that it's a question of law, not a question of fact?

MR. CONNAUGHTON: I do, Your Honor, and they're in our reply brief. There are three cases, I think, at least. There are cases that say three or four months is enough of a break. There are cases that say -- I think there's a six-month case. There's a nine-month case. There is no case cite submit ever that would say when you've got this long -- yearlong gap that you could still somehow allow a jury or someone else to infer a

connection between those. So I think it is a legal issue. It seems unusual enough in these employment cases that they're not. It's hard to have -- they have legal issues, but here when you've got that distinct issue, and I'm leaving aside the other issues that come in where there's a complaint, and then you're offered a three-year contract and other good things happen. Let's leave all that aside. I'm just focusing on that gap issue. That would be enough just on that issue itself to -- for Your Honor to grant without leave. So that's it. Thanks, Your Honor.

THE COURT: Yeah.

MR. PANG: I'll just talk about that last part just really quick. It is a factual issue, all those cases that Mr. Connaughton mentions. Go and talk about these specific cases of -- you could look at the specific facts of that case. There is no rule that six months is the rule or nine months. Factual circumstances of this case would evidence that as -- your Court -- Your Honor has read the -- now, I thought that I would be the first person to speak because there are two things that I would like to mention.

I called Ms. Maas yesterday after we got the tentative and I said, Hey, we have great news for you. Their motion failed, but there's this one thing that the Court granted the motion. And so under 425.16 they would be entitled to fees under that statute. And so the first thing I would like to mention or I would like to raise

with the Court is that we would like the Court just to change the word -- words "granted" to "denied." And I understand that that's normally a big ask, but I think in this case, given the -- given that the ruling -- it's fitted. Just as the defendant's motion is framed by the plaintiff's pleadings, the Court's ruling and why we're here today is framed by the defendant's motion. And defendant's motion is to, quote, move the Court for an order to strike the causes of action and plaintiff's complaint to the extent that these causes of action are predicated on the allegation that plaintiff's employment with McKinnon Broadcasting Company was wrongfully terminated.

None of plaintiff's complaints and none of plaintiff's claims are predicated on any sort of wrongful termination claim. I think that there's been a moving target by the time this -- from the notice to their points and authorities to their reply, which they've kind of shifted to say, Hey, they can move to amend but -- but grants the motion. No, that's not how this works. There's no cause of action for wrongful termination unlike the plaintiff in Wilson vs. CNN.

The causes of action in this case are for age and/or gender discrimination and retaliation under the FEHA. That's CACI 2500 and 2505. And -- so if Mr. Gruenberg or Ms. Delvaux or myself argue to the jury, we'll be going off of that CACI in which we'll try to meet the elements. The elements are an adverse

employment action, and that's what we were arguing in the opposition is that there was an adverse employment action.

And for those reasons, the defense motion must instead just be denied, and there are a couple of cases that are instructive on this issue. In Nguyen vs. CAO -- that's 171 Cal.App.4th 873 -- the plaintiff who is determined to be a public figure filed a defamation claim, all right? And the court noted however that he -- or I'm sorry -- she didn't plead actual malice. And so the court allowed the plaintiff to amend the pleadings to say, Hey, that was actually malice because the court reviewed the evidence in the declaration to say, Hey, there's enough here to survive the motion. And the Court of Appeal affirmed that and said that the plaintiff in this case would not have an incentive to appeal and said that, quote, authorizing an amendment under these circumstances is tantamount to denying the strike motion. That's in 2009. Two years later in Martin vs. Inland Empire Utilities Agency -- that's 198 Cal.App.4th at 629 -- the court said an order granting Anti-SLAPP motion with leave to amend is the functional equivalent of the denial of a motion. And that's what we're asking here, just to -- just to change that wording. Furthermore, the second issue I want to talk about is I'm not even sure what they want anymore because we need to be able -- we would like to be able to argue to the jury that this, in fact, was a wrongful termination. And based on the

REPORTER'S CERTIFICATE

STATE OF CALIFORNIA)
)
COUNTY OF SAN DIEGO)

I, A. Desiree Tipper, a Certified Shorthand Reporter No. 13806 in the State of California, do hereby certify:

That the foregoing proceedings were taken before me at the time and place herein set forth; that any witnesses in the foregoing proceedings, prior to testifying, were placed under oath; that a verbatim record of the proceedings was made by me using machine shorthand which was thereafter transcribed under my direction; further, that the foregoing is an accurate transcription thereof.

I further certify that I am neither financially interested in the action nor a relative or employee of any attorney of any of the parties.

IN WITNESS WHEREOF, I have hereunto subscribed my name.

Dated this 15th day of July, 2020.

A. Desiree Tipper
CSR No. 13806

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO					*for court use only*
Attorney(s) Name and Address JOSHUA D. GRUENBERG, ESQ., SB #163281 DAPHNE A.M. DELVAUX, ESQ., SB #292345 JOSHUA P. PANG, ESQ., SB #296371 GRUENBERG LAW 2155 First Ave, San Diego, CA 92101					2020 AUG 20 PM 3:57 CLERK OF THE SUPERIOR COURT SAN DIEGO COUNTY, CA FILED Clerk of the Superior Court AUG 20 2020 By: _____, Deputy
Name of Case (abbreviated) MAAS v. MCKINNON BROADCASTING CO. KUSI-TV 51.,					
Attorney(s) For	Telephone	Hearing Date	Time	Dept	Case Number
Plaintiff	(619) 230-1234				37-2019-00032336-CU-OE-CTL

PROOF OF SERVICE

I, the undersigned, declare that I am over the age of 18 years and not a party to this action; I am employed in the County of San Diego, State of California, within which County the subject mailing occurred; my business address is 2155 First Avenue, San Diego, CA 92101.

On August 20, 2020, I served the following document(s):

1. PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR ANTI-SLAPP ATTORNEY'S FEES AND COSTS
2. DECLARATION IN SUPPORT OF PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR ANTI-SLAPP ATTORNEY'S FEES AND COSTS
3. EXHIBITS

[] **Service By Mail:** I am familiar with attorney JOSHUA D. GRUENBERG'S practice for collection and processing correspondence for mailing with the United States Postal Service the same day in the ordinary course of business. By placing a true copy of each document in a separate envelope addressed to each addressee. By placing each for deposit in the United States Postal Service, this same day, following ordinary business practices.

[X] **By Electronic Transmission:** Parties have agreed to accept service by email transmission.

[ ] **Service By Personal Service:** I am familiar with the practice of this firm for personally serving a defendant. Pursuant to this practice, I served the following Defendant at the following address:

RICHARD A. PAUL
FRED M. PLEVIN
E. JOSEPH CONNAUGHTON
JACQUELINE SEITER
Paul, Plevin, Sullivan & Connoughton
101 West Broadway, 9th floor
San Diego CA 92101

Attorney for Defendants,
MCKINNON BROADCASTING COMPANY

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 20, 2020, at San Diego, California.

Kayla Diaz

Kayla Diaz