S225090

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ROBERT C. BARAL,

Plaintiff and Respondent,

v.

DAVID SCHNITT,

Defendant and Appellant.

After a Published Decision by the Court of Appeal
Second Appellate District,
Division One Case No. B253620

PETITION FOR REVIEW

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rule of Court, rule 8.208, Defendant and Appellant David Schnitt, to the best of his knowledge, is unaware of any entities or persons who have a financial or other interest in the outcome of this proceeding that would be relevant to the question of disqualification under Canon 3E of the Code of Judicial Ethics.

Dated: March 16, 2015

KERR & WAGSTAFFE LLP

By _____
JAMES M. WAGSTAFFE

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To the Honorable Tani Cantil-Sakauye, Chief Justice, and the Honorable Associate Justices of the Supreme Court of California:

Defendant and Appellant David Schnitt ("Petitioner") petitions for review of the decision of the Court of Appeal, Second Appellate District, Division One filed on February 5, 2015.

It is finally time for this Court to decide whether the anti-SLAPP statute can strike anything less than what a plaintiff happens to lump together as a "single" cause of action. This is a frequently recurring issue that the lower appellate courts have grappled with no fewer than ***fourteen*** separate times since just May of 2011.[1] That was when this Court made a passing reference to *Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90 [15 Cal.Rptr.3d 215] [hereafter *Mann*] in its opinion in *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820 [124 Cal.Rptr.3d 256, 250 P.3d 1115] [hereafter *Oasis West*] that some courts have since read as implicitly adopting *Mann*'s reasoning on this issue.

It is also a question on which the appellate courts are sharply divided. Much of the confusion stems from the fact that the Supreme Court's passing reference to the *Mann* decision was made in a case that did *not* involve a so-called "mixed" cause of action and the fact that the *Mann* standard—quoted during a recitation of what the Court may have believed

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[1] See discussion *infra* pages 24 to 29 and footnotes 9-10.

were uncontroversial legal standards rather than during analysis of any issue presented in *Oasis West*—conflicted with numerous prior cases including this Court's lengthy, reasoned decision in *Taus v. Loftus* (2007) 40 Cal.4th 683 [54 Cal.Rptr.3d 775, 151 P.3d 1185] [hereafter *Taus*].

As it currently stands, there are numerous published appellate decisions purporting to bind trial courts on *both* sides of this split. Indeed, as a result of the published opinion issued by the lower court in this case, the Second District Court of Appeal now has published two decisions reaching diametrically opposed conclusions, albeit in different Divisions.

This issue is so difficult because, as the appellate court candidly noted below, "reasonable minds may differ" on both what the Supreme Court meant in *Oasis West* and *Taus* and on the "competing policies at stake." (Ct. of Appeal, Slip. Op., p. 22.) Unfortunately, trial court judges do not have the luxury of simply throwing up their hands. They desperately need guidance from this Court to resolve the intractable divide that has emerged in the lower appellate courts and to avoid a situation where superior court judges down the hall from one another can reach opposite conclusions on the same issue while both citing binding precedent—accurately—in their favor.

This case is a particularly good vehicle for addressing this crucial and frequently repeating issue because its procedural posture readily demonstrates the dangers of adopting a rule that immunizes mixed causes

of action from anti-SLAPP motions if a plaintiff can show success on any part of his or her claim. Here, Defendant was initially successful in striking two causes of action under Code of Civil Procedure section 425.16 for defamation regarding the creation, publication, and refusal to correct an allegedly defamatory audit report. Then Plaintiff, after abandoning his appeal of that adverse anti-SLAPP order, simply amended his complaint to re-allege *the very same conduct* under a "new" heading along with *other*, indisputably *un*protected conduct. Plaintiff then claimed that, as long as he could show a probability of success on this *other un*protected conduct, it simply did not matter whether his allegations concerning protected conduct had minimal merit. He contended this was warranted under the *Mann* rule even though the entire purpose of the anti-SLAPP statute was to require early judicial scrutiny of claims involving *protected* conduct in order to spare individuals from litigating meritless claims concerning such conduct. Surprisingly, the trial court and the Second Appellate District (or at least one division of it) agreed with him.

Petitioner respectfully suggests that the *Oasis West* decision's quotation of *Mann* has demonstrably created confusion in this area of the law that cries out for clarification by this Court, and that this appeal presents the ideal case for review because the issue is squarely and crisply presented by the two wholly distinct sets of claims lumped together in this matter.

This petition is timely filed pursuant to California Rules of Court, rule 8.500, subdivision (e)(1). A copy of the Court of Appeal's published Opinion is attached hereto. Petitioner did not file a petition for rehearing.

I. ISSUES PRESENTED

1. Can a plaintiff avoid application of the anti-SLAPP law, Code of Civil Procedure section 425.16, by merely combining claims arising from protected conduct with claims that do not so arise into what is denominated as a single "cause of action"?

a. Did this Court in *Oasis West* intend to overrule the statement-by-statement analysis of *Taus* when it quoted, without discussion, the "any part of the claim" standard announced as an issue of first impression in *Mann* despite the fact that no party cited or discussed *Mann* or its standard in the briefs before the Court in *Oasis West*?

b. Is what constitutes a "cause of action" under the anti-SLAPP statute different than the well-recognized meaning of that term for purposes of demurrers, motions for summary adjudication, and application of res judicata?

c. Can a plaintiff who loses an anti-SLAPP motion avoid the settled prohibition on amending causes of action stricken by that motion by simply re-alleging the very same conduct under a different name, provided that some *other* conduct—whether protected or not—is then

added to the stricken allegations and the plaintiff styles the new amalgamation as a "single" cause of action?

II. REVIEW IS NECESSARY TO SECURE UNIFORMITY OF DECISION AND TO SETTLE IMPORTANT QUESTIONS OF LAW

Review is warranted under both prongs of Rules of Court, rule 8.500 subdivision (b)(1). First, review is necessary to secure uniformity of decision. As mentioned above, and discussed in detail below, this Court's stand-alone citation to *Mann* in *Oasis West* is to a decision that is at odds with pre-existing law, including this Court's own detailed, statement-by-statement treatment of the similar anti-SLAPP analysis presented in *Taus* just four years earlier. The Courts of Appeal have noted this unexplained departure from *Taus* and other pre-existing law numerous times in the past few years, most thoroughly in *Wallace v. McCubbin* (2011) 196 Cal.App.4th 1169, 1195-1212 [128 Cal.Rptr.3d 205] [hereafter *Wallace*], which spent seventeen pages discussing why the *Mann* rule is incorrect, inconsistent with *Taus*, and cited without analysis in *Oasis West*.

It is not at all likely the Court intended to depart from *Taus*, as well as from numerous other well-established authorities defining the term "cause of action" and disallowing plaintiffs from pleading around legal standards by lumping two separate claims together as "one" "cause of action," through the use of a single quoted sentence from *Mann*. This would be especially puzzling because the *Mann* standard (which the *Mann*

court invented as a question of first impression) was *not* at issue in *Oasis West* and, indeed, was not even cited to this Court in any of the briefs in *Oasis West*, much less analyzed by the parties in that case. The Courts of Appeal, however, cannot resolve this dilemma and have come down on both sides of this issue, even within the same District. Only this Court can resolve the incongruity.

Second, the issues in this case are very important to the proper application of anti-SLAPP law. If the *Mann* rule is the law, then any plaintiff can plead around the anti-SLAPP statute by simply combining his or her allegations about protected speech or conduct with some other allegations about unprotected conduct, and then calling the combination "one" "cause of action." Such a rule will convert the anti-SLAPP statute from the substantive protection it is intended to be into a mere pleading trap for unwary plaintiffs. We submit that this appellate case, now at least the sixth presented on this issue in less than one year, presents a very clear record on which to review the proper method of dealing under the anti-SLAPP statute with allegations of distinct claims lumped together as unitary "causes of action."

III. BACKGROUND AND STATEMENT OF THE CASE

A. THE FORMATION OF IQ BACKOFFICE

Plaintiff Robert C. Baral ("Baral") alleges that he worked with Defendant David Schnitt ("Defendant or "Petitioner") to form a new

business entity, IQ BackOffice, LLC ("IQB") in 2003. (Appellant's Appendix ["AA"] 892.) IQB was in the business of providing "outsourcing" services to other companies by, among other things, performing accounting or finance functions that such companies did not want to keep in-house. (AA138.)

The exact nature of Schnitt and Baral's agreement concerning IQB is disputed in this lawsuit, although in ways largely immaterial to the instant appeal. Schnitt claims that IQB was a single-member LLC in which he was the sole member, and that Baral was merely an "economic interest holder" (under former Corporations Code § 17001(n)), who had no right to participate in management. (AA688.) Baral contends otherwise. He argues that he and Schnitt agreed orally that Baral would be a co-managing member of IQB, and that Baral therefore had a right to participate in IQB management decisions. (AA892.)

B. SCHNITT PREPARES TO SELL IQB AND BARAL ACCUSES SCHNITT OF FREEZING HIM OUT OF THAT PROCESS

Baral alleges that, sometime in 2010, Schnitt began efforts to sell IQB without Baral's knowledge and approval. (AA894.) When Baral found out about Schnitt's efforts to sell the company, he became very upset. (AA138-139, AA894.) Baral contended that he, as a supposed co-managing member of IQB, should have had input into decisions concerning the sale. (AA139.)

C. SCHNITT UNCOVERS EVIDENCE OF BARAL'S SON'S EMBEZZLEMENT FROM IQB AND COMMISSIONS THE MOSS ADAMS FRAUD AUDIT IN ANTICIPATION OF LITIGATION

In compiling records in preparation for the sale of IQB, Schnitt identified a series of unauthorized IQB checks. (AA688.) Schnitt investigated the matter, and found that the checks were made out to Baral's son Mitch, who at the time was acting as IQB's bookkeeper. (AA688.) He also uncovered the fact that IQB's QuickBooks accounting records were being deleted, presumably in an attempt to conceal the theft. (AA688.)

Schnitt confronted Baral, who then *admitted* that his son had been embezzling money from IQB, agreed to pay the money back, and begged Schnitt not to report the matter to the police. (AA734-736.) Schnitt told Baral that the company needed to do a full investigation in order to identify any additional instances of misconduct and determine the full damage to the company. (AA735.) Schnitt then hired the firm of Moss Adams to conduct an independent forensic analysis to learn about the extent of the misconduct. (AA688.) He did so in anticipation of possible litigation with Baral, his company RC Baral & Co., his son Mitch, potential purchasers of IQB, and others. (AA688, 692-693.) It is this audit, referred to in this litigation as "The Moss Adams Fraud Audit," that is at the heart of the parties' current dispute in this appeal.

D. THE MOSS ADAMS FRAUD AUDIT IMPLICATES BARAL HIMSELF IN MISCONDUCT

The Moss Adams Fraud Audit was completed on February 2, 2011, and a written Report was issued. (AA59, AA688-89, AA738-748, AA895.) The Report not only concluded that Baral's son Mitch had embezzled over $120,000, but also implicated Baral, his company, and others in misconduct. (AA738-748.) Among other things, it concluded: Baral paid himself $65,000 in transactions that did not appear to be authorized or supported; Baral's company, RC Baral & Co. had provided incomplete support for IQB transactions totaling $244,072.79; and there was a discrepancy associated with a check for $2,685.72 written out to Baral. (AA738-748.) Schnitt later disclosed the Report to IQB's investors and its potential purchaser. (AA167-168.)

Baral was, to put it mildly, unhappy with the results of the Moss Adams Fraud Audit and Schnitt's disclosure of its contents. (AA167-169, AA895.) Baral was, after all, a certified public accountant conducting business in the entertainment industry and he felt that the allegations of his own potential misconduct, combined with those regarding his son, threatened to destroy his reputation. (AA167-169.) He was also specifically concerned that publication of the Moss Adams Fraud Audit Report put him at a personal disadvantage related to the sale of IQB. (AA169.) Ultimately, IQB was sold to a company called LiveIt

Investments, Ltd. (AA169; AA895.)

E. BARAL SUES SCHNITT, ALLEGING THAT SCHNITT DEFAMED HIM RELATED TO THE MOSS ADAMS FRAUD AUDIT AND FROZE HIM OUT OF THE SALE OF IQB

On December 11, 2011 Baral sued Schnitt in Los Angeles Superior Court alleging 18 different causes of action. (AA2.) Sixteen of those causes of action related to Schnitt's alleged misconduct in freezing Baral out of the negotiations regarding the sale of IQB to LiveIt (these claims have been referred to in this litigation as the "LiveIt" claims). (AA16-20, AA24-41.)

Two of the causes of action—Claims Five and Six—related solely to an entirely different wrong. (AA21-24, ¶¶ 60-74.) These claims (known in this litigation as the "Moss Adams Claims") alleged that Schnitt had defamed Baral in relation to the Moss Adams Fraud Audit. Specifically, they asserted that Schnitt had defamed Baral by (1) providing slanderous information to Moss Adams "so as to predetermine conclusions that could discredit and disparage Baral" (AA21, ¶ 61), (2) later publishing the Moss Adams Fraud Audit Report to IQB's eventual purchaser and to the other investors in IQB (AA21-24, ¶¶ 63, 69), and (3) subsequently refusing to allow the supposed "errors" in the Report to be corrected. (AA24, ¶ 69.)

F. SCHNITT SUCCESSFULLY STRIKES BARAL'S DEFAMATION CLAIMS VIA AN ANTI-SLAPP MOTION, AND BARAL DOES NOT PURSUE AN APPEAL OF THAT RULING

Schnitt subsequently moved to strike the Fifth and Sixth Causes of

Action under Code of Civil Procedure section 425.16. The trial court granted the motion—correctly—holding that "communications made by defendant to accountancy firm and vendors [with] respect to alleged misappropriation of funds" "fall under CCP 425.16 as they are an act in furtherance of the person's right of petition or free speech as 'all activities in connection [with] litigation, including communications preparatory to or in anticipation of litigation, are included in the definition. CCP 425.16(e)(2); [*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115 (81 Cal.Rptr.2d 471, 969 P.2d 564)].'" (AA276.) The court further held that "it is undisputed that plaintiff's son embezzled monies. The defendant had a right to hire Moss Adams to conduct an investigation into the corporate books to determine whether there were other misappropriations made. The declaration of defendant indicates the investigation was made in anticipation of litigation. [¶] Further, the plaintiff is not able to demonstrate a possibility of prevailing on the merits as the Litigation Privilege of [Civil Code section] 47(b) applies to the statements allegedly made by defendant while conducting the investigation in anticipation of litigation." (AA264, 276-277).

Schnitt had also filed a demurrer to various other causes of action—none of which related to Schnitt's conduct in connection with the Moss Adams Fraud Audit. (See AA16-20, AA24-41.) On the same day that it granted Schnitt's anti-SLAPP motion, the court also sustained Schnitt's

demurrer in part. (AA264.) The court then granted Baral leave to amend, but just with respect to the causes of action disposed of via the demurrer. (AA264, 267-272.) The court explicitly—and correctly—did not grant leave to amend with respect to claims stricken by the anti-SLAPP motion. (AA265.)

Baral initially appealed the order granting the special motion to strike. (AA337.) He later abandoned this appeal. (AA357.)

G. BARAL ATTEMPTS TO AMEND AROUND THE ANTI-SLAPP RULING AND RE-PLEADS LIABILITY BASED ON THE VERY SAME CONDUCT

In an effort to resurrect his stricken claims, Baral filed a sprawling First Amended Complaint that—in blatant disregard of the trial court's ruling denying him leave to amend the claims stricken by the anti-SLAPP statute and in violation of the settled ban on pleading around successful anti-SLAPP motions—added an additional sixteen pages of allegations concerning purported wrongdoing regarding the Moss Adams Fraud Audit. (AA279.) Schnitt again moved to strike those claims under Code of Civil Procedure section 425.16. (AA340.)

Before the court could rule on that motion, Baral filed the Second Amended Complaint—the one primarily at issue in this appeal. (AA359.) It asserted just four causes of action, for (1) Breach of Fiduciary Duty, (2) Constructive Fraud, (3) Negligent Misrepresentation, and (4) Declaratory Relief. (*Id.*) This time, in a shrewd attempt to plead his way around the

court's prior anti-SLAPP ruling, instead of pleading the exact same defamation claims in a single cause of action, Baral combined the Moss Adams Claims with the LiveIt Claims in the same cause of action. The misconduct alleged—that Schnitt had slandered Baral to Moss Adams, that he had re-published the Moss Adams Fraud Report to others, and that he was engaged in an ongoing effort to prevent Baral (and Moss Adams) from setting the record straight (AA372-AA379)—was *identical* to what he had previously pled as "defamation." (See discussion *supra* page 10.) But Baral claimed that because he had affixed the labels "breach of fiduciary duty," "constructive fraud," and "declaratory relief" to these allegations, they were no longer the same causes of action. (AA801.)

Schnitt again filed an anti-SLAPP motion, directed solely at the Moss Adams Claims that were previously stricken. (AA646.) Importantly, Schnitt never contested that Baral could demonstrate (under the prong-two standard that resolves all factual issues in Baral's favor) a probability of succeeding with respect to Baral's *other* claims, which were *not* protected under the anti-SLAPP statute and solely related to Schnitt allegedly freezing Baral out of the negotiations concerning the sale of IQB. (AA1080.) Schnitt instead contended that the anti-SLAPP motion should be granted because Baral could not succeed on his *protected* claims regarding Moss Adams, especially given that Baral had already lost these very claims in the first anti-SLAPP motion. (*Id.*)

The trial court, in a decision by a different judge from the one who had granted the first special motion to strike, denied the anti-SLAPP motion through rote application of the *Mann* rule, holding that the anti-SLAPP statute only allows the striking of whole causes of action. (AA1116.) Schnitt promptly appealed that ruling, resulting in the decision below.

IV. ARGUMENT: THE ANTI-SLAPP STATUTE CANNOT BE AVOIDED BY COMBINING CLAIMS BASED ON PROTECTED CONDUCT WITH CLAIMS BASED ON UNPROTECTED CONDUCT AND CALLING THE AMALGAMATION A "SINGLE" CAUSE OF ACTION

The anti-SLAPP analysis involves a familiar two-step process. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one 'arising from' protected activity. (Code Civ. Proc., § 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim." *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76 [124 Cal.Rptr.2d 519, 52 P.3d 695].

This Petition relates to the second part of that analysis.[2]

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[2] The appellate court properly held that the claims at issue here relating to the Moss Adams Fraud Audit "arose from" protected activity under the statute, and there is no reason for this Court to review that issue. "The *apparently unanimous* conclusion of published appellate cases is that 'where a cause of action alleges both protected and unprotected activity, the cause of action will be subject to section 425.16 unless the protected conduct is 'merely incidental' to the unprotected conduct. [citations]'" (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 672 [35 Cal.Rptr.3d 31], quoting *Mann*, 120

Specifically, it asks this Court to decide whether a plaintiff can side-step the need to demonstrate a probability of prevailing on a claim by simply lumping that claim together with other claims (whether those other claims arise from protected activity or not) under a single "cause of action" and then showing that those *other* claims have minimal merit. Petitioner respectfully contends that allowing such an easy end-run around the anti-SLAPP statute will effectively render it a nullity through artful pleading and, in so doing, thwart the Legislature's purpose of providing strong disincentives to bring meritless claims attacking a person's right of petition or free speech and ameliorating the burdens that would otherwise be placed on persons forced to defend such actions.

A. THE ANTI-SLAPP STATUTE APPLIES TO EACH "CAUSE OF ACTION," A TERM WITH A UNIVERSAL MEANING IN CALIFORNIA CIVIL PROCEDURE HAVING NOTHING TO DO WITH THE ORGANIZATION OF THE COMPLAINT

The anti-SLAPP statute allows the court to strike causes of action based on certain protected conduct:

> A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that

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Cal.App.4th at p. 103, italics added.) Here, the protected conduct of investigating Baral and others' wrongful conduct via the Moss Adams Fraud Audit in anticipation of litigation is far more than merely incidental.

> the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

(Code Civ. Proc., § 425.16, subd. (b)(1).) The anti-SLAPP statute's focus on a "cause of action" is not, of course, unique.[3] At every step, California civil procedure is focused on discerning the causes of action at issue in a case because, ultimately, that is what defines the res judicata effect of a judgment.

As this Court has explained, the violation of a primary right creates one cause of action, no matter how many different legal theories are pled:

> California's res judicata doctrine is based upon the primary right theory. ... "It provides that a 'cause of action' is comprised of a 'primary right' of the plaintiff, a corresponding 'primary duty' of the defendant, and a wrongful act by the defendant constituting a breach of that duty. The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action...."

(*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 904 [123 Cal.Rptr.2d 432] [citations omitted].)

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[3] Although the anti-SLAPP statute alternatively uses the words "cause of action" and "claim," these terms are synonymous, as this Court's usage of them repeatedly shows. (See, e.g., *Hayes v. County of San Diego* (2013) 57 Cal.4th 622, 631 [160 Cal.Rptr.3d 684, 305 P.3d 252]; *Pooshs v. Philip Morris USA, Inc.* (2011) 51 Cal.4th 788, 800, fn. 6 [123 Cal.Rptr.3d 578, 250 P.3d 181].) Thus, this Petition will likewise use them interchangeably. But, even if the terms could possibly "mean something different" from one another, that would still support Petitioner's argument here, as discussed in detail in *Wallace*, *supra*, 196 Cal.App.4th at pp. 1197-1198.

Thus, "[w]hether a complaint in fact asserts one or more causes of action for pleading purposes depends on whether it alleges invasion of one or more primary rights." (*Hindin v. Rust* (2004) 118 Cal.App.4th 1247, 1257 [13 Cal.Rptr.3d 668].) The way in which the complaint is organized is totally irrelevant to this analysis:

> The manner in which a plaintiff elects to organize his or her claims within the body of the complaint is irrelevant to determining the number of causes of action alleged under the primary right theory. "...[I]f a plaintiff alleges that the defendant's single wrongful act invaded two different primary rights, he has stated two causes of action, and this is so even though the two invasions are pleaded in a single count of the complaint."

(*Ibid.* [citations omitted]; see also, *McCoy v. Gustafson* (2009) 180 Cal.App.4th 56, 102-103 [103 Cal.Rptr.3d 37].)

This primary-right based definition of "cause of action" is equally applicable at the demurrer and summary adjudication stages. Both a demurrer and a motion for summary adjudication must be brought against a "cause of action," as determined by a primary right analysis. (*Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848, 1853-1854 [16 Cal.Rptr.2d 458] ["cause of action" for summary judgment is based on primary right analysis, not the way the complaint is organized]; *Lincoln Property Co., N.C., Inc. v. Travelers Indem. Co.* (2006) 137 Cal.App.4th 905, 912-913 [41 Cal.Rptr.3d 39].) Thus, in both pre- and post-trial phases, California civil procedure uses the term "cause of action" to refer to the

invasion of a primary right. There is no basis whatsoever for concluding that the term means anything different under the anti-SLAPP statute than it means on demurrer, summary adjudication, or in evaluating the effect of a judgment.

B. THE *MANN* RULE IS CONTRARY TO THE LANGUAGE, HISTORY, AND PUBLIC POLICY OF THE ANTI-SLAPP STATUTE

Mann involved defamation and trade libel claims arising from a contentious falling-out between two companies. The allegations involved both reports to government agencies as well as other alleged communications. The Court of Appeal, without any analysis of the definition of "cause of action"[4] or settled defamation law,[5] considered all

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[4] Like this Petition, *Mann* appears mostly to use the words "claim" and "cause of action" interchangeably. (See *Mann*, *supra*, 120 Cal.App.4th at p. 106 [alternatively referring to "parts of a cause of action" and "part of its claim"].) But its usage is sometimes inconsistent in this regard, and therefore confusing. (See *Mann*, *supra*, 120 Cal.App.4th at p. 106 [noting that a defendant "can move for summary adjudication of any distinct claim within a cause of action."].)

[5] In defamation claims, the rule is well settled: each alleged act of defamation gives rise to a separate cause of action. (*See Martinelli v. Int'l House USA* (2008) 161 Cal.App.4th 1332, 1336 [75 Cal.Rptr.3d 186] ["Martinelli alleges defendant published three libelous statements about her, thus giving rise to three causes of action."] [summary adjudication]; *McGarry v. Univ. of San Diego* (2007) 154 Cal.App.4th 97, 111, n.10 [64 Cal.Rptr.3d 467] ["McGarry's defamation claims rest on two distinct sets of allegedly defamatory statements. Accordingly, we evaluate separately each set of statements to determine whether McGarry has shown there is a reasonable probability he will prevail on the merits as to either set of statements."] [anti-SLAPP].)

of these allegations to be part of the same cause of action. (*Mann*, *supra*, 120 Cal.App.4th at pp. 103-106.) The court held, "as a matter of first impression," that "[w]here a cause of action refers to both protected and unprotected activity and a plaintiff can show a probability of prevailing on *any part of its claim*, the cause of action is not meritless and will not be subject to the anti-SLAPP procedure. ... Thus, a court need not engage in the time-consuming task of determining whether the plaintiff can substantiate all theories presented within a single cause of action and need not parse the cause of action so as to leave only those portions it has determined have merit." (*Id.* at p. 106, emphasis in original.)

The *Mann* court did not explain how different defamatory publications could be part of the same "cause of action." Instead, it seemed to draw a distinction between "theories within a cause of action" and an overall "cause of action." (*Id.*) It argued procedures other than the anti-SLAPP statute can "eliminate theories within a cause of action that lack merit or cannot be proven," citing law allowing for summary adjudication to be taken against "any distinct claim within a cause of action." (*Id.*)[6] That is, however, illogical because the summary adjudication statute, like

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[6] *Mann* oddly asserted that a plaintiff could alternatively file a motion to strike under section 436 to eliminate a claim that lacks merit or cannot be proven. (*Mann*, *supra*, 120 Cal.App.4th at p. 106.) The anti-SLAPP motion *is* a motion to strike. (Code Civ. Proc., § 425.16, subd. (b)(1) ["shall be subject to a special motion to strike"].)

the anti-SLAPP statute, is directed at resolving entire causes of action. (Code Civ. Proc., § 437c, subd. (f)(1) ["A motion for summary adjudication shall be granted only if it completely disposes of a cause of action...."].) The two summary adjudication cases *Mann* cited apply the well-established primary rights definition to conclude that parts of a count are actually separate causes of action and thus subject to summary adjudication. (*Edward Fineman Co. v. Superior Court* (1998) 66 Cal.App.4th 1110, 1118 [78 Cal.Rptr.2d 478] ["notwithstanding the aggregation of the 23 1991-1993 checks, each constitutes a separate cause of action"]; *Lilienthal & Fowler v. Superior Court*, *supra*, 12 Cal.App.4th at pp. 1853-1854.)

The *Mann* court appears to have concluded, despite this law, that although plaintiff Mann had combined separate causes of action into one count in the complaint, the court could avoid "the time consuming task" of parsing the poorly organized complaint by treating the term "cause of action" in the anti-SLAPP statute in a way totally antithetical to California procedural law. Nothing in *Mann* supports the notion that claims based on violation of separate primary rights are treated as separate causes of action for all other steps in a case *except* an anti-SLAPP motion, or that the Legislature intended plaintiffs to be able to defeat anti-SLAPP motions by combining what are really separate causes of action into a single count despite longstanding California law requiring the opposite analysis. (See *Skrbina v. Fleming Companies* (1996) 45 Cal.App.4th 1353, 1364 [53

Cal.Rptr.2d 481] ["if a plaintiff alleges that the defendant's single wrongful act invaded two different primary rights, he has stated two causes of action, and this is so even though the two invasions are pleaded in a single count of the complaint."].)

C. THE CONFUSION CREATED BY *TAUS* AND THIS COURT'S PASSING REFERENCE IN *OASIS WEST* TO THE *MANN* RULE

Nearly three years after *Mann*, this Court issued its decision in *Taus*. *Taus* involved defamation and related privacy claims arising from two newspaper articles and subsequent discussion of those articles. (*Taus*, *supra*, 40 Cal.4th at pp. 689-701.) The operative complaint listed four "causes of action": negligent infliction of emotional distress, invasion of privacy, fraud, and defamation. (*Id.* at pp. 701-702.) Defendants filed an anti-SLAPP motion which was granted in part and denied in part. (*Id.* at pp. 702-703.) In reviewing that decision, the Court of Appeal examined the case *statement by statement* (as is required under defamation law given that each separately published statement gives rise to a distinct cause of action)[7] despite the fact that all of the allegedly improper statements were lumped together in the complaint. (*Id.* at pp. 704-711.) This Court granted review concerning the dismissal of claims relating to several of the statements/incidents, and again reviewed the anti-SLAPP order on a

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[7] See discussion *supra* footnote 5.

statement-by-statement basis. (*Id.* at pp. 714-742.) The Court's meticulous analysis is the antithesis of the "find-one-issue-and-deny-the-whole-motion" approach advocated by the *Mann* decision.

The *Mann* standard, but not *Taus*, was subsequently cited in *Haight-Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539 [110 Cal.Rptr.3d 129], although the majority opinion purported not to reach the question of whether *Mann* was correct. (*Id.* at p. 1554 ["validity of the *Mann* analysis (or any other analysis) is not really before us."].) Justice Needham wrote separately, concurring in part and dissenting in part, to explain why the *Mann* rule was incorrect. (*Id.* at pp. 1556-1558.)

Then, on May 16, 2011, this Court issued its decision in *Oasis West*. *Oasis West* involved an attorney who was sued by a former client for publicly working to thwart that client's redevelopment project on which the attorney had worked. The attorney brazenly claimed that the anti-SLAPP statute protected him from being sued for this clear breach of his professional duties, a position rejected by both the trial court and this Court. (*Oasis West*, *supra*, 51 Cal.4th at pp. 821-825.) The Court readily concluded that an attorney cannot hide his use of confidential client information against that client from liability under the anti-SLAPP law. (*Ibid.*)

In generally describing the standard for an anti-SLAPP claim, the Court quoted the "any part of the claim" standard invented by *Mann*:

> If the plaintiff "can show a 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." (*Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 106, 15 Cal.Rptr.3d 215, original italics.)

(*Oasis West*, *supra*, 51 Cal.4th at p. 820.) No other citation to *Mann* is made in the Court's opinion, and no discussion is provided concerning why this standard, created in *Mann* "as a matter of first impression," states the law or how it is to be applied. Rather, it appears the citation was part of a mechanically described backdrop to the statute, which played no role in the decision.

It is unclear how this quotation from *Mann* found its way into the *Oasis West* opinion. None of the parties before the Court made any argument concerning *Mann* or whether each allegedly protected act needed to be evaluated independently for anti-SLAPP purposes—that simply was not an issue in *Oasis West*. Indeed, *Mann* was not even cited once by any party in the petition for review briefs *or* in the briefs on the merits before the Court.[8] Nor was there any briefing before the Court about the

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[8] Neither the *Mann* case nor any discussion of this issue appears in the *Oasis West* Petition for Review, 2010 WL 1901054, Answer to Petition for

erroneous nature of the *Mann* standard, how it is inconsistent with *Taus* and long standing California law concerning the meaning of "cause of action," the criticism of *Mann* by Justice Needham, or any of the other matters that one would expect to be discussed before this Court purportedly adopted a new standard for application of the anti-SLAPP statute that is different than that applied on demurrer and summary adjudication, and that is contrary to the prior practice of courts analyzing such motions.

Shortly after *Oasis West*, the court in *Wallace* analyzed in detail whether the *Mann* rule was correct, describing the issue as "whether the plaintiff can satisfy [its prong-two anti-SLAPP burden] by showing it could prevail on any of the allegations underlying the cause of action, or whether the plaintiff must show it could prevail on the allegations of protected activity alone." (*Wallace, supra,* 196 Cal. App. 4th at p. 1195.) First, the *Wallace* court looked to the language of the anti-SLAPP statute, and determined that it was clear. (*Id.* at pp. 1196-1200.)

> [T]he face of the statute discloses only one reasonable answer to the question of what a plaintiff must do to show a probability of prevailing ... a plaintiff must show a probability of prevailing on the assertion of liability based on protected activity, and nothing else.

Review, 2010 WL 2692315, Reply in Support of Petition for Review, 2010 WL 2624900, Opening Brief on the Merits, 2010 WL 3216311, Answering Brief on the Merits, 2010 WL 3973562, Reply Brief on the Merits, 2010 WL 4716572, Amicus Curiae Brief of Lawrence J. Fox, 2010 WL 5587062, or Response to Brief of Amicus Curiae Lawrence J. Fox, 2011 WL 597372.

(*Id.* at pp. 1199-1200.)

Then, the *Wallace* court looked to the legislative history of the anti-SLAPP statute and reached the same conclusion. (*Wallace*, *supra*, 196 Cal.App.4th at pp. 1200-1202.) It then looked to the public policy behind the anti-SLAPP statute, and reached the same result. (*Id.* at pp. 1202-1203.) *Wallace* then examined the *Mann* court's reasoning, and explained why it is unpersuasive and inconsistent with the statutory language, history, and policy. (*Id.* at pp. 1203-1208.)

Next, *Wallace* examined this Court's decision in *Taus*, concluding that *Taus* is also inconsistent with *Mann*. (*Wallace*, *supra*, 196 Cal.App.4th at 1208-1210.) "One would think that *Taus* would be the death knell for the rule ventured earlier in *Mann*." (*Id.* at 1210.) The *Wallace* court concluded that

> Given the language of section 425.16, its legislative history, public policy concerns, the genesis of the *Mann* rule, and our Supreme Court's subsequent teaching in *Taus*, we would conclude that the second prong of anti-SLAPP analysis requires a plaintiff to demonstrate with admissible evidence a probability that it would prevail on its cause of action arising from protected activity, based only on its allegations of protected activity. If the plaintiff failed in this regard, the meritless claims based on protected activity would be stricken as a basis for liability.
>
> Then came *Oasis [West]*.

(*Id.* at 1210.) *Wallace* noted that in *Oasis West* this Court cited *Mann*, "did not mention *Taus*, which would dictate a different result" and that "*Oasis*

apparently did not involve a mixed cause of action." (*Id.* at pp. 1211.) Nonetheless, the *Wallace* court felt compelled to follow this Court's latest ruling in *Oasis West* despite all of the detailed reasons why the *Mann* rule is incorrect. (*Id.* at 1212.)[9]

And even after *Wallace*'s extremely reluctant adherence to what it believed was the Supreme Court's mistaken and perhaps inadvertent adoption of the *Mann* rule in *Oasis West*, the appellate courts continued to be sharply divided on this issue, frequently resulting in split-decisions of appellate panels, vehemently disagreeing with the appellate courts that immediately preceded them, and often with vigorous dissents.

In *City of Colton v. Singletary* (2012) 206 Cal.App.4th 751, 774 [142 Cal.Rptr.3d 74] (hereafter *City of Colton*), for example, the Fourth Appellate District, Division Two, citing heavily to the underlying reasoning of the *Wallace* court—but contrary to *Wallace*'s ultimate holding—held that "*Taus* shows us that a portion of a cause of action may be stricken if it falls within anti-SLAPP protections." (*Id.*)

Justice Richli wrote separately, concurring and dissenting in part, arguing that the *Taus* court did not address the issue as to striking less than

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[9] Shortly after *Wallace* came down, the Sixth District Court of Appeal likewise followed the *Mann* rule without any substantive analysis of why it was doing so, other than because the court felt *Oasis West* required such a result. (*M.F. Farming, Co. v. Couch Distributing Co.* (2012) 207 Cal.App.4th 180, 193 [143 Cal.Rptr.3d 160].)

an entire cause of action, that the *Wallace* court's reading of *Taus* was incorrect, and that if the majority really wanted to follow *Wallace* it should have adopted its actual holding that *Oasis West* overruled *Taus*. (*Id.* at pp. 793-794 (dis. opn. of Richli, J.).)

The see-saw nature of appellate court outcomes on this issue continued with *Burrill v. Nair* (2013) 217 Cal.App.4th 357, 382 [158 Cal.Rptr.3d 332]. There, the Third Appellate District disagreed with *Taus* and *City of Colton* and instead adopted the *Mann* rule. (*Ibid.*) Demonstrating the ever-widening divide between the different sides on this issue, *Burrill* primarily cited to the *dissenting* opinion of Justice Richli and adopted his reasoning instead of the *City of Colton* majority. (*Ibid.*)

Perhaps unsurprisingly, the next published opinion on this issue, in *Cho v. Chang* (2013) 219 Cal.App.4th 521, 527 [161 Cal.Rptr.3d 846] (hereafter *Cho*), *again* disagreed with the holding of the published decision immediately preceding it, and flipped back to rejecting the *Mann* rule. In articulating its reasoning, the Second Appellate District stated that "the guiding principle in applying the anti-SLAPP statute to a mixed cause of action case is that 'a plaintiff cannot frustrate the purposes of the SLAPP statute through a pleading tactic of combining allegations of protected and unprotected activity under the label of one 'cause of action.'" (*Ibid.*, quoting *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 308 [106 Cal.Rptr.2d 906].) It also noted what had by then become

glaringly obvious: there were a "large and growing number of cases" in which the appellate courts had "wrestled" with these issues and come to different conclusions. (*Id.* at p. 526.)

Then, the published opinion in the instant case was handed down on February 5, 2015. Surprisingly, the Second District Court of Appeal rejected its own ruling in *Cho*, issued just a year-and-a-half earlier, albeit from a different Division. In so doing, the court again noted that there was a "growing debate among the appellate districts" as to what the right answer was regarding this issue. (Ct. of Appeal, Slip. Op., p. 22.) It also said something rarely found in judicial opinions: that "*reasonable minds may differ*" on the correct answer to this question. (*Id.*, italics added.)

The litany of cases cited above chronicles just *some* of the *published* decisions to reach this issue. There are, of course, many more unpublished decisions in which courts have likewise had to pick sides without any clear guidance from the Supreme Court.[10]

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[10] See e.g., *Weksler v. Weksler* (Feb. 25, 2015, B252276) [nonpub. opn.]; *Coyote Springs Guest Ranch v. Castaldi*, (Dec. 19, 2014, F065144) [nonpub. opn.]; *Monterra Homeowners Ass'n v. McCullough* (Sept. 16, 2014, D065485) [nonpub. opn.]; *Ajamian v. Terzian-Feliz* (July 22, 2014, A137929) [nonpub. opn.]; *Williams v. Cahill* (Mar. 26, 2014, G048301) [nonpub. opn.]; *San Diego Hosp. Based Physicians v. El Centro Reg'l Med. Ctr.* (Aug. 1, 2013, D061740) [nonpub. opn.]; *Brain Research Labs, LLC v. Clarke* (Jan. 26, 2012, A127544) [nonpub. opn.]; *Novack v. State Farm Gen. Ins. Co.* (Oct. 26, 2011, B221485) [nonpub. opn.].

Only this Court can definitively resolve the conflict that has so bedeviled the lower courts between the *Taus* standard and the *Mann* standard obliquely referenced in *Oasis West*. Indeed, whatever the ultimate merits, it is indisputable that there are significant questions as to whether the *Mann* rule is correct, as explained in detail in *Wallace* and the numerous other cases cited above. If the Court is going to adopt the *Mann* rule, it should do so after full briefing and argument concerning that rule, its implications for future application of the anti-SLAPP statute, and fundamentally whether it is a correct interpretation of the anti-SLAPP law. None of that occurred in *Oasis West*, where *Mann* was not cited or discussed *at all* by any party. For each of these reasons, Petitioner respectfully requests this Court to grant review so that this matter can be fully briefed and the discordance between *Oasis West* and *Taus* and the many decisions that followed them can be resolved.

D. THIS CASE PROVIDES AN EXCELLENT VEHICLE TO EXAMINE THESE ISSUES BECAUSE OF ITS PROCEDURAL POSTURE

The procedural posture of this case readily demonstrates why the *Mann* rule should be jettisoned. Through his own artful pleading, Plaintiff was able to reinstate protected claims that had *already* been deemed to lack minimal merit in a prior anti-SLAPP ruling. He did so by taking the very same allegations of protected conduct that had previously been stricken—the Moss Adams Claims—and combining them with allegations of

indisputably *unprotected* conduct—the LiveIt claims—and calling the pleading contrivance a "single" cause of action. He then argued that the court was therefore barred under *Mann* from even analyzing whether the allegations involving protected conduct had minimal merit. As a result—and directly in contravention of the anti-SLAPP statute—Baral was able to resurrect his stricken claims concerning protected activity and force Schnitt to expend significant resources defending himself against them.

As this case clearly demonstrates, *Mann* renders irrelevant the question of whether a claim based on *protected* activity has merit. Instead, by combining any alleged protected activity with unprotected activity, the artful plaintiff is able to ensure that only the merits of the *unprotected* activity will determine the outcome of the anti-SLAPP motion. (*Wallace*, *supra*, 196 Cal.App.4th at p. 1204.) The policies underlying the anti-SLAPP statute cannot be squared with such a troubling outcome.

This case also clearly shows how the *Mann* rule upends the settled rule that plaintiffs cannot amend-around a successful anti-SLAPP motion. "Instead of having to show a probability of success on the merits," the *Mann* rule allows the SLAPP plaintiff "to go back to the drawing board with a second opportunity to disguise the vexatious nature of the suit through more artful pleading" simply by amalgamating the causes of action. (See *Simmons v. Allstate Ins. Co.* (2001) 92 Cal.App.4th 1068, 1073-74 [112 Cal.Rptr.2d 397][hereafter *Simmons*].) "By the time the

moving party [is] able to dig out of this procedural quagmire, the SLAPP plaintiff will have succeeded in his goal of delay and distraction and running up the costs of his opponent," thus "totally frustrat[ing] the Legislature's objective of providing a quick and inexpensive method of unmasking and dismissing such suits." (See *Ibid.*). Indeed, Baral admits that he is seeking to exploit precisely the potential loophole that *Simmons* closed. (See AA1324 [in which Baral contended that *he* was entitled to attorneys' fees to defend the second anti-SLAPP motion because, after losing the initial anti-SLAPP motion, he combined the LiveIt Claims and the Moss Adams Claims, and thus any further effort to strike those allegations should be deemed frivolous].)

V. CONCLUSION

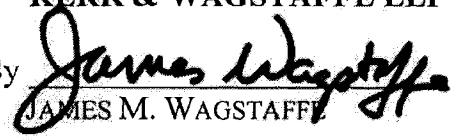
As the Court of Appeal explained in detail in *Wallace*, this Court's quotation of *Mann* in *Oasis West* adopts a rule that is inconsistent with both prior case law and the language and policy of the anti-SLAPP statute. It is an unwise rule, wholly inconsistent with public policy, and one that has frequently troubled the appellate courts. No clearer example could be found than this case, where Plaintiff had *already lost* such claims under a prior-anti-SLAPP ruling and then merely cut-and-pasted such claims into a "new" cause of action that also alleged *un*protected claims for which he could show minimal merit. That result is wholly antithetical to the anti-

SLAPP statute, and converts that statute from a substantive legal protection to a technical obstacle that can easily be pled around.

For each of these reasons, Petitioner respectfully requests that the Court grant the Petition for Review of this matter.

Dated: March 16, 2015

KERR & WAGSTAFFE LLP

By 
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CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

Pursuant to Rules of Court, rules and 8.504(d)(1), I certify that this Brief is proportionately spaced, has a typeface of 13-point, proportionally-spaced font, and contains 7,617 words.

Dated: March 16, 2015

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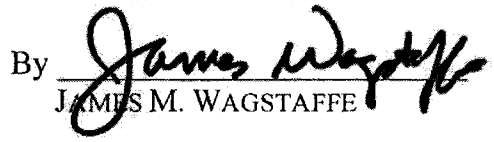
By 
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Filed 2/5/15

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ROBERT C. BARAL, Plaintiff and Respondent, v. DAVID SCHNITT, Defendant and Appellant.	B253620 (Los Angeles County Super. Ct. No. BC475350)

APPEAL from an order of the Superior Court of Los Angeles County, Maureen Duffy-Lewis, Judge. Affirmed.

Ervin Cohen & Jessup, Michael C. Lieb and Leemore L. Kushner for Defendant and Appellant

Sauer & Wagner, Gerald L. Sauer and Amir A. Torkamani for Plaintiff and Respondent

This is an appeal from an order denying a special motion to strike under Code of Civil Procedure, section 425.16.[1] We are asked to add our voice to the growing debate among appellate districts as to whether section 425.16 (anti-SLAPP statute) authorizes excision of allegations subject to the anti-SLAPP statute (protected activity) in a cause of action that also contains meritorious allegations not within the purview of that statute (mixed cause of action). The trial court applied appellate and Supreme Court authority holding that the statute does not. (See, e.g., *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811 (*Oasis*); *Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90 (*Mann*).) We agree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The original and first amended complaints and first two special motions to strike

Respondent Robert Baral and appellant David Schnitt owned a company, IQ BackOffice LLC (IQ), with others.[2] Baral's original complaint, filed in December 2011, contained 18 causes of action. Baral alleged that Schnitt had engaged in fraud and multiple breaches of fiduciary duty, including seizing control and secretly negotiating the sale of IQ to his advantage, while excluding Baral's membership interest and comanagement powers. The fifth and sixth causes of action (slander and libel) in the original complaint incorporated the latter allegations. Baral also averred that Schnitt unilaterally retained Moss Adams to conduct an investigation of IQ after Schnitt discovered misappropriation of corporate assets prior to the sale of the business.

Baral contended that Schnitt determined the scope of Moss Adams's examination and knowingly gave Moss Adams false information in order to discredit Baral. He also alleged that Schnitt directed Moss Adams not to interview Baral in connection with its examination. As a result of Schnitt's claimed falsehoods, Moss Adams incorrectly concluded in its report that Baral had engaged in certain unauthorized transactions and that there was incomplete support for others. Schnitt subsequently refused to correct the

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[1] Undesignated statutory references are to the Code of Civil Procedure.

[2] The other owners are not parties to this appeal.

false information contained in the report, which was ultimately published to both the potential purchaser and the members of IQ.

On May 17, 2012, the trial court determined that the fifth and sixth causes of action should be struck because they were protected under section 425.16. Because these defamation claims were based exclusively on communications made in a prelitigation fraud investigation, the trial court concluded that the absolute litigation privilege under Civil Code section 47, subdivision (b) (litigation privilege) applied to "the statements allegedly made by [Schnitt] while conducting the investigation in anticipation of litigation."

Also on May 17, 2012, the trial court ruled on Schnitt's demurrer to the other causes of action. It sustained the demurrer with leave to amend as to nine of the remaining 16 causes of action, sustained it without leave to amend as to five causes of action, and overruled the demurrer as to two causes of action. Baral filed a notice of appeal from the May 17, 2012 rulings, which he abandoned in January 2013 after he obtained new counsel. (*Baral v. Schnitt* (Jan. 22, 2013, B242569).)

In June 2012, Baral, through his former counsel, filed a first amended complaint. The first amended complaint contained 11 causes of action; none was a defamation claim. Baral averred that Schnitt had frozen Baral out of participation in the Moss Adams audit and that Schnitt had made false representations to auditors in an effort to discredit Baral. On July 23, 2012, Schnitt filed another anti-SLAPP motion to strike 10 of the 11 causes of action from the first amended complaint.[3] According to Schnitt, each incorporated allegations about the Moss Adams audit that had been the subject of his first motion to strike.

The second amended complaint and third special motion to strike

On January 24, 2013, Baral, who was then represented by new counsel, filed a second amended complaint. The second amended complaint contained four causes of

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[3] The trial court did not rule on that anti-SLAPP motion because that motion had been withdrawn by stipulation when Baral abandoned his appeal and the parties further stipulated to Baral's filing the second amended complaint.

action: breach of fiduciary duty, constructive fraud, negligent misrepresentation, and declaratory relief.[4] Baral asserted that Schnitt violated his fiduciary duties in usurping Baral's ownership and management interests in IQ so that Schnitt could benefit from what was initially a secret sale of IQ. As one example of Schnitt's alleged breach of fiduciary duty, Baral asserted that Schnitt prevented him from participating in Moss Adams's investigation in an effort to force Baral's cooperation in the sale of IQ. That cause of action sought the trial court's assistance in reopening the investigation, in which Baral would participate, and preventing Schnitt from interfering with corrections to the report, if any, taken by Moss Adams.

More specifically, Baral alleged that in 2003 he was a certified public accountant and owned and operated an accounting firm, R.C. Baral & Company, Inc. (R.C. Baral). In August or September 2003 Schnitt was having a dispute with his partner in CoEfficient Back Office Solutions LLC (CoEfficient) when he approached Baral to invest and become a partner in CoEfficient. Both R.C. Baral and CoEfficient specialized in "outsourcing" business services to companies that did not internally handle those needs.

Baral, Schnitt, and nonparty Dennis Foster ultimately orally agreed in 2003 to operate IQ as a new outsourcing company. They agreed to act as comanaging members, with Schnitt holding a 35 percent interest and Baral a 30 percent interest. Baral alleged that, unbeknownst to him, in September 2003 Schnitt filed with the California Secretary of State documents that identified Schnitt as the sole managing member. Also without Baral's knowledge, in October 2003 Schnitt executed an operating agreement for IQ that identified Schnitt as the sole manager and member of IQ.

Baral further alleged the parties operated IQ as comanaging partners from 2003 until 2010, when Schnitt began unilateral negotiations for the sale of IQ to LiveIt Investment, Ltd. (LiveIt). As part of the purchase agreement to sell IQ, Schnitt agreed to sell a 72.6 percent interest in IQ based on his representation that he was the sole member

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[4] We recite the facts taken from the second amended complaint and the parties' respective declarations only for the purpose of deciding the anti-SLAPP motion.

and manager of IQ. Schnitt negotiated an employment position and ownership interest for himself without Baral's knowledge or consent. Also in connection with the sale, in November 2010 Schnitt retained Moss Adams to audit IQ's financial statements. Moss Adams issued an auditor's report on December 15, 2010, which concluded that the financial statements fairly represented IQ's financial position.

Later, in December 2010 Schnitt discovered that Baral's son, who was a bookkeeper for IQ, had misappropriated funds belonging to IQ. When apprised of this, Baral guaranteed that he would indemnify IQ for any losses caused by his son. Schnitt retained Moss Adams to determine the amount of misappropriated assets. Baral averred that on Schnitt's instructions, Moss Adams did not interview Baral during its investigation or otherwise allow Baral to submit information to the auditors. Schnitt's motivation for excluding Baral from the investigation was to leverage Baral's cooperation with the sale of IQ.

Baral also alleged that the Moss Adams investigative report, which was distributed by Schnitt to Baral and various third parties in February 2011, contained inaccurate conclusions. Schnitt refused to instruct Moss Adams to withdraw the report or reopen the investigation to consider additional information that would be provided by Baral. In March 2011, Baral reimbursed IQ for all funds allegedly misappropriated by his son.

In addition, Baral alleged that in April 2011, Schnitt, Baral, and Foster sold IQ to LiveIt. In connection with the sale, the parties entered into a number of agreements, which reflected that Baral was a member and manager of IQ from its inception in 2003. In May 2011, after the sale of IQ had closed, Baral renewed his efforts to provide information to the Moss Adams auditors, to no avail.

On February 22, 2013, Schnitt filed an anti-SLAPP motion, seeking to strike all references to the Moss Adams audit in the first (breach of fiduciary duty), second (constructive fraud), and fourth (declaratory relief) causes of action and related prayers

for relief.[5] Schnitt asserts that, under *Cho v. Chang* (2013) 219 Cal.App.4th 521 (*Cho*) and *City of Colton v. Singletary* (2012) 206 Cal. App.4th 751 (*City of Colton*), the trial court should have struck these allegations notwithstanding that the first, second, and fourth causes of action contain other allegations that are not within the purview of the anti-SLAPP statute, and notwithstanding that Schnitt chose not to argue that Baral could not make a prima facie showing of prevailing on the merits of those surviving allegations.

The trial court denied the anti-SLAPP motion on December 13, 2013. Without expressly deciding whether the second amended complaint contained allegations of protected activity, the trial court concluded: "[The] Anti-SLAPP motion still applies to causes of action or to an entire complaint, not allegations. Cases cited state that if a cause of action contains portions that are subject to anti-SLAPP and portions that are not, the defendant can move to strike those portions that are subject, i.e. the cause of action would be considered to contain two 'counts'; one count subject and one count not. No case allows striking allegations per se under [section] 425.16; that is within the province of a regular motion to strike." Schnitt filed this timely appeal.

After the trial court denied Schnitt's anti-SLAPP motion, Schnitt filed a motion to quash Baral's subpoena to Moss Adams, which was denied on September 23, 2014 (September 23 Order). In the September 23 Order, the trial court stated that the "[l]ititgation privilege is not a discovery privilege . . . . The audit goes directly to the issues and may lead to the discovery of admissible evidence."

Schnitt also filed a motion to stay the trial court proceedings pending appeal. When the trial court denied that motion and Baral threatened to initiate contempt proceedings if Schnitt did not comply with Baral's discovery requests, Schnitt filed a petition for writ of supersedeas to stay all trial court proceedings pending the instant appeal and to vacate the September 23 Order.

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[5] Schnitt did not seek to strike any part of the third cause of action for negligent misrepresentation.

In that petition, Schnitt made many of the same arguments he made in his appeal. Baral opposed the petition, also reiterating his arguments in the appeal and expressing dismay over the three-year delay in the case. Baral disputed that the discovery subpoena related only to the Moss Adams fraud audit; he contended the discovery was also relevant to claims that Schnitt conceded would be in the case irrespective of our ruling on the anti-SLAPP motion. We granted a temporary stay, and then granted the writ of supersedeas staying all trial court proceedings pending resolution of the instant appeal.

At oral argument, Baral contended that Schnitt did not have standing to assert the litigation privilege because IQ had retained Moss Adams, and IQ was no longer a party. Schnitt responded that by contesting standing for the first time at oral argument on appeal, Baral had waived the argument, and that because Baral abandoned his appeal from the anti-SLAPP motion as to the defamation claims in the original complaint, this court may not revisit the merits of the litigation privilege as to the anti-SLAPP motion regarding the Moss Adams allegations in the second amended complaint. We asked for and received letter briefs on these issues, as well as the issue of if we were to affirm the trial court, whether Schnitt would be foreclosed from asserting the litigation privilege upon remand.[6]

DISCUSSION

Schnitt asserts that Baral's causes of action are mixed. Schnitt denies the relevance of whether Baral would have had a probability of prevailing on allegations of breach of fiduciary duty not based on the Moss Adams audit. Instead, he contends that all allegations in the second amended complaint about the Moss Adams audit are governed by the trial court's prior anti-SLAPP ruling regarding the defamation claims in the original complaint.

Schnitt further contends, as he did below, that *Cho*, *supra*, 219 Cal.App.4th 521, and *City of Colton*, *supra*, 206 Cal.App.4th 751, require striking the Moss Adams audit allegations even though such a ruling would not eliminate any cause of action. Any

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[6] Baral and Schnitt filed their respective letter briefs on January 5, 2015.

ruling to the contrary would allow artful pleading as a means to evade the purpose of the anti-SLAPP statute, especially here, where the trial court already had struck Baral's claims regarding the Moss Adams audit from the original complaint.

Baral responds that Schnitt mischaracterizes the second amended complaint when he equates the Moss Adams allegations therein to the defamation claims in the original complaint. The allegations about the Moss Adams audit do not address the content of the auditor's report, but instead describe Schnitt's efforts to preclude Baral from participating in the audit, which is not protected activity, but was a breach of fiduciary duty given that Baral was a member and comanager of IQ.

Finally, Baral contends that the trial court correctly followed *Mann*, *supra*, 120 Cal.App.4th 90, and *Oasis*, *supra*, 51 Cal.4th 811. All causes of action would remain given Schnitt's admitted failure to argue that Baral could not prevail on the merits of breaches of fiduciary duty and fraud not relating to the Moss Adams audit. To hold otherwise would (1) contravene the language of the anti-SLAPP statute, which expressly refers to a cause of action, and its underlying purpose of preventing defendants from incurring litigation costs that would chill First Amendment and redress rights; and (2) force courts to engage in time-consuming evaluations of all allegations in a cause of action without achieving any appreciable reduction in trial time.

I. The anti-SLAPP statute requires a two-pronged analysis

Section 425.16, subdivision (a) provides: "The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly."

Section 425.16, subdivision (b)(1) provides: "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection

with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim."

Section 425.16, subdivision (e) states: "As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."

A trial court engages in a two-part analysis in deciding an anti-SLAPP motion. First, the trial court considers whether the defendant has satisfied the initial burden to establish a prima facie case that the plaintiff's claim arises out of activity in furtherance of the right of petition or free speech. (§ 425.16, subd. (b)(1); *Flatley v. Mauro* (2006) 39 Cal.4th 299, 314 (*Flatley*); *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056 (*Rusheen*).) In making this determination, the trial court "shall consider the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based." (§ 425.16, subd. (b)(2).)

Second, if the defendant satisfies this first prong, the burden shifts to the plaintiff to establish a legally sufficient claim and a probability of prevailing on the merits of that claim. (§ 425.16, subd. (b)(1); *Flatley*, *supra*, 39 Cal.4th at p. 314; *Rusheen*, *supra*, 37 Cal.4th at p. 1056.) The plaintiff meets this burden by making a prima facie showing, with admissible evidence, of facts that would sustain a favorable judgment if plaintiff's evidence were credited. (*Oasis*, *supra*, 51 Cal.4th at p. 820.) In considering the second prong of the anti-SLAPP analysis, the trial court cannot weigh evidence. (*Flatley*, *supra*,

39 Cal.4th at pp. 323, 326.) Instead, the trial court must accept as true evidence that is favorable to the plaintiff; it may consider the defendant's evidence only to determine whether the cause of action fails as a matter of law. (*Id.* at p. 326.)

Appellate courts review de novo an order granting an anti-SLAPP motion. (*Oasis*, *supra*, 51 Cal.4th at p. 820.)

II. Baral's allegations regarding the audit describe protected activity; accordingly, the causes of action are mixed

Baral's claims for slander and libel, respectively, in the fifth and sixth causes of action in the original complaint addressed, in major part, Schnitt's allegedly false statements to the Moss Adams auditors and the resulting "false and defamatory Investigative Report." Baral sought general, special, and punitive damages. As noted earlier, Baral further alleged in the fifth cause of action for slander that Schnitt directed Moss Adams not to interview him. The same allegation appears in the general allegations section, which was also incorporated in the fifth and sixth causes of action.

Schnitt moved to strike the fifth and sixth causes of action in their entirety under the anti-SLAPP statute. The trial court held that the defamation causes of action were based on communications to the auditor triggered by misappropriation of corporate assets by Baral's son. For this reason, it concluded that the audit was in anticipation of litigation and protected activity that was absolutely privileged under Civil Code section 47, subdivision (b).

Schnitt argues that because this ruling applies to all allegations in the second amended complaint referring to the Moss Adams audit, "The first prong is not at issue in this appeal." We are not aware of any authority that would make a trial court's anti-SLAPP ruling as to a different complaint binding on this court.[7]

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[7] The trial court's ruling would not be law of the case absent a prior appellate ruling (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, §§ 459–460, pp. 515–517), nor would collateral estoppel apply when the trial judge never addressed Baral's general allegations in the original complaint regarding being frozen out of the audit (see 7 Witkin, Cal. Procedure, *supra*, Judgment, § 414, p. 1055). Res judicata also would not

In accordance with the dictates of the anti-SLAPP statute, we now examine the pleadings and evidence that Schnitt submitted in support of his anti-SLAPP motion. We do so to determine whether Schnitt has satisfied his burden to show that the allegations regarding the Moss Adams audit in the second amended complaint describe protected activity.

The thrust of the breach of fiduciary and constructive fraud causes of action is that Schnitt endeavored to treat Baral as if he did not exist as an owner and comanager of IQ and to usurp the financial benefits of the business for himself. All this, even though Baral alleged that he invested about half of IQ's operating capital and allowed IQ to use his business moniker so that IQ could market its services based on Baral's alleged decades of successful accountancy practice. In further breach of Schnitt's fiduciary duties, Baral alleged that Schnitt held Baral's participation in the Moss Adams audit hostage to Baral's cooperation in the sale of IQ.

In contrast to the defamation claims in his original complaint, Baral does not seek compensatory or punitive damages relating to the Moss Adams audit in any of his causes of action. He seeks just an injunction that would (1) require notifying Moss Adams that it is to accept information from Baral "in connection with any disputed conclusions" in the audit and "to undertake any corrective measures that it deems appropriate under the circumstances (*i.e.*, the issuance of a new written report)"; and (2) restrain Schnitt from objecting to Baral's submission of additional information and any corrective measures undertaken by Moss Adams as long as Baral pays Moss Adams for this additional work.

In his declaratory relief cause of action, Baral incorporates the allegations from the preceding causes of action and seeks, in part, a declaration that Baral was a comanaging member of IQ "at all relevant times." The thrust of the cause of action, however, is a request for a declaration of Baral's right to submit information to contravene the

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appear to apply to an earlier ruling in the same case (*id.* § 334, p. 939). We do not address any of these doctrines of preclusion because Schnitt failed to assert them.

conclusions of the audit report so that Moss Adams may choose to revise that report and a declaration precluding Schnitt from preventing Baral from doing so as a comanager.

In support of the instant anti-SLAPP motion, Schnitt submitted, among other documents, the first and supplemental declarations he previously filed in support of the anti-SLAPP motion addressed to the defamation causes of action in the original complaint. His first declaration contained the conclusion that, after discovering unauthorized checks payable to Baral's son and "anticipating litigation," he hired Moss Adams to do a forensic audit. His supplemental declaration is less opaque. There, he asserted that, because Baral supervised IQ's books and records and prepared its tax returns, Schnitt had to hire a forensic auditor to discern the extent of the misappropriation and whether Baral was involved in it. He anticipated both suing others if the audit revealed that persons other than Baral's son were involved in the theft and being sued by Baral's son if Schnitt fired him, which Schnitt expected to do.

This evidence constitutes a prima facie showing that Schnitt hired Moss Adams to conduct a forensic audit in anticipation of litigation. Substantial case law supports the principle that oral statements and writings made before litigation actually commences can arise from the right to petition the judicial branch. (Burke, Anti-SLAPP Litigation (The Rutter Group 2014) ¶ 3:29, pp. 3-23 to 3-24, and cases cited therein.) The parties do not challenge this principle.

The next question is whether merely seeking to participate in a reopening of the audit for the purpose of convincing Moss Adams to revise a report procured in anticipation of litigation "aris[es] from any act . . . in furtherance of the person's right of petition . . . ." (§ 425.16, subd. (b)(1).) In answering this question, we are required to look to the conduct on which the liability is based and not the motive for the conduct. (*Hunter v. CBS Broadcasting, Inc.* (2011) 221 Cal.App.4th 1510 (*Hunter*).) In addition, "arising from any act . . . in furtherance of a person's right of petition or free speech" within the purview of section 425.16, subdivision (b)(1) also means "*helping* to advance, assisting." (*Lieberman v. KCOP Television, Inc.* (2003) 110 Cal.App.4th 156, 166 [newsgathering through surreptitious recordings incorporated in a broadcast was in

furtherance of the news media's right of free speech as to an issue of public interest and, therefore, protected activity]; *Hunter*, *supra*, 221 Cal.App.4th at p. 1520.)

In *Hunter*, the appellate court expressly rejected the argument that the act of hiring a younger female anchor was not in furtherance of the free speech rights of a television station where the male plaintiff alleged age and gender discrimination in that station's hiring decisions. "Thus, even if Hunter is correct that the act of hiring a weather anchor does not qualify as an exercise of free speech rights (an issue we need not decide), he has provided no argument as to why such conduct does not qualify as an act in furtherance of the exercise of such rights. For the reasons explained above, we conclude that it does." (*Hunter*, *supra*, 221 Cal.App.4th at p. 525.) This case is similar. Schnitt proffered evidence in support of his motion that he hired the forensic auditor because he wanted to investigate the extent of embezzlement by Baral's son and whether Baral and others were involved. Schnitt did so in order to consider whether to take legal action against them.

Under the unique facts of this case and the preceding authorities, the decision as to who may participate in the audit would also be "in furtherance of the right to petition." To hold otherwise — where the very subjects of the forensic audit were Baral and his son — would indeed chill exercise of "the right to petition for the redress of grievances" (§ 425.16, subd. (b)(1)) given that the audit was evaluating potential claims against them. For all these reasons, we hold that Schnitt has satisfied his burden under the first prong of the anti-SLAPP analysis.

III. Baral may contest Schnitt's standing to assert the litigation privilege and Baral's abandonment of his appeal regarding the original complaint has no preclusive effect here

Lack of standing is a jurisdictional defect that cannot be waived. As the California Supreme Court observed in *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, "Although [the defendant] did not raise these issues before the Court of Appeal, contentions based on a lack of standing involve jurisdictional challenges and may be raised at any time in the proceeding." (*Id.* at p. 438.)

Schnitt contends that because (1) the trial court found that the litigation privilege provided a complete defense to the defamation claims in the original complaint, and (2) Baral abandoned his appeal from that ruling, then (3) this court must conclude that the litigation privilege applies to the Moss Adams allegations in the second amended complaint. More specifically, Schnitt asserts that California's "'one shot' rule" recognized in *In re Baycol Cases I and II* (2011) Cal.4th 751, 761, footnote 8 and in section 906 requires this conclusion.

Schnitt arguably would be correct if Baral were arguing here that the trial court erred in granting the anti-SLAPP motion regarding statements that were the subject of the defamation claims in the original complaint. That, however, is not Baral's argument. There are no defamation claims in the second amended complaint, and Baral is not seeking damages regarding the Moss Adams allegations in that complaint. The Moss Adams allegations in the second amended complaint regard a different wrong—breach of fiduciary duty in being frozen out of the management of IQ.[8] By this observation, we are not ruling that the litigation privilege does not apply to these allegations, but only that this is still an open question. In fact, both sides argue in their letter briefs that were we to affirm the trial court's ruling before us, it would not bind the trial court in considering the litigation privilege upon remand.

We decline the invitation to decide the merits of the litigation privilege as applied to the second amended complaint. As set forth *post* in part IV, even if, arguendo, Schnitt were correct that the litigation privilege applies to the Moss Adams allegations in the second amended complaint, the anti-SLAPP statute does not authorize excising allegations in mixed causes of action where the plaintiff has demonstrated a prima facie

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[8] At oral argument, Schnitt's counsel conceded that he was not relying on traditional doctrines of preclusion to support his argument that we are precluded from revisiting the litigation privilege as applied to a different complaint. As set forth in footnote 7, *ante*, the trial court's ruling as to the original complaint would not appear to be law of the case, nor would the doctrines of collateral estoppel or res judicata appear to apply.

case of prevailing on part of the mixed causes of action. Once again, by so ruling, we express no opinion on what impact, if any, the litigation privilege would have on future pretrial and trial proceedings upon remand.[9]

IV. The anti-SLAPP statute applies only to an entire cause of action, and Baral demonstrated a prima facie case of prevailing on at least part of each cause of action, thus satisfying the second prong of the anti-SLAPP analysis

Schnitt does not contest that Baral proffered evidence establishing a prima facie case of breach of fiduciary duty as to the allegations not involving protected activity and not relating to the Moss Adams audit in each cause of action. Instead, he argues that this inquiry is irrelevant because the anti-SLAPP statute can be used to strike nonmeritorious allegations of protected activity within an entire cause of action. Thus, the only remaining issue before us is whether Schnitt is correct.

Division Four of this District observed, "Appellate courts have wrestled with the application of the anti-SLAPP law where . . . a single cause of action includes multiple claims, some protected by that law and some not." (*Cho*, *supra*, 219 Cal.App.4th at p. 526 [cataloging the competing points of view].) We too have struggled with this issue. We come out on the side of those cases holding that, if the nonmoving party demonstrates a prima facie case of prevailing on any part of a mixed cause of action, the anti-SLAPP motion fails. Our conclusion is based on: (1) the express words of the statute; (2) its underlying policies; and (3) the extraordinary consequences of the anti-SLAPP statute that distinguishes it from all other procedural motions.

In *Mann*, *supra*, 120 Cal.App.4th 90, the plaintiff asserted several causes of action, including defamation, trade libel, and interference with business. The plaintiff asserted that the defendants, who were former employees, made false remarks to regulators about plaintiff's handling of carcinogenic chemicals. Plaintiff also alleged that defendants made false remarks to plaintiff's customers to lure them away from plaintiff's business

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[9] In keeping with this observation, we conclude that the September 23 Order should be vacated.

and harassed plaintiff by inundating it with facsimiles, as well as pornographic material and junk mail. The allegations regarding false statements to regulators were incorporated in plaintiff's interference with business claims.

The defendants moved to strike these causes of action. The trial court denied the motion on the ground that the plaintiff had not alleged protected activity. Division One of the Fourth District affirmed as to the defamation cause of action and reversed and remanded as to the trade libel cause of action. On remand, the trial court was to consider the motion under a "new rule of law regarding the prior analysis of the second prong of the anti-SLAPP procedure[.]" (*Mann, supra*, 120 Cal.App.4th at p. 113.) It also reversed as to the mixed interference cause of action. "Where a cause of action refers to both protected and unprotected activity and a plaintiff can show a probability of prevailing on *any part of its claim*, the cause of action is not meritless and will not be subject to the anti-SLAPP procedure." (*Id.* at p. 106.)

The appellate court recognized the policy underlying the anti-SLAPP statute "to encourage participation in matters of public significance by allowing a court to promptly dismiss unmeritorious actions or claims that are brought to chill another's valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (*Mann, supra*, 120 Cal.App.4th at p. 102.) It rejected the analogy to a motion to strike under section 436. "Stated differently, the anti-SLAPP procedure may not be used like a motion to strike under section 436, eliminating those parts of a cause of action that a plaintiff cannot substantiate. Rather, 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. Thus, a court need not engage in the time-consuming task of determining whether the plaintiff can substantiate all theories presented within a single cause of action and need not parse the cause of action so as to leave only those portions it has determined have merit." (*Mann, supra,* 120 Cal.App.4th at p. 106.)

In *Oasis, supra*, 51 Cal.4th 811, the plaintiff sued the defendant attorney and his law firm for breach of fiduciary duty, professional negligence, and breach of contract.

The claims related to the public opposition by the individual defendant to a development project. The defendant engaged in that conduct after he had concluded the representation of the plaintiff developer in seeking approval of that very project. The defendant moved to strike all causes of action. The trial court denied the motion, which ruling was reversed on appeal.

The Supreme Court reversed the appellate court. In its discussion of general principles underlying the anti-SLAPP statute, the Supreme Court quoted the above language in *Mann*. (*Oasis*, *supra*, 51 Cal.4th at p. 820.) It further observed that the "complaint identifies a number of acts of alleged misconduct and theories of recovery, but for purposes of reviewing the ruling on an anti-SLAPP motion, it is sufficient to focus on just one." (*Oasis*, at p. 821.) The Supreme Court did not specify those other acts of misconduct or expressly label the causes of action as "mixed." It appears, however, based on the Supreme Court's recitation of the facts, that the plaintiff's causes of action were mixed; to find otherwise would render as surplus the Supreme Court's reference to the *Mann* holding.

Since *Oasis* was decided, a number of courts has concluded that section 425.16 is not available to strike allegations from an otherwise viable cause of action. (*Burrill v. Nair* (2013) 217 Cal.App.4th 357, 379 (*Burrill*); *Wallace v. McCubbin* (2011) 196 Cal.App.4th 1169, 1211–1212 (*Wallace*).) *Wallace* explained that "*Oasis* clearly holds that, where a cause of action (count) is based on protected activity, the entire cause of action may proceed as long as the plaintiff shows a probability of prevailing on at least *one* of the asserted bases for liability. [¶] . . . Indeed, not only does *Oasis* permit the entirety of the cause of action to go forward, it precludes consideration of the merit of any other claims in the cause of action once a probability of prevailing is demonstrated as to one of them." (*Wallace*, at p. 1211.)

Schnitt relies on two appellate rulings that disagreed with *Mann*—one (*City of Colton*) from the very same district that decided *Mann*, and the other (*Cho*), from Division Four of our own district.

The subject of the anti-SLAPP motion in *City of Colton*, *supra*, 206 Cal.App.4th 751, was the causes of action asserted by the City of Colton (City) in a cross-complaint for unfair business practices under Business and Professions Code section 17200 and for injunctive relief. The City claimed that the cross-defendant had bribed a City councilman to obtain a development contract. The City also asserted in the general allegations portion of its cross-complaint that cross-defendant had sued to compel the City to pay for infrastructure improvements under a prior contract—improvements the City alleged were to be built and paid for by cross-defendant. The City incorporated these allegations in its Business and Professions Code section 17200 cause of action and sought an injunction compelling cross-defendant to construct and pay for the remaining infrastructure and to cease profiting from his own bribery. (*City of Colton*, at pp. 758–759.)

The cross-defendant moved to strike the cross-complaint, including the causes of action for unfair business practices and injunctive relief. The appellate court found that the bribery portion of those causes of action was not protected activity, but that cross-defendant's filing of a lawsuit was protected activity. It also held that the anti-SLAPP statute is available to strike protected allegations even within a single cause of action containing other allegations. In so holding, the appellate court relied principally on the Supreme Court's opinion in *Taus v. Loftus* (2007) 40 Cal.4th 683 (*Taus*). "Given the ruling in *Taus*, we conclude that the portions of the [Business and Professions Code section 17200 and injunctive relief causes of action] that concern [cross-defendant's] lawsuit activity must be stricken from the complaint." (*City of Colton*, *supra*, 206 Cal.App.4th at p. 774.)

In *Taus*, the plaintiff sued, among others, the authors of several articles on recovered memory of child abuse for negligent infliction of emotional distress, invasion of privacy, fraud, and defamation. The defendants filed an anti-SLAPP motion to strike the entire pleading. Relevant to the inquiry in the instant appeal, we focus on the Supreme Court's analysis of the invasion of privacy cause of action. Noting that this cause of action was based on two theories, public disclosure of private facts and intrusion into private matters, it found protected activity as to the former, but not the latter, where

the plaintiff alleged that "defendants employed fraudulent means to obtain private information from plaintiff's relatives, including misrepresenting their identity and befriending plaintiff's biological mother." (*Taus*, *supra*, 40 Cal.4th at p. 701.) The *Taus* court then struck all allegations except those relating to obtaining private information by fraudulent means. (*Id.* at p. 742.)

Other courts have criticized *City of Colton*'s conclusion that section 425.16 can be used to parse protected allegations from a cause of action. These courts have referred to the failure of *City of Colton* to consider the Supreme Court's post-*Taus* decision in *Oasis,* or explain why *Oasis* was inapplicable. (See *Burrill*, *supra*, 217 Cal.App.4th at pp. 378–382.) In addition, some authorities have concluded that *City of Colton*'s reliance on *Taus* is questionable because, in citing language from *Mann*, *Oasis* implicitly overruled *Taus*. (See *Burrill*, at pp. 378–382; *Wallace*, *supra*, 196 Cal.App.4th at p. 1211.) We note that *Taus* is not referenced in *Oasis*.

Next comes the ruling of Division Four of our District in *Cho*, *supra*, 219 Cal.App.4th 521. There, the plaintiff sued the defendant for, among other causes of action, sexual harassment. The defendant cross-claimed, alleging defamation and intentional infliction of emotional distress based on statements plaintiff made to the Equal Employment Opportunity Commission and the California Department of Fair Employment and Housing in obtaining her right-to-sue letter and statements to her coworkers. The plaintiff filed an anti-SLAPP motion as to the cross-complaint. The *Cho* court affirmed the trial court's grant of the anti-SLAPP motion as to the allegations about the statements made to the governmental entities and denial of the motion as to the allegations about statements made to coworkers. (*Cho*, at pp. 527–528.)

The *Cho* court acknowledged *Taus* and *Oasis*, but observed that neither "is a mixed cause of action." (*Cho*, *supra*, 219 Cal.App.4th at p 527.) Eschewing a "broad[]" reading of *Oasis*, the appellate court counseled that "the guiding principle in applying the anti-SLAPP statute to a mixed cause of action case is that 'a plaintiff cannot frustrate the purposes of the SLAPP statute through a pleading tactic of combining allegations of protected and nonprotected activity under the label of one "cause of action."' [Citation.]"

(*Cho*, at p. 527.) Where each cause of action combined allegations of conduct that is protected by section 425.16 with conduct that is not, "the better view in such a case is that the trial court may strike the allegations . . . attacking the protected activity while allowing the unprotected theories to remain." (*Cho*, at p. 523.)

Cho cited the policy of the anti-SLAPP statute and section 436 to conclude that it "would make little sense if the anti-SLAPP law could be defeated by a pleading . . . in which several claims are combined into a single cause of action, some alleging protected activity and some not." (*Cho*, *supra*, 219 Cal.App.4th at p. 527.) "Striking the entire cause of action would plainly be inconsistent with the purposes of the statute. Striking the claims that invoke protected activity but allowing those alleging nonprotected activity to remain would defeat none of them. Doing so also is consonant with the historic effect of a motion to strike: 'to reach certain kinds of defects in a pleading that are not subject to demurrer.' (See 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 1008, p. 420.)" (*Cho*, *supra,* 219 Cal.App.4th at p. 527 [referring to Witkin's discussion of motions to strike under §§ 435 and 436].)

We respectfully disagree with our colleagues. First, the anti-SLAPP statute states that it applies to a "cause of action." The Legislature amended the statute several times (see Historical and Statutory Notes, 14B West's Ann. Code Civ. Proc. (2004 ed.) foll. § 425.16, pp. 384–385), but left intact its application to a "cause of action." If the better rule is to apply the statute to less than a cause of action, enacting that rule is a legislative function, not a judicial one.

Second, section 425.16 was enacted "to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights" of petition or free speech. (*Rusheen*, *supra*, 37 Cal.4th at pp.1055–1056.) "[T]he core purpose . . . is not to pose new impediments to all lawsuits arising from speech and petitioning activity but to remedy a very specific pattern by which contestants in the arena of public affairs were using meritless litigation as a device to silence and punish their adversaries." (*Old Republic Construction Program Group v. Boccardo Law Firm, Inc.* (2014) 230 Cal.App.4th 859, 876.) This "core" purpose would not be served by granting the motion in this case.

It is undisputed that were we to reverse the order denying the instant motion, not a single cause of action would be eliminated from the second amended complaint. Each would be the subject of pretrial and potential trial proceedings in the trial court. There would be no appreciable timesaving if certain portions of the claims were struck. This is not a case in which the plaintiff merely rebranded a prior defamation claim and thereby implicated concerns about artful pleading. Instead, the second amended complaint describes several acts of self-dealing and breaches of fiduciary duty aimed at depriving Baral of the financial benefits of his investments of time and labor in IQ, of which the Moss Adams allegations are but a small part.

The *Cho* court analogized anti-SLAPP motions to "the historic effect" of motions to strike under section 436 to eliminate defects in pleadings not subject to demurrer. (*Cho*, *supra*, 219 Cal.App.4th at p. 527.) We respectfully observe that this analogy does not give proper measure to the extraordinary features of a motion to strike under section 425.16. Unlike any other motion in the procedural toolbox, the filing of an anti-SLAPP motion (1) stays all discovery absent court permission; (2) precludes amendment of the complaint; (3) forces the plaintiff to make an early proffer of proof generally without the benefit of discovery; (4) provides for an award of attorney fees if the moving party prevails; and (5) provides for automatic appeal if the motion is denied and stays all other proceedings in the case. (Burke, Anti-SLAPP Litigation, *supra*, ¶ 1.1, p. 1-2.)

For a defendant to get the benefit of these extraordinary consequences merely by filing a motion aimed at some allegations would encourage a different kind of artfulness, as worrisome as the artful pleading that concerned the *Cho* court. Under the rule advocated in *Cho*, defendants would be encouraged to file an anti-SLAPP motion to excise allegations—no matter how minimal in relation to the remainder of the cause of action—merely to stop discovery and force plaintiff to show plaintiff's evidentiary hand early on, with further delay if the motion is denied and there is an appeal. Trial courts, moreover, would be burdened with more prolix motions with little commensurate savings in trial time.

We appreciate that there are competing policies at stake. On the one hand is the policy behind the anti-SLAPP statute aimed at protecting redress and free speech rights against unmeritorious claims. On the other are other procedural rules aimed at giving the parties their day in court and promoting efficient pretrial and trial proceedings. We also appreciate that reasonable minds may differ on how to balance these competing policies in a mixed cause of action. For the reasons set forth above, we conclude that the balance tips in favor of allowing mixed causes of action containing potentially meritorious claims to proceed unencumbered by the special procedures of the anti-SLAPP statute. For all these reasons, we affirm.

DISPOSITION

The order denying the special motion to strike is affirmed. Baral is awarded his costs on appeal. The writ of supersedeas and the September 23, 2014 order are vacated.

CERTIFIED FOR PUBLICATION.

BENDIX, J.*

We concur:

CHANEY, Acting P. J.

JOHNSON, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

PROOF OF SERVICE

I, Ginie U. Phan, declare that I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Kerr & Wagstaffe LLP, 101 Mission Street, 18th Floor, San Francisco, California 94105-1727.

On, March 16, 2015 I served the following document(s):

PETITION FOR REVIEW

on the parties and entities listed below as follows:

Gerald Sauer Amir Torkamani **SAUER & WAGNER LLP** 1801 Century Park East, Ste. 1150 Los Angeles, CA 90067	**CALIFORNIA COURT OF APPEAL** Second Appellate District, Division 1 Ronald Reagan State Building 300 S. Spring Street 2nd Floor, North Tower Los Angeles, CA 90013
Clerk of Court **LOS ANGELES SUPERIOR COURT** 111 N. Hill Street, Los Angeles, CA 90012	**CALIFORNIA SUPREME COURT** 350 McAllister Street San Francisco, CA 94102 http://www.courts.ca.gov *via e-submission*

☒ **By first class mail** by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid and placing the envelope in the firm's daily mail processing center for mailing in the United States mail at San Francisco, California.

☐ **By facsimile machine** (FAX) by personally transmitting a true copy thereof via an electronic facsimile machine.

☐ **By personal service** by causing to be personally delivered a true copy thereof to the address(es) listed herein at the location listed herein.

☐ **By Federal Express** or overnight courier.

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

Executed on March 16, 2015, at San Francisco, California.

GINIE U. PHAN