S239777

Case No. _____

*In the*

# Supreme Court

*of the*

# State of California



NEWPORT HARBOR VENTURES, LLC, et al.,
*Plaintiffs and Respondents,*

v.

MORRIS CERULLO WORLD EVANGELISM et al.,
*Defendants and Appellants.*

AFTER A DECISION OF THE CALIFORNIA COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION THREE, CASE NO. G052660
ORANGE COUNTY SUPERIOR COURT CASE NO. 30-2013-00665314
HONORABLE DEBORAH C. SERVINO

## PETITION FOR REVIEW

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2. When a plaintiff pleads inconsistent claims and undisputed evidence precludes one of those claims, should courts apply a demurrer-like pleading standard allowing inconsistent claims to survive an anti-SLAPP motion, or should they apply a summary judgment-like standard that precludes inconsistent claims?

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

Anti-SLAPP law is in a state of flux, requiring this court's intervention to clear up a dispute among the appellate courts and settle two important, often-litigated questions of procedure, satisfying both prongs of Rule of Court 8.500(b)(1).

The anti-SLAPP statute states that a motion must be filed within 60 days of the pleading it targets, but what is unclear is whether that motion may target all the claims in an amended pleading, or just the newly added claims. In the trial court, Defendants-Petitioners filed an anti-SLAPP motion targeting four causes of action in Plaintiffs'-Respondents' third amended complaint. Two of those causes of action (breach of contract, breach of covenant of good faith) had appeared in the original complaint, while the other two (quantum meruit, promissory estoppel) appear for the first time in the third amended complaint. The anti-SLAPP motion was filed within 60 days

of the third amended complaint – but more than three years after the original complaint. The trial court declined to consider the motion on its merits, finding that the whole thing was untimely. On appeal, Defendants-Petitioners argued that *Yu v. Signet Bank* gives a defendant the absolute right to file an anti-SLAPP motion within 60 days of an amended pleading, even if some of the claims in that pleading were first pleaded years earlier. *Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, 313, 315. In the published decision below, the Fourth District Court of Appeal expressly disagreed with *Yu v. Signet Bank*, and held that the motion was untimely, even though it was filed within sixty days – at least insofar as it targeted the two causes of action based in contract, which had appeared in earlier pleadings in some form. The court nevertheless held that the motion was timely as to the two newly pleaded causes of action for promissory estoppel and quantum meruit, and evaluated the motion on its merits as to those claims. In doing so, the appellate court created a split in authority. The published decision below discounts the holding of *Yu v. Signet Bank* – expressly stating "We disagree with *Yu*" – and relies instead on dicta from *Hewlett-Packard v. Oracle Corp.* (2015) 239 Cal.App.4th 1174, 1192 fn. 11. *Hewlett-Packard*, in a footnote, noted that the anti-SLAPP statute was enacted to dispose of claims at an early stage in litigation, and mused that a rule "properly tailored" to that objective "would permit an amended pleading to extend or reopen the [60-day] time limit only as to *newly pleaded* causes of action arising from protected conduct." *Hewlett-Packard*, supra, at 1192 fn. 11 (emphasis in original). Relying on that footnote's musings about the policy behind the anti-SLAPP statute, and disagreeing with

*Yu* and the statute's plain language, the court below held that the motion was untimely as to the first two causes of action. In other words, the appellate court held that *Hewlett-Packard*'s eleventh footnote was not merely wistful pining for a better rule, it *was* a rule, despite *Yu*'s holding to the contrary. This conflict between the Fourth District's decision and *Yu* cries out for clarification from the Supreme Court, lest future litigants and judges be left to guess at which line of authority is the actual law of the land.

The decision below also frames a second issue for review. The appellate court evaluated the merits of the anti-SLAPP motion's attack on the newly pleaded causes of action for quantum meruit and promissory estoppel, and found the motion lacking. The Court initially conceded that the existence of a contract covering the same topic as the "quasi-contracts" defeats those quasi-contract claims as a matter of law. A valid contract means there was an exchange of consideration, and consideration is fatal to promissory estoppel and quantum meruit claims. The existence of a contract is therefore itself fatal to such claims. But the panel still denied the anti-SLAPP motion targeting those quasi-contract claims, despite the existence of a contract, on the rationale that a plaintiff is allowed to "plead inconsistent counts". Although a plaintiff cannot *recover* on both contract and quasi-contract claims, the panel insisted that inconsistent claims can be *pleaded*, and that such pleadings survive an anti-SLAPP motion despite countervailing evidence. It characterized Petitioners' anti-SLAPP motion as an attempt to force the Plaintiffs to elect a remedy at the pleading stage, rather than a test of the factual support for each cause of action. The court held: "Nothing in the anti-SLAPP

statute required [Plaintiffs-Respondents] to make an election between the breach of contract and quantum meruit causes of action in response to the anti-SLAPP motion." Decision Below at p. 17. In so holding, the panel relied on two decisions allowing a plaintiff to plead inconsistent claims in the alternative, while noting a different decision holding a plaintiff "cannot recover for both breach of contract and quantum meruit." Decision Below at p. 17 (citing *Mendoza v. Continental Sales Co.* (2006) 140 Cal.App. 4th 1395, 1402; *Crowley v. Katleman* (1994) 8 Cal.4th 666, 691; *Hedging Concepts, Inc. v. First Alliance Mortgage Co.*, supra, 41 Cal.App. 4th 1419-1420).

The contrast raises a fundamental question about how courts should analyze anti-SLAPP motions: Although filed at the "pleading" stage, is an anti-SLAPP motion subject to the same evaluation as a demurrer, where a plaintiff may plead inconsistent claims? Or, since the motion requires a plaintiff to provide evidentiary support for his claims, should courts strike claims which are inconsistent with other, factually supported claims? The cases cited by the panel discuss the pleading standard on a demurrer, but no published decisions explain whether an anti-SLAPP plaintiff is entitled to the same deference. The panel's reliance on cases like *Tanforan v. Tanforan*, a 1916 case about election of remedies at trial, to shield inconsistent claims against an anti-SLAPP motion to strike, a modern procedural tool which did not exist until 1992, demonstrates the need for this Court to clarify the proper standard to be used when a plaintiff's inconsistent claims confront the modern anti-SLAPP motion. Stats. 1992, ch. 726, § 2; CCP 425.16; Dec. at 17, fn. 4 (citing *Tanforan v. Tanforan* (1916) 173 Cal. 270, 274). As a published opinion, the decision below created

new law, and contradicts opinions like *Simmons v. Allstate Ins. Co.* holding that an anti-SLAPP motion, "like a summary judgment motion, *pierces* the pleadings and requires an evidentiary showing," and is "similar to that of a motion for summary judgment, nonsuit, or directed verdict." *Simmons v. Allstate Ins. Co.* (2001) 92 Cal. App. 4th 1068, 1073. An anti-SLAPP motion is properly treated like a motion for nonsuit, not a demurrer. When the evidence forecloses one of a plaintiff's two inconsistent claims, the claim cannot survive a motion for nonsuit – so it should be with an anti-SLAPP motion, as well.

Defendants-Petitioners respectfully request this Court grant review of the Fourth Appellate District's decision in order to reverse that decision and issue two holdings: 1) an anti-SLAPP motion filed within 60 days of the pleading it targets may strike any allegations in those pleadings, consistent with *Baral v. Schnitt* and *Yu v. Signet Bank*, and 2) inconsistent claims cannot survive an anti-SLAPP motion when evidence defeats one of those claims.

This petition is timely filed pursuant to Rule of Court 8.500(e)(1). A copy of the court of appeal's opinion is attached to this petition. Petitioners did not file a petition for rehearing.

## III. BACKGROUND AND STATEMENT OF THE CASE

### A. Petitioners sublease the Subject Property to Newport Harbor Offices & Marina

Petitioner-Defendant Morris Cerullo World Evangelism ("MCWE" or "Petitioner") is the sub-landlord and sublessor of an office building and marina located at 3101 W. Coast Highway in Newport Beach, CA ("Subject Property"). Volume 1 of Clerk's

Transcript at pp. 124-125[1]. Petitioner-Defendant Roger Artz, as trustee of the Plaza Del Sol Real Estate Trust ("Plaza") subleased the Subject Property from MCWE until 2004. The fee owner of the Subject Property is a trust operated by John Jakosky ("Jakosky"), who serves as lessor to MCWE under a Ground Lease that has been amended several times. 2 CT 341. Since 2004, the Subject Property's primary sublessee has been Newport Harbor Offices & Marina, LLC ("NHOM"), a company with a history of failing to maintain and repair the property. 1 CT 135.

**B. Petitioners execute a management agreement, hiring Plaintiffs to manage the Subject Property.**

On March 3, 2011, Respondent-Plaintiff Newport Harbor Ventures, LLC ("NHV") entered into a property management agreement with Petitioners ("Management Agreement"). (1 CT 135-149). In exchange for Petitioner MCWE promising to introduce NHV to Jakosky to request an extension of the Ground Lease, Respondent NHV agreed to perform property management duties. According to the Management Agreement, "all costs" of those management duties "shall be borne by NHV." 1 CT 138. In addition, "NHV shall be responsible for the costs of an Unlawful Detainer action (or actions) together with customary defenses thereto and no other litigation." *Id.* NHV also agreed to "perform all duties normally associated with the administration of a sublease by the master lessor," which included

[1] Future references to the Clerk's Transcript will appear in the format "[Volume number] CT [page number]:[line or paragraph number].

monitoring the property, enforcing the ground lease and sublease, and serving notices of default on tenants. 1 CT 136-173.

Respondent NHV and Petitioners modified the Management Agreement on April 22, 2011 ("Modification"), whereby Vertical Media Group, Inc. ("VMG") "would act as the Asset Manager in place of NHV." 1 CT 147. The Modification stated that "[VMG] will act in the place and stead of NHV in the capacity as Asset Manager, under the terms of the [Management Agreement] dated March 3, 2011, with NHV continuing to have all rights and obligations set forth in said prior agreement. All other terms of said prior agreement remain the same." 1 CT 147. MCWE made no promises and had no agreement with Plaintiffs as to what would happen to the Subject Property after any unlawful detainer action against the sublessee. 2 CT 427:16-21, 428:5-6.

### C. Plaintiffs file an unlawful detainer action in Petitioner's name against the sublessee, and Petitioner settles the action.

The sublessee, NHOM, was not maintaining or repairing the Subject Property, so Respondents-Plaintiffs began the unlawful detainer process through service of "notices to cure" defaults beginning on April 22, 2011. 3 CT 613-655. The tenant did not cure, so Plaintiffs filed an unlawful detainer action in Petitioner's name on June 21, 2011 in the Superior Court for the County of Orange in *MCWE v. Newport Harbor Offices & Marina, LLC*, case number 30-2011-00485656 ("UD Action"). 1 CT 76:24-77:1; 1 CT 127:4-8.

On August 15, 2012, Petitioner MCWE signed a settlement agreement of the unlawful detainer. 3 CT 881-882.

### D. Plaintiffs-Respondents file this lawsuit for breach of contract.

Plaintiffs-Respondents filed this lawsuit against Petitioners on July 29, 2013. 1 CT 4. They filed a first amended complaint on December 16, 2013 (1 CT 9), a second amended complaint on March 28, 2014 (1 CT 12), and a third amended complaint on June 24, 2015. 1 CT 43.

In the original complaint, filed on a judicial council form, Plaintiffs alleged three causes of action: breach of contract and two untitled "intentional torts" with allegations substantively identical to the breach of contract claim. Plaintiffs alleged that Petitioners "granted contract rights and settled unlawful detainer action without P's consent in breach of [the written Management] Agreement." Exhibit A to Respondents' Motion to Augment Record ("R.M.[2]") at p. 1-5. The original complaint contained no claims for quantum meruit or promissory estoppel, and no allegations that Defendants-Petitioners made any oral promises.

Plaintiffs' first amended complaint alleges six causes of action, including claims for breach of the written Management Agreement. R.M. at pp. 22-34. The first amended complaint alleges that Petitioners failed to reimburse Plaintiffs for the costs of managing the Subject Property, and breached the Management Agreement by "going behind [Plaintiffs'] backs and by settling The Litigation by signing The Settlement Agreement on August 15, 2012...without

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[2] Future references to the portion of the appellate record supplemented by Exhibit A to Respondents' Motion to Augment the Record will be referred to as "R.M. at [page number]".

Plaintiffs' and Dennis D'Alessio's knowledge...." R.M. at p. 27. There were no claims in the first amended complaint for quantum meruit or promissory estoppel, and no allegations that Petitioners made any oral promises.

The second amended complaint brought claims for breach of the Management Agreement, breach of the covenant of good faith, and fraud, based on the same allegations as the first amended complaint. R.M. at p.55-66. No oral promises or claims for quantum meruit or promissory estoppel were alleged in the second amended complaint.

Quasi-contract claims and allegations about oral promises appear only in the third amended complaint, which states four causes of action: breach of the written Management Agreement, breach of the covenant of good faith inherent in the Management Agreement, quantum meruit for reimbursement of the costs of asset management, and promissory estoppel for reimbursement of those same costs. 1 CT 123-150. All of these causes of action allege, in significant part, that Petitioners harmed Plaintiffs by entering into a settlement agreement for an unlawful detainer action. Plaintiffs, it seems, had hoped to evict the sub-tenant NHOM and move into the newly vacated Subject Property. They were frustrated when Petitioners settled the unlawful detainer instead of seeing it through to trial, and now want to be reimbursed for the costs of asset management, despite the existence of the written Management Agreement, which says Plaintiffs need to bear those costs themselves.

**E. Petitioners file an anti-SLAPP motion to strike the third amended complaint.**

On July 23, 2015 – 29 days after the third amended complaint was filed – Petitioners timely filed a motion for judgment on the pleadings and a special motion to strike Plaintiffs' third amended complaint as a meritless SLAPP under section 425.16 of the Code of Civil Procedure. 2 CT at 301-323. Petitioners argued that Plaintiffs' claims are subject to subdivision (e)(1), (e)(2), and (e)(4) of the anti-SLAPP statute because they arise out of Petitioners' act of settling the unlawful detainer lawsuit, a quintessential exercise of the constitutionally protected right to petition the government.

**F. Trial court finds the anti-SLAPP motion "untimely" in its entirety.**

On August 28, 2015, a hearing was held on Petitioners' special motion to strike before the Honorable Judge Deborah Servino. 6 CT 1738. The trial court issued a brief order denying Petitioners' motion to strike as untimely. 6 CT 1738.

**G. On appeal, anti-SLAPP motion held untimely as to first two causes of action, but timely as to claims for quantum meruit and promissory estoppel.**

Petitioners timely appealed. The Court of Appeal, Fourth District, Division Three, held that the anti-SLAPP motion was untimely insofar as it targeted the claims for breach of contract and breach of the covenant of good faith, since both causes of action could have been targeted when they first appeared. *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism*, 4th Dist. Ct. App. Case No. G052660, Opinion Filed 11/30/2016 (Certified for

Publication per Order dated December 22, 2016). The court also held, however, that the motion was timely filed as to the two new causes of action for quantum meruit and promissory estoppel. But on those quasi-contract claims, the court denied the anti-SLAPP motion on its merits, holding that a plaintiff is entitled to plead inconsistent claims. This petition followed.

## IV. LEGAL DISCUSSION

### A. This court should grant review to clarify whether inconsistent claims can survive an anti-SLAPP motion, and whether a motion served within 60 days of an amended complaint may strike claims which appeared in earlier complaints.

An anti-SLAPP motion must be brought within 60 days of service of the pleading it targets. A timely filed anti-SLAPP motion is evaluated with 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(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. This petition relates to the 60-day deadline and the second prong of the two-step process. Specifically, it asks this Court to determine the timeliness of an anti-SLAPP motion filed within 60 days of the amended complaint it targets, when some of the plaintiff's claims had appeared in earlier versions of the complaint. Petitioner contends that an anti-SLAPP motion filed within 60 days of the targeted pleading may properly

target any of the claims in that pleading, regardless of whether some of those claims could have been targeted in earlier pleadings. The court below disagrees. This Petition also asks the Court to determine, as a matter of first impression, whether a plaintiff's inconsistent claims can survive an anti-SLAPP motion when the evidence before the Court precludes one of those claims.

### B. The Appellate Court incorrectly relied on *Hewlett-Packard* in holding that anti-SLAPP motions cannot target claims in an amended complaint if those claims had appeared in earlier complaints.

In refusing to consider the anti-SLAPP motion's merits as applied to the two counts based in breach of contract, the appellate court held that an anti-SLAPP motion must be brought within 60 days of the date a particular cause of action first appears in a lawsuit. If a cause of action first appears in 2013 and has not been significantly changed in any subsequent pleading, it cannot be challenged by an anti-SLAPP motion in 2016, according to the court's decision. In coming to this conclusion, the Fourth District's sole source of authority is the eleventh footnote in *Hewlett-Packard Co. v. Oracle Corp*, which the Court refers to as a "rule". That footnote says:

> "The rule that an amended complaint reopens the time to file an anti-SLAPP motion is intended to prevent sharp practice by plaintiffs who might otherwise circumvent the statute by filing an initial complaint devoid of qualifying causes of action and then amend to add such claims after 60 days have passed. [Citation.] But a rule properly tailored to that objective would permit an

> amended pleading to extend or reopen the time limit only as to newly pleaded causes of action arising from protected conduct. A rule automatically reopening a case to anti-SLAPP proceedings upon the filing of any amendment permits defendants to forgo an early motion, perhaps in recognition of its likely failure, and yet seize upon an amended pleading to file the same meritless motion later in the action, thereby securing the 'free time-out' condemned in [*People ex rel. Lockyer v.*] *Brar* [(2004)] 115 Cal.App.4th 1315, 1318."

Decision Below at pp.10-11 (citing *Hewlett-Packard Co. v. Oracle Corp.* (2015) 239 Cal.App.4th 1174, 1192, fn. 11.

The language of this footnote implies that such a rule would be desirable, not necessarily that such a rule already existed. This "rule" is not law, but dicta. The court below, however, adopted this "*Hewlett-Packard* Rule" as its holding, and declared it superior to the actual rule expounded in *Yu v. Signet Bank/Virginia*, a case cited by Petitioners repeatedly in the trial and appellate court. Decision Below at p. 11 (disagreeing with *Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, 313, 315 (*Yu*)).

Contra the *Hewlett-Packard* Rule, the *Yu* decision adopts a strict holding that any anti-SLAPP motion filed within the 60-day period is timely – even if it would have made more sense to file the anti-SLAPP motion earlier in the litigation, targeting an earlier complaint. As the court below explained:

> "Cerullo and Artz rely on *Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, 313, 315 (*Yu*), in which the

> Court of Appeal concluded an anti-SLAPP motion filed within 60 days of service of a third amended complaint was timely, even though the motion could have been filed at the outset of the case. "Admittedly," the *Yu* court stated, "this is not a case where an anti-SLAPP motion was promptly made to counter SLAPP allegations first added to an amended pleading" and the defendants' anti-SLAPP theory appeared to have been "an afterthought." (*Id.* at p. 315.)"

Decision Below at p. 11.

In *Yu*, the defendants filed an anti-SLAPP motion several years after the original complaint, but less than 60 days after service of the third amended complaint – exactly the same circumstances as this case. Like the Plaintiffs-Respondents in this case, the *Yu* plaintiffs argued "that allowance of an anti-SLAPP motion as a matter of right [several years] following service of an amended complaint would be inconsistent with the statutory design 'to prevent SLAPPs by ending them early.'" *Yu, supra*, at 103 Cal. App. 4th at 314 (quoting dicta from *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 65). The court rejected the *Yu* plaintiffs' argument and affirmed the anti-SLAPP motion, explaining that "The Yus' position is contrary to the reported cases that have considered the issue." *Id.* Citing other reported decisions, the *Yu* court held that "in view of the statutory admonition that the anti-SLAPP law be broadly construed (§ 425.16, subd. (a))," the law was clear "that the 60–day period for filing the motion runs from service of the most recent amended complaint, rather than the original complaint." *Id.* The court acknowledged that

"Admittedly, this is not a case where an anti-SLAPP motion was promptly made to counter SLAPP allegations first added to an amended pleading," conceding that the defendants *could* have filed their anti-SLAPP motion at the outset of the case. *Id.* at 315. However, because the plaintiffs filed a third amended complaint, the defendants' "opportunity to belatedly raise that [anti-SLAPP] theory arose **as a matter of right**." *Id.* at 315 (emphasis added); see also *Harper v. Lugbauer* (N.D. Cal., Mar. 15, 2012), 2012 WL 1029996, at *2. The *Yu* court held that "the 60-day period for filing the motion runs from service of the most recent amended complaint, rather than the original complaint. *Lam v. Ngo* reached the same conclusion, pointing out among other things that if the statute were construed as the Yus urge, a plaintiff might attempt to circumvent the anti-SLAPP law by waiting until an amended complaint to assert its SLAPP allegations." *Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, 314, *as modified on denial of reh'g (Nov. 25, 2002)* (citing *Lam v. Ngo* (2001) 91 Cal.App.4th 832, 840-842. The danger of allowing plaintiffs to circumvent the anti-SLAPP law by sandbagging their allegations was greater than the danger of defendants circumventing the "purpose" of the anti-SLAPP law by keeping their anti-SLAPP powder dry until an amended pleading reset the 60-day clock. In both *Yu* and *Lam v. Ngo* – incidentally, another Fourth District decision – the appellate court held that "broadly construing" the anti-SLAPP statute sometimes means tilting the balance in favor of the defendants. Giving a strong tool to defendants was, of course, the very the reason the law was enacted.

The appellate panel below was not convinced that this resolved the matter, opining that "the holding in *Yu* is not as clear-cut as [Petitioners] Cerullo and Artz portray it to be." *Id.* The decision below says the *Yu* court had "noted" that "it was 'unclear'...when the defendants would have been entitled as a matter of right to file their motion...." Decision Below at p. 11. Recognizing that *Yu* was at odds with the *Hewlett-Packard* Rule, the court below expressly disagreed with *Yu v. Signet Bank*, and held: "We disagree with *Yu* to the extent it holds that a defendant has an absolute right to file an anti-SLAPP motion to an amended complaint." Decision Below at p. 11. The court emphasized the policy behind the anti-SLAPP statute, characterizing its intent to "prevent SLAPPs by ending them early and without great cost to the SLAPP target" as one which would be frustrated by "the argument advanced by [Petitioners] Cerullo and Artz." Decision Below at pp.11-12. (Never mind that an anti-SLAPP motion *always* helps eliminate costs to the "SLAPP target", since the "SLAPP target" is another word for defendant, and the motion is always filed by the defendant. Presumably no defendant would file an anti-SLAPP motion unless it were advantageous to them.) The court concluded by resolving the conflict between the "*Hewlett-Packard* Rule" and the *Yu* decision in favor of the former:

> "We therefore conclude a defendant must file an anti-SLAPP motion within 60 days of service of the first complaint (or cross-complaint, as the case may be) that pleads a cause of action coming within section 425.16(b)(1) unless the trial court, in its discretion and upon terms it deems proper, permits the motion to be

filed at a later time (§ 425.16(f)). An amended complaint reopens the time to file an anti-SLAPP motion without court permission only if the amended complaint pleads new causes of action that could not have been the target of a prior anti-SLAPP motion, or adds new allegations that make previously pleaded causes of action subject to an anti-SLAPP motion."

Decision Below at p.12.

Since this passage and its restatement of the *Hewlett-Packard* Rule openly conflict with *Yu*, the decision below is ripe for Supreme Court review. The state of the law is in flux, and demands clarification from the highest court to settle the important question of which causes of action in an amended pleading an anti-SLAPP motion may target.

**C. A summary judgment-like standard is more appropriate for anti-SLAPP motions than the demurrer-like standard applied by the Fourth District.**

The second part of the appellate court's decision addresses the merits of the anti-SLAPP motion's challenge to the Plaintiffs' causes of action for quantum meruit and promissory estoppel. In evaluating the motion on its merits, the court defers to the Plaintiffs and allows them to maintain the two quasi-contractual claims, despite the undisputed evidence that a contract exists, which would normally preclude quasi-contractual claims. Decision Below at p. 16. In support, the Fourth District relies on the principle that a plaintiff may plead inconsistent counts, and is not required to "elect a remedy" at the pleading stage. Decision Below at p. 17. The Court held that "NHV and VMG were permitted to plead inconsistent

counts...Nothing in the anti-SLAPP statute required NHV and VMG to make an election between the breach of contract and quantum meruit causes of action in response to the anti-SLAPP motion." Dec. Below at p.17. No other appellate court has addressed the issue of whether the principle allowing plaintiffs to plead inconsistent counts also protects inconsistent claims from an anti-SLAPP motion. This is a matter of first impression that this Court needs to determine, because the decision below drastically narrows the effectiveness of the anti-SLAPP motion as a tool to root out baseless claims at the pleading stage.

It is settled law that on the second, or "merits", prong of the anti-SLAPP analysis, the burden shifts to the plaintiffs to establish a "probability" that they "will prevail" on those claims. CCP §425.16(b)(1). Unlike a demurrer, a plaintiff opposing an anti-SLAPP motion cannot rely on allegations in the complaint, but must bring forth evidence that would be admissible at trial. *HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal. App. 4th 204, 212; *Ampex Corp. v. Cargle* (2005) 128 Cal. App. 4th 1569, 1576. In this way, an anti-SLAPP motion is more akin to a motion for summary judgment than a demurrer – albeit a motion for summary judgment where the plaintiff has the burden of proof. *Comstock v. Aber*, (2012) 212 Cal. App. 4th 931, 947 ("anti-SLAPP statute operates like a 'motion for summary judgment in 'reverse.'"); *Simmons v. Allstate Ins. Co.* (2001) 92 Cal. App. 4th 1068, 1073 (anti-SLAPP motion "like a summary judgment motion, *pierces* the pleadings and requires an evidentiary showing...SLAPP motion is similar to that of a motion for summary judgment, nonsuit, or directed verdict."). A court "should grant the

motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim." *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821. The unresolved question is what a court should do with inconsistent claims when the evidence supporting one of those claims defeats a different, inconsistent claim. Here, the existence of the management agreement should have defeated the quasi-contract claims for promissory estoppel and quantum meruit, but the Fourth District held that a plaintiff may plead inconsistent claims even in the face of contrary evidence.

This Court should grant review to adopt Petitioners' argument that a court is supposed to evaluate each claim *individually*, looking at the evidence in front of the court and, based on that evidence, determine if the claim is defeated as a matter of law – an analysis that this Court's recent holding in *Baral v. Schnitt* would seem to mandate. *Baral v. Schnitt* (Cal. 2016) 205 Cal.Rptr.3d 475, 488 (holding "an anti-SLAPP motion, like a conventional motion to strike, may be used to attack parts of a count as pleaded"). In this case, the existence of a signed, written contract between Plaintiffs and Petitioners would defeat Plaintiff's quantum meruit and promissory estoppel claims as a matter of law. This standard of evidence weighing is similar to that of a motion for summary judgment, where the parties cannot rely on unsupported allegations in the pleadings, but must marshal admissible evidence to prove or disprove the claims.

Instead of relying solely on the evidence and analyzing whether each claim could survive in the face of that evidence, the Fourth District accepted the Plaintiffs' pleadings as true. It held that a

plaintiff is allowed to "**plead** inconsistent claims". And while that is technically correct – a plaintiff may *plead* inconsistent claims – when it comes time to *prove* a claim, as on an anti-SLAPP motion or motion for summary judgment, a plaintiff cannot show a probability of success on two claims which are inconsistent with each other. Here, the evidence was undisputed that a written contract exists which covers the same topics as the quantum meruit and promissory estoppel claims, which means those claims should fail. The court sidestepped this evidence, treated the anti-SLAPP motion like a demurrer, and allowed the inconsistent claims to survive.

No appellate decision squarely addresses the correctness of the appellate court's holding, which raises more questions than it answers. Is there a different level of deference given to inconsistent claims facing a challenge to the pleadings (like a demurrer) as opposed to an evidence-based motion (like a motion for summary adjudication)? If there is a difference in the deference given to inconsistent claims, on which side of the "demurrer versus motion for summary adjudication" divide does an anti-SLAPP motion fall? An anti-SLAPP motion to strike is nominally a challenge to the pleadings, but it is a challenge that demands evidentiary support. If the evidence forecloses one of the plaintiff's inconsistent counts, can the claim nevertheless survive an anti-SLAPP motion based on the principle that at the pleading stage, inconsistent claims are allowed? That was the holding of the court below, which laid out the contradiction:

> "NHV and VMG had the obligation under the Management Agreement of paying for the costs of the Unlawful Detainer Action. In the quantum meruit cause

of action, NHV and VMG seek to recover those costs from Cerullo and Artz. Quantum meruit recovery that is contrary to an express contractual term is not allowed. (*Hedging Concepts, Inc. v. First Alliance Mortgage Co.*, *supra*, 41 Cal.App.4th at p. 1419.) But NHV and VMG were permitted to plead inconsistent counts.

"When a pleader is in doubt about what actually occurred or what can be established by the evidence, the modern practice allows that party to plead in the alternative and make inconsistent allegations." (*Mendoza v. Continental Sales Co.* (2006) 140 Cal.App.4th 1395, 1402.) "The plaintiff remains free to allege any and all 'inconsistent counts' that a reasonable attorney would find legally tenable on the basis of the facts known to the plaintiff at the time." (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 691.) Thus, a plaintiff may plead inconsistent causes of action for breach of contract and common count. (4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 407, p. 546.) NHV and VMG cannot recover for both breach of contract and quantum meruit (see *Hedging Concepts, Inc. v. First Alliance Mortgage Co.*, *supra*, 41 Cal.App.4th at pp. 1419-1420), but they can plead both causes of action. Nothing in the anti-SLAPP statute required NHV and VMG to make an election between the breach of contract and quantum meruit causes of action in response to the anti-SLAPP motion." Decision Below at pp. 16-17.

This holding emerges out of a vacuum. The cited authorities – *Mendoza*, *Crowley*, *Hedging Concepts*, and the Witkin practice guide — say nothing about the anti-SLAPP statute. Each of the cited authorities discusses pleadings in general terms, or, in the case of *Crowley*, in the context of the tenability of failed claims when a prior lawsuit becomes the basis of a subsequent malicious prosecution action. The Fourth District's opinion breaks new ground and creates new law, narrowing the anti-SLAPP statute and relegating it to the realm of a demurrer. This contradicts the express command of the Legislature in the statute itself: "this section shall be construed broadly." CCP §425.16(a).

"Broadly" interpreting the statute requires reversal of the Fourth District. It is true that plaintiffs may plead inconsistent **claims** – but they are not entitled to inconsistent **facts**. When it comes time to show evidence, the evidence will necessarily defeat one of the inconsistent claims. An anti-SLAPP motion is an evidence-based motion, and Plaintiffs must provide admissible evidence to defeat it, just as they would on summary judgment. Allegations in the complaint are not enough to carry the day. *Comstock*, supra, at 950 (anti-SLAPP "plaintiff cannot rely on his pleading at all, even if verified, to demonstrate a probability of success on the merits."). The Fourth District's holding conflicts with *Baral* and *Comstock* and abrogates the purpose of the anti-SLAPP statute, which is to force a SLAPP plaintiff to abandon claims that are defeated by the evidence. This Court should reverse it, and clarify that an anti-SLAPP motion is no ordinary challenge to the pleadings, and the ordinary rule that a

plaintiff may plead "inconsistent counts" does not factor into the anti-SLAPP analysis.

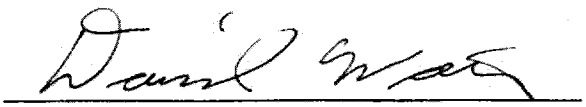
## V. CONCLUSION

That the anti-SLAPP statute gives an advantage to defendants is a feature, not a bug. The 60-day period to file an anti-SLAPP motion is supposed to reopen whenever a new complaint is filed, and a defendant may challenge any of the allegations in that new complaint, pursuant to *Baral v. Schnitt*, *Lam v. Ngo*, and *Yu v. Signet Bank*. In the published opinion below, the Fourth District disagreed. This Court should grant this petition to resolve this split in authority.

The Court should also grant this petition to resolve an unsettled question of law raised by the Fourth District's opinion: Does the principle allowing plaintiffs to plead inconsistent counts also allow their inconsistent counts to survive an anti-SLAPP motion, despite evidence that would seem to defeat one of those counts? To give effect to the Legislature's admonition that the anti-SLAPP statute be "broadly construed", this Court should answer the question in the negative.

Respectfully submitted,

Date: January 27, 2017



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## CERTIFICATE OF WORD COUNT

**(Cal. Rules of Court, rule 8.204(c)(1))**

The text of this petition consists of 5,948 words as counted by the word-processing program used to generate the petition.

Dated: January 27, 2017

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# OPINION

Filed 11/30/16 Certified for Publication (order attached)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

| | |
|---|---|
| NEWPORT HARBOR VENTURES, LLC, et al.,<br><br>Plaintiffs and Respondents,<br><br>v.<br><br>MORRIS CERULLO WORLD EVANGELISM et al.,<br><br>Defendants and Appellants. | G052660<br><br>(Super. Ct. No. 30-2013-00665314)<br><br>O P I N I O N |

Appeal from an order of the Superior Court of Orange County, Deborah C. Servino, Judge. Affirmed. Appellants' request for judicial notice. Granted. Respondents' request for judicial notice. Granted.

Galuppo & Blake, Louis A. Galuppo, Steven W. Blake, Andrew E. Hall and Daniel T. Watts for Defendants and Appellants.

Knypstra Law, Bradley P. Knypstra and Grant Hermes for Plaintiffs and Respondents.

* * *

## INTRODUCTION

A special motion to strike under California's anti-SLAPP statute, Code of Civil Procedure section 425.16,[1] is to be filed "within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper." (§ 425.16, subd. (f).)[2] In this case, we address whether an anti-SLAPP motion was timely when it was filed within 60 days of service of a third amended complaint and no previous anti-SLAPP motion had been filed. We conclude the filing of an amended complaint does not automatically reopen the period for bringing an anti-SLAPP motion. Whether the filing of an amended complaint reopens the period for bringing an anti-SLAPP motion depends on the basis and nature of the claims in the amended complaint.

Defendants and appellants Morris Cerullo World Evangelism (Cerullo) and Roger Artz filed a special motion under the anti-SLAPP statute to strike the third amended complaint brought by plaintiffs and respondents Newport Harbor Ventures, LLC (NHV), and Vertical Media Group, Inc. (VMG).[3] The third amended complaint alleged four causes of action: (1) breach of written contract, (2) breach of the implied covenant of good faith, (3) quantum meruit, and (4) promissory estoppel. The first two causes of action had been pleaded in earlier complaints while the latter two causes of action were new to the third amended complaint.

The act asserted by Cerullo and Artz to have been "in furtherance of [their] right of petition or free speech" (§ 425.16(b)(1)) was the settlement of an unlawful detainer action. That settlement had been alleged in the initial complaint and each

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[1] "SLAPP" is an acronym for "strategic lawsuit against public participation." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57.) Further code references are to the Code of Civil Procedure.

[2] We refer to section 425.16, subdivision (f) as section 425.16(f). In like fashion, we refer to section 425.16, subdivision (b)(1) as section 425.16(b)(1), and section 425.16, subdivision (e) as section 425.16(e).

[3] We refer to Cerullo and Artz's special motion to strike as the anti-SLAPP motion.

succeeding complaint. The trial court denied the anti-SLAPP motion on the ground it was untimely filed because it should have been filed in response to the earlier complaints.

We hold that, under section 425.16(f), an anti-SLAPP motion is untimely if not filed within 60 days of service of the first complaint that pleads a cause of action coming within anti-SLAPP protection unless the trial court, in its discretion and upon terms it deems proper, permits the motion to be filed at a later time. Thus, we conclude the anti-SLAPP motion was untimely as to the breach of contract and breach of implied covenant causes of action because Cerullo and Artz could have challenged those causes of action by filing an anti-SLAPP motion to prior complaints. The anti-SLAPP motion was timely as to the quantum meruit and promissory estoppel causes of action because they were new causes of action that could not have been challenged by an anti-SLAPP motion to a prior complaint.

Because we exercise de novo review, we address the merit of the anti-SLAPP motion as to the quantum meruit and promissory estoppel causes of action. Those causes of action arose out of protected activity as defined in section 425.16(e); that issue is not in dispute. We conclude that NHV and VMG met their burden of establishing a probability of prevailing on both the quantum meruit cause of action and the promissory estoppel cause of action. We therefore affirm.

## ALLEGATIONS OF THE THIRD AMENDED COMPLAINT

NHV is a California limited liability company. VMG is a Delaware corporation. Dennis D'Alessio is the manager of NHV and the president of VMG. Cerullo is a California corporation. Artz is a vice-president of Cerullo and the trustee of Plaza del Sol Real Estate Trust (Plaza del Sol).

Cerullo is a successor lessee under a ground lease of real property in Newport Beach (the Property), the term of which expires in November 2018. In 2004, Cerullo, as sublessor, entered into a sub-ground lease of the Property (the Sublease) with

Newport Harbor Offices & Marina, LLC (NHOM). The Property had been improved with an office building and marina (the Improvements). In order to sublease the Property, NHOM obtained a loan for more than $2 million from the Hazel I. Maag Trust (the Maag Trust).

By 2011, NHOM was in default of the sublease for failure to properly maintain the Property and the Improvements. In March 2011, Cerullo and Plaza del Sol entered into an asset management and option agreement (the Management Agreement) with NHV. Pursuant to the Management Agreement, Cerullo and Plaza del Sol granted certain irrevocable rights to NHV, including an option to acquire an assignment of the ground lease. In exchange, NHV agreed to act as asset manager and "perform all duties normally associated with the administration of a sub-lease by the master lessor." In particular, NHV agreed to (1) "[t]ake all action necessary to enforce the terms of the [Sublease]," including the "filing and prosecution of legal action for Unlawful Detainer"; (2) "serve appropriate Notices of Default and other statutory notices as conditions precedent to any Unlawful Detainer action"; and (3) obtain Cerullo's written permission before commencing legal action against NHOM, the sublessee. NHV was responsible for the costs of any unlawful detainer action.

Under the Management Agreement, NHV would be responsible for getting NHOM evicted from the Property and the Sublease terminated and, in exchange, would receive an irrevocable option to acquire the sublease and, potentially, an assignment of the ground lease from Cerullo. In April 2011, NHV, Cerullo, and Plaza del Sol entered into a modification to the Management Agreement, making VMG the asset manager in place of NHV.

Pursuant to the Management Agreement, VMG took action to evict NHOM due to its failure to adequately maintain the Property and the Improvements. VMG retained Attorney Darryl Paul, who filed an unlawful detainer action against NHOM (the Unlawful Detainer Action). VMG paid for the costs and expenses of the Unlawful

Detainer Action, including attorney fees, costs, expert fees, and appraiser fees. Those costs totaled more than $500,000. As asset manager, VMG spent more than $200,000 for such things as insurance premiums, travel, office supplies, meals, entertaining, accounting, salaries, wages, and service bureau.

In August 2012, Cerullo and Artz entered into a settlement agreement regarding the Unlawful Detainer Action. The settlement agreement was made and signed without the knowledge or approval of Paul, and without the knowledge, participation, or approval of VMG.

Under the settlement agreement, Cerullo and Artz agreed to dismiss the Unlawful Detainer Action against NHOM in exchange for payment of "a substantial sum" by the Maag Trust. The trial of the Unlawful Detainer Action was taken off calendar. Although trial of the Unlawful Detainer Action "remains the subject of ongoing litigation," NHV and VMG contended "there is no certain or predictable outcome in view of the Settlement Agreement." NHV and VMG alleged: "The execution by Defendants of the Settlement Agreement was fraudulent and constitutes a high jacking [*sic*] of the [Unlawful Detainer] Action from the discretion and auspices of Plaintiffs and from the authority and direction of counsel . . . Paul."

The third amended complaint asserted causes of action for breach of written contract, breach of the covenant of good faith, quantum meruit, and promissory estoppel. The third amended complaint alleged that Cerullo and Artz breached the Management Agreement by failing to reimburse VMG for money spent on the Unlawful Detainer Action and in managing the Property and that Cerullo and Artz breached the covenant of good faith of the Management Agreement by failing to make those reimbursements and by settling the Unlawful Detainer Action. NHV and VMG sought recovery under quantum meruit for the benefit their services bestowed on Cerullo and Artz.

In the promissory estoppel cause of action, NHV and VMG alleged that, in March 2011, Artz made oral promises to D'Alessio that NHV and VMG would become

the asset manager for the Property and, in exchange for litigating the Unlawful Detainer Action and evicting NHOM, would have an option to acquire the ground lease to the Property and the Improvements. Those alleged oral promises were made at restaurants in Carlsbad and San Clemente. (The promises basically mirror the terms of the Management Agreement.) In reliance on those promises, NHV and VMG agreed to act as asset manager and "undert[ook] the litigation and expense of the [Unlawful Detainer] Action."

## PROCEDURAL HISTORY

VMG initiated this litigation by filing a form complaint for breach of contract and intentional tort in July 2013. The complaint alleged that Cerullo and Artz breached the Management Agreement and/or interfered with it by "entering into a settlement agreement, and settling unlawful detainer action, in secret, and without P's consent."

A first amended complaint was filed in December 2013. The first amended complaint added NHV as a plaintiff and asserted causes of action for breach of written contract, breath of the covenant of good faith, breach of fiduciary duty, negligence, fraud, and declaratory relief. The first amended complaint alleged, "[t]he execution by Defendants of The Settlement Agreement was fraudulent and constitutes a highjacking of The Litigation from the discretion and auspices of Plaintiffs and from the authority and direction of counsel . . . Paul."

NHV and VMG filed a second amended complaint in March 2014. The second amended complaint had three causes of action—breach of written contract, breach of the covenant of good faith, and fraud. The second amended complaint included substantially the same references to the settlement agreement as the first amended complaint.

NHV and VMG filed the third amended complaint in June 2015. Within 60 days, Cerullo and Artz filed the anti-SLAPP motion to the third amended complaint. In

the anti-SLAPP motion, Cerullo and Artz argued that settlement of the Unlawful Detainer Action was an act arising from the right to petition and therefore was protected by the anti-SLAPP statute. Cerullo and Artz argued that "each of the four causes of action arises from [Cerullo] signing the Purported Settlement in the [Unlawful Detainer] Action."

In opposition, NHV and VMG argued the anti-SLAPP motion was not timely filed because it was not filed within 60 days of the initial complaint, the first amended complaint, or the second amended complaint. The trial court agreed. In denying the anti-SLAPP motion, the trial court ruled: "Defendants' Special Motion to Strike the Third Amended Complaint under CCP § 425.16 is denied as untimely. The case has been pending for over two years. The court notes that the Complaint and every pleading filed by Plaintiffs thereafter, all referenced the Settlement Agreement at the heart of Defendants' argument. Defendants demurred to every pleading filed by Plaintiffs. They filed a Motion to Strike the Complaint and the Second Amended Complaint. The court has also heard and ruled on Defendants' Motion for Judgment on the Pleadings and Motion for Summary Judgment. Substantial discovery has already taken place. The court has granted several discovery motions filed by Plaintiffs. The purpose of the anti-SLAPP statute is to dismiss meritless lawsuits designed to chill free speech rights at the earliest stage of the case. That purpose no longer applies at this late stage in the litigation. [Citations.]"

**REQUESTS FOR JUDICIAL NOTICE**

After oral argument, counsel for Cerullo and Artz filed a request for judicial notice of the fact that NHV's corporate status had changed to suspended. Attached as an exhibit to the request was business entity information from the California Secretary of State showing that as of September 16, 2016, NHV's status was "FTB SUSPENDED." NHV then filed a request for judicial notice of (1) a certificate of revivor for NHV issued by the California Franchise Tax Board on October 6, 2016 and (2) business entity detail

from the California Secretary of State's Web site reflecting that, as of October 7, 2016, NHV's status was "ACTIVE." We grant both requests for judicial notice.

The certificate of revivor for NHV states, "[t]his Limited Liability Company was relieved of suspension or forfeiture and is now in good standing with the Franchise Tax Board." Because NHV is now a corporation in good standing, it may defend and participate in this action. (See *Cadle Co. v. World Wide Hospitality Furniture, Inc.* (2006) 144 Cal.App.4th 504, 513.) NHV was ineligible to appear at oral argument because at that time NHV was a suspended corporation. But counsel appearing for NHV also represented VMG at oral argument and therefore could appear and argue. Cerullo and Artz argue NHV cannot proceed because it did not seek a continuance to secure a revivor. Although the "'normal practice'" is for the court to grant a short continuance to enable the suspended corporation to obtain reinstatement (*id.* at p. 512), the suspended corporation is not required to ask for a continuance for that purpose.

## DISCUSSION

### I.

### Background Law and Standard of Review

"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." (§ 425.16(b)(1).)

"The anti-SLAPP statute does not insulate defendants from *any* liability for claims arising from the protected rights of petition or speech. It only provides a procedure for weeding out, at an early stage, *meritless* claims arising from protected activity. Resolution of an anti-SLAPP motion involves two steps. First, the defendant

must establish that the challenged claim arises from activity protected by [Code of Civil Procedure] section 425.16. [Citation.] If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success. We have described this second step as a 'summary-judgment-like procedure.' [Citation.] The court does not weigh evidence or resolve conflicting factual claims. Its inquiry is limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment. It accepts the plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law. [Citation.] '[C]laims with the requisite minimal merit may proceed.' [Citation.]" (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384-385, fn. omitted.)

We review an order granting or denying an anti-SLAPP motion under the de novo standard. (*Karnazes v. Ares* (2016) 244 Cal.App.4th 344, 351.)

## II.

## The Anti-SLAPP Motion Was Untimely as to the Breach of Contract and Breach of Implied Covenant Causes of Action.

A. *General Analysis of Timing of Anti-SLAPP Motion*

Section 425.16(f) states, "[t]he special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper." Section 425.16(f) imposes a time limit for bringing an anti-SLAPP motion; that is, "[a] party may not file an anti-SLAPP motion more than 60 days after the filing of the complaint, unless the trial court affirmatively exercises its discretion to allow a late filing." (*Platypus Wear, Inc. v. Goldberg* (2008) 166 Cal.App.4th 772, 775.)

The term "the complaint" in section 425.16(f) has been interpreted to include amended complaints. (*Lam v. Ngo* (2001) 91 Cal.App.4th 832, 840.) Key to the decision in *Lam* is the concern a plaintiff could circumvent the anti-SLAPP statute if amended complaints were not subject to anti-SLAPP motions: "Primarily, the purpose of

the anti-SLAPP suit law would be readily circumventable if a defendant's only opportunity to strike meritless SLAPP claims were in an attack on the original complaint. Causes of action subject to a special motion to strike could be held back from an original complaint . . . . [¶] In context, the 'special' anti-SLAPP suit motion is directed at a particular document, namely 'the complaint.' It would make no sense to read 'complaint' to refer to an earlier complaint that contained no anti-free-speech claims, but not allow such a motion for a later complaint that had been amended to contain some. After all, the whole purpose of the statute is to provide a mechanism for the *early* termination of claims that are improperly aimed at the exercise of free speech or the right of petition." (*Id.* at pp. 840-841.)

Cerullo and Artz argue an interpretation of the term "the complaint" to include an amended complaint is absolute and means the filing of any amended complaint automatically reopens the period for bringing an anti-SLAPP motion. We disagree and follow the rule, expressed by the Court of Appeal in *Hewlett-Packard Co. v. Oracle Corp.* (2015) 239 Cal.App.4th 1174, which recognizes the anti-SLAPP statute's purpose and the need to prevent gamesmanship by both the plaintiff and the defendant. In *Hewlett-Packard Co. v. Oracle Corp.*, the Court of Appeal stated: "The rule that an amended complaint reopens the time to file an anti-SLAPP motion is intended to prevent sharp practice by plaintiffs who might otherwise circumvent the statute by filing an initial complaint devoid of qualifying causes of action and then amend to add such claims after 60 days have passed. [Citation.] But a rule properly tailored to that objective would permit an amended pleading to extend or reopen the time limit only as to *newly pleaded* causes of action arising from protected conduct. A rule automatically reopening a case to anti-SLAPP proceedings upon the filing of *any* amendment permits defendants to forgo an early motion, perhaps in recognition of its likely failure, and yet seize upon an amended pleading to file the same meritless motion later in the action, thereby securing

the 'free time-out' condemned in [*People ex rel. Lockyer v.*] *Brar* [(2004)] 115 Cal.App.4th 1315, 1318." (*Id.* at p. 1192, fn. 11.)

Cerullo and Artz rely on *Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, 313, 315 (*Yu*), in which the Court of Appeal concluded an anti-SLAPP motion filed within 60 days of service of a third amended complaint was timely, even though the motion could have been filed at the outset of the case. "Admittedly," the *Yu* court stated, "this is not a case where an anti-SLAPP motion was promptly made to counter SLAPP allegations first added to an amended pleading" and the defendants' anti-SLAPP theory appeared to have been "an afterthought." (*Id.* at p. 315.)

But the holding in *Yu* is not as clear-cut as Cerullo and Artz portray it to be. The plaintiffs in *Yu* had argued the anti-SLAPP statute did not permit an anti-SLAPP motion to be filed, without leave of the court, more than 60 days after service of the original complaint. (*Yu, supra*, 103 Cal.App.4th at p. 313.) The *Yu* court agreed with *Lam v. Ngo* that the word "complaint" in the anti-SLAPP statute included an amended complaint. (*Yu, supra*, at p. 314.) The *Yu* court noted, however, it was "unclear" under the plaintiffs' construction of the anti-SLAPP statute when the defendants would have been entitled as a matter of right to file their motion because the original complaint had never been served and an amended complaint, filed shortly after the original one, was the first complaint to be served. (*Ibid.*)

We disagree with *Yu* to the extent it holds that a defendant has an absolute right to file an anti-SLAPP motion to an amended complaint, even when the motion could have been brought against an earlier complaint. "The Legislature enacted [Code of Civil Procedure] section 425.16 to prevent and deter 'lawsuits [referred to as SLAPP's] brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.' [Citation.] Because these meritless lawsuits seek to deplete 'the defendant's energy' and drain 'his or her resources' [citation], the Legislature sought '"to prevent SLAPPs by ending them early and without

great cost to the SLAPP target"' [citation]." (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192.) The argument advanced by Cerullo and Artz would encourage gamesmanship that could defeat rather than advance that purpose.

We therefore conclude a defendant must file an anti-SLAPP motion within 60 days of service of the first complaint (or cross-complaint, as the case may be) that pleads a cause of action coming within section 425.16(b)(1) unless the trial court, in its discretion and upon terms it deems proper, permits the motion to be filed at a later time (§ 425.16(f)). An amended complaint reopens the time to file an anti-SLAPP motion without court permission only if the amended complaint pleads new causes of action that could not have been the target of a prior anti-SLAPP motion, or adds new allegations that make previously pleaded causes of action subject to an anti-SLAPP motion.

B. *Application of Timing Rule to This Case*

In this case, the anti-SLAPP motion challenged the third amended complaint on the ground that settlement of the Unlawful Detainer Action was an act arising from the right to petition and that "each of the four causes of action arises from [Cerullo and Artz] signing the Purported Settlement in the [Unlawful Detainer] Action." On appeal, Cerullo and Artz argue that each cause of action in the third amended complaint arose out of the protected activity of signing the settlement of the Unlawful Detainer Action.

Settlement of the Unlawful Detainer Action was first alleged in the initial complaint, which asserted causes of action for breach of contract and intentional tort. Settlement of the Unlawful Detainer Action was pleaded again in the first amended complaint and again in the second amended complaint. The first amended complaint and the second amended complaint included causes of action for breach of contract and breach of the implied covenant of good faith.

Cerullo and Artz could have filed anti-SLAPP motions against any of those complaints on the ground that settling the Unlawful Detainer Action constituted protected

activity under section 425.16(e). They did not do so. Instead, they waited until the third amended complaint, by which time they had brought (1) a demurrer to and motion to strike the initial complaint, (2) a demurrer to the first amended complaint, (3) a demurrer to, motion to strike, motion for judgment on the pleadings, and motion for summary judgment on, the second amended complaint, and (4) a demurrer to the third amended complaint. The parties had engaged in extensive discovery and the trial court had ruled on several discovery motions. Entertaining the anti-SLAPP motion would have defeated rather than advanced the anti-SLAPP's statute's "central purpose" of "screening out meritless claims that arise from protected activity, before the defendant is required to undergo the expense and intrusion of discovery." (*Baral v. Schnitt*, *supra,* 1 Cal.5th at p. 392; see *Platypus Wear, Inc. v. Goldberg*, *supra*, 166 Cal.App.4th at p. 776 [purpose of anti-SLAPP statute is "ensuring the *prompt* resolution of lawsuits that impinge on a defendant's free speech rights"]; *Kunysz v. Sandler* (2007) 146 Cal.App.4th 1540, 1543 ["the purpose of the anti-SLAPP statute is to dismiss meritless lawsuits designed to chill the defendant's free speech rights at the earliest stage of the case"].)

Cerullo and Artz did not file the anti-SLAPP motion within 60 days of service of the initial complaint, the first amended complaint, or the second amended complaint. They did not seek leave of court to file a late anti-SLAPP motion. The trial court did not err by denying the anti-SLAPP motion as untimely—at least as to the causes of action for breach of contract and breach of the implied covenant of good faith, which appeared in earlier complaints.

The third amended complaint added two causes of action not before pleaded: quantum meruit and promissory estoppel. The quantum meruit cause of action alleged that NHV and VMG performed services under the Management Agreement which resulted in benefit to Cerullo and Artz for which NHV and VMG should be compensated. The promissory estoppel cause of action was premised on alleged oral promises made by Artz to D'Alessio that NHV and VMG would become the asset

manager for the Property and, in exchange for litigating the Unlawful Detainer Action and evicting NHOM, would have an option to acquire the ground lease to the Property and the Improvements.

The anti-SLAPP motion was timely as to the quantum meruit and promissory estoppel causes of action. To conclude otherwise would allow NHV and VMG to circumvent the purpose of the anti-SLAPP statute by holding back those two causes of action from earlier complaints. (*Lam v. Ngo*, *supra*, 91 Cal.App.4th at pp. 840-841.) An anti-SLAPP motion to the initial complaint, the first amended complaint, or the second amended complaint, even if successful, would not have prevented NHV and VMG from bringing a lawsuit for quantum meruit and promissory estoppel. That is because an earlier anti-SLAPP motion would not necessarily have resolved whether NHV and VMG could demonstrate the probability of prevailing on their claims for quantum meruit and promissory estoppel.

## III.

## NHV and VMG Made a Prima Facie Showing on the Quantum Meruit and the Promissory Estoppel Causes of Action.

The first prong of the anti-SLAPP procedure—whether the challenged claims arose from activity protected by section 425.16—is not in dispute. Cerullo and Artz argue the causes of action of the third amended complaint arise out of the act of settling the Unlawful Detainer Action, which is an act in furtherance of their right of petition. (§ 425.16(e).) NHV and VMG do not contend otherwise.

In the second prong of the anti-SLAPP procedure, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success. (*Baral v. Schnitt*, *supra*, 1 Cal.5th at p. 384.) That issue was fully briefed before the trial court and on appeal. In view of its decision on timeliness, however, the trial court did not reach the question "whether the plaintiff has stated a legally sufficient claim and made a

prima facie factual showing sufficient to sustain a favorable judgment." (*Id.* at pp. 384-385.) The standard of review is de novo (*Karnazes v. Ares*, *supra*, 244 Cal.App.4th at p. 351), meaning we are in as good a position as the trial court to make that inquiry.

A. *Quantum Meruit*

Cerullo and Artz contend NHV and VMG did not state a legally sufficient claim for quantum meruit because (1) the quantum meruit cause of action was time-barred and (2) the quantum meruit allegations were inconsistent with the breach of contract allegations.

The statute of limitations for quantum meruit claims is two years. (*Maglica v. Maglica* (1998) 66 Cal.App.4th 442, 452.) Cerullo and Artz argue, with no disagreement from NHV and VMG, that the quantum meruit cause of action accrued, and the statute of limitations began to run, in August 2012, when the Unlawful Detainer Action was settled. NHV and VMG filed the third amended complaint in June 2015, nearly three years later.

NHV and VMG contend the third amended complaint relates back to earlier complaints for statute of limitations purposes, making the quantum meruit cause action timely. An amended complaint is considered a new action for purposes of the statute of limitations only if the claims do not "relate back" to an earlier timely filed complaint. (*Pointe San Diego Residential Community, L.P. v. Procopio, Cory, Hargreaves & Savitch, LLP* (2011) 195 Cal.App.4th 265, 276.) Under the relation-back doctrine, an amendment relates back to the original complaint if the amendment (1) rests on the same general set of facts; (2) involves the same injury; and (3) refers to the same instrumentality. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 408-409.) An amended complaint relates back to an earlier complaint if the amended complaint is based on the same general set of facts, even if the plaintiff alleges a different legal theory or new cause of action. (*Smeltzley v. Nicholson Mfg. Co.* (1977) 18 Cal.3d 932, 934, 936.)

The general set of facts forming the basis for the quantum meruit cause of action is included in the second amendment complaint, which was filed in March 2014. The second amended complaint alleged that VMG retained and paid for counsel to prosecute the Unlawful Detainer Action, paid for all of the costs and expenses of the Unlawful Detainer Action (which totaled more than $500,000), and spent over $200,000 for expenses as asset manager. The second amended complaint alleged that Cerullo settled the Unlawful Detainer Action without the knowledge of VMG and that Cerullo received "payment of a substantial sum" in exchange for dismissing the Unlawful Detainer Action. Those same allegations, the same injury, and the same instrumentality form the basis for the quantum meruit cause of action in the third amended complaint.

Thus, the quantum meruit cause of action relates back to the second amended complaint for statute of limitations purposes. Because the second amended complaint was filed within two years of August 2012, the quantum meruit cause of action is timely.

As Cerullo and Artz contend, the breach of contract cause of action and quantum meruit cause of action are inconsistent. Quantum meruit recovery is inconsistent with recovery for breach of written contract. (*Hedging Concepts, Inc. v. First Alliance Mortgage Co.* (1996) 41 Cal.App.4th 1410, 1419.) "A quantum meruit or quasi-contractual recovery rests upon the equitable theory that a contract to pay for services rendered is implied by law for reasons of justice. [Citation.] However, it is well settled that there is no equitable basis for an implied-in-law promise to pay reasonable value when the parties have an actual agreement covering compensation." (*Ibid.*)

NHV and VMG had the obligation under the Management Agreement of paying for the costs of the Unlawful Detainer Action. In the quantum meruit cause of action, NHV and VMG seek to recover those costs from Cerullo and Artz. Quantum meruit recovery that is contrary to an express contractual term is not allowed. (*Hedging Concepts, Inc. v. First Alliance Mortgage Co.*, *supra*, 41 Cal.App.4th at p. 1419.)

But NHV and VMG were permitted to plead inconsistent counts. "When a pleader is in doubt about what actually occurred or what can be established by the evidence, the modern practice allows that party to plead in the alternative and make inconsistent allegations." (*Mendoza v. Continental Sales Co.* (2006) 140 Cal.App.4th 1395, 1402.) "The plaintiff remains free to allege any and all 'inconsistent counts' that a reasonable attorney would find legally tenable on the basis of the facts known to the plaintiff at the time." (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 691.) Thus, a plaintiff may plead inconsistent causes of action for breach of contract and common count. (4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 407, p. 546.) NHV and VMG cannot recover for both breach of contract and quantum meruit (see *Hedging Concepts, Inc. v. First Alliance Mortgage Co.*, *supra*, 41 Cal.App.4th at pp. 1419-1420), but they can plead both causes of action. Nothing in the anti-SLAPP statute required NHV and VMG to make an election between the breach of contract and quantum meruit causes of action in response to the anti-SLAPP motion.[4]

Cerullo and Artz argue in their reply brief that the quantum meruit claim fails because, in opposition to the anti-SLAPP motion, NHV and VMG did not produce evidence they spent any money performing their obligations as asset manager. Cerullo and Artz waived that argument by not presenting it in their opening brief. (*Chicago Title Ins. Co. v. AMZ Ins. Services, Inc.* (2010) 188 Cal.App.4th 401, 427-428.) The argument also has no merit. D'Alessio submitted a declaration in opposition to the anti-SLAPP motion. At paragraph 14 of that declaration, D'Alessio stated he "incurred thousands of

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[4] At some point, NHV and VMG might have to elect between a breach of contract remedy and a quantum meruit remedy. (4 Witkin, Cal. Procedure, *supra*, Pleading, § 409, pp. 547-548.) But that point is not now. "'Plaintiff is entitled to introduce his evidence upon each and all of these causes of action, and the election, or in other words the decision as to which of them is sustained, is, after the taking of all the evidence, a matter for the judge or the jury.'" (*Id.*, § 406, p. 545, quoting *Tanforan v. Tanforan* (1916) 173 Cal. 270, 274.)

dollars in fees and costs" in preparing for the trial of the Unlawful Detainer Action and "incurred well over $700,000 in expenses while Asset Manager." In the same paragraph, D'Alessio declared that "[a]s of April 2014, the total costs and expenses I incurred as Asset Manager total no less than $791,605.73." Although the declaration is not drafted as precisely and directly as might be desirable (e.g., D'Alessio does not state that he "spent money" or "wrote checks" in certain amounts), a fair reading of the declaration is that D'Alessio spent no less than $791,605.73 as asset manager.

B. *Promissory Estoppel*

Cerullo and Artz contend that NHV and VMG did not state a legally sufficient claim for promissory estoppel because (1) the promissory estoppel cause of action was time-barred under a two-year statute of limitations, (2) the promissory estoppel allegations were inconsistent with the breach of contract allegations, and (3) NHV and VMG failed to produce evidence of a prima facie factual showing sufficient to sustain a favorable judgment.

The statute of limitations for promissory estoppel based on oral promises is two years. (§ 339, subd. 1.)[5] The promissory estoppel cause of action accrued in August 2012, as did the quantum meruit cause of action, when the Unlawful Detainer Action was settled. Although the third amended complaint was filed more than two years later, the

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[5] The applicable statute of limitations is determined by the nature of the right sued upon rather than the form of the action or the relief demanded. (*Day v. Greene* (1963) 59 Cal.2d 404, 411.) The California Supreme Court accordingly has held that where the primary purpose of an equitable cause of action is to recover money under a contract, the statute of limitations applicable to contract actions governs the equitable claim. (*Jefferson v. J. E. French Co.* (1960) 54 Cal.2d 717, 718-719 [accounting action was subject to the two-year statute of limitations of section 339 because "the primary purpose of the action [was] to recover money under the oral contract" and the "accounting [was] merely ancillary to the perfection of plaintiff's right under the oral contract"].) In this case, NHV and VMG's claim for promissory estoppel is closest in nature to a claim of breach of oral contract and, therefore, the two-year period of section 339, subdivision 1 (action on an obligation not in writing) is applicable.

promissory estoppel cause of action relates back, for statute of limitations purposes, to the second amended complaint or the first amended complaint. The third amended complaint alleged Artz made a series of promises to D'Alessio at restaurants in Carlsbad and San Clemente in March 2011. Those promises were substantially the same as the terms of the Management Agreement, the existence and terms of which were alleged in the prior complaints. The relief sought by the promissory estoppel cause of action (amounts spent as asset manager) is essentially the same as the relief sought by the breach of contract cause of action in the prior complaints.

As we explained above, an amended complaint relates back to an earlier complaint if the amended complaint is based on the same general set of facts, even if the plaintiff alleges a different legal theory or new cause of action. (*Smeltzley v. Nicholson Mfg. Co.*, *supra*, 18 Cal.3d at pp. 934, 936.) The promissory estoppel cause of action, though a new cause of action, was based on generally the same facts as the prior complaints, related back to those complaints, and therefore was not barred by a two-year statute of limitations.

Cerullo and Artz contend the promissory estoppel cause of action is inconsistent with the breach of contract cause of action. Although they are correct, NHV and VMG could plead inconsistent causes of action. Promissory estoppel is an equitable claim that substitutes reliance on a promise as a substitute for bargained-for consideration. (*Fleet v. Bank of America N.A.* (2014) 229 Cal.App.4th 1403, 1412-1413.) Promissory estoppel does not apply if the promisee gave actual consideration and, therefore, a cause of action for promissory estoppel is inconsistent with a cause of action for breach of contract based on the same facts. (*Id.* at p. 1413.) But "'[w]hen a pleader is in doubt about what actually occurred or what can be established by the evidence, the modern practice allows that party to plead in the alternative and make inconsistent allegations.'" (*Ibid.*) At this stage, NHV and VMG do not have to elect between a

promissory estoppel remedy and a breach of contract remedy. (4 Witkin, Cal. Procedure, *supra*, Pleadings, §§ 406, 409.)

Finally, we conclude that NHV and VMG met their burden of making a prima facie factual showing on the promissory estoppel cause of action. The elements of promissory estoppel are (1) a promise, (2) the promisor should reasonably expect the promise to induce action or forbearance on the part of the promisee or a third person, (3) the promise induces action or forbearance by the promisee or a third person, and (4) injustice can be avoided only by enforcement of the promise. (*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal.4th 305, 310.)

Cerullo and Artz contend that NHV and VMG failed to produce evidence of promises made to D'Alessio and that the evidence presented in connection with the anti-SLAPP motion proved that no promises were made. In his declaration submitted in opposition to the anti-SLAPP motion, D'Alessio stated that he had met with Artz in March 2011 to discuss NHOM's default under the Sublease. D'Alessio declared that he and Artz had "c[o]me to a solution" by which NHV "agreed to take the necessary actions to evict NHOM for its Default" and, in exchange, "[Cerullo] would assign the ground lease that it has with the Property owner . . . to me (NHV), so that I could take over the Property and Improvements once NHOM was evicted and have the opportunity to operate a successful business venture at the Property."

Cerullo and Artz argue D'Alessio's declaration failed to set forth any promises made by Artz. An agreement is an exchange of promises. (E.g., *Chicago Title Ins. Co. v. AMZ Ins. Services, Inc.*, *supra*, 188 Cal.App.4th at pp. 421-422.) D'Alessio's declaration, by setting forth agreements made at the meeting between D'Alessio and Artz, also set forth promises made at that meeting.

In support of the anti-SLAPP motion, Cerullo and Artz submitted portions of the transcript of D'Alessio's deposition taken in November 2011 in connection with the Unlawful Detainer Action. During the deposition, D'Alessio was asked whether he

had an agreement with Cerullo or Plaza del Sol as to what would happen to the Property and the Improvements if Cerullo prevailed in the Unlawful Detainer Action. D'Alessio responded: "Other than what we've already talked about, no. No agreement." Cerullo and Artz contend this testimony defeats any claim that promises were made to D'Alessio. D'Alessio's deposition testimony does not defeat the promissory estoppel cause of action as a matter of law (*Baral v. Schnitt*, *supra*, 1 Cal.5th at pp. 384-385) because D'Alessio testified there were other agreements "we've already talked about."

Moreover, in assessing the anti-SLAPP motion, we accept as true NHV and VMG's evidence, which included D'Alessio's declaration. That evidence established the promissory estoppel cause of action has "'the requisite minimal merit'" to proceed. (*Baral v. Schnitt*, *supra*, 1 Cal.5th at p. 385.)

**DISPOSITION**

The order denying the anti-SLAPP motion is affirmed. Respondents shall recover costs on appeal.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.

Filed 12/22/2016

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

NEWPORT HARBOR VENTURES, LLC, et al.,

Plaintiffs and Respondents,

v.

MORRIS CERULLO WORLD EVANGELISM et al.,

Defendants and Appellants.

G052660

(Super. Ct. No. 30-2013-00665314)

ORDER GRANTING REQUEST FOR PUBLICATION

Appellants have requested that our opinion, filed on November 30, 2016, be certified for publication. It appears that our opinion meets the standards set forth in California Rules of Court, rule 8.1105(c)(2)-(6). The request is GRANTED. The opinion is ordered published in the Official Reports.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.

State of California )
County of Los Angeles )
)

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I, Stephen Moore , declare that I am not a party to the action, am over 18 years of age and my business address is: 631 S Olive Street, Suite 600, Los Angeles, California 90014.

**On** 01/27/2017 declarant served the within: Petition for Review

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