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October 18, 2017

Honorable Chief Justice,
Tani Gorre Cantil-Sakauye
& Honorable Associate Justices,
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: *Rand Resources, LLC et al. v. City of Carson et al*,
California Supreme Court, Case No. S235735

To the Honorable Chief Justice & Associate Justices:

Dr. Leonard Bloom and U.S. Capital LLC (collectively referred to as "Dr. Bloom") submits this reply to the "Supplemental Letter Brief" of Rand Resources, LLC & Carson El Camino, LLC (collectively, "Rand") addressing the effect, if any, of *Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, on the issues presented in the current appeal. Rand seems to just reiterate its prior legal briefing and appears to misrepresent the opinion of the court below while incorrectly construing this Court's *Park* opinion.

I. THE OPINION BELOW EFFECTIVELY CONCEDES THAT THE FOURTH, FIFTH, AND SIXTH CAUSES OF ACTION IN THE FIRST AMENDED COMPLIANT "ARISE FROM" THE CONDUCT (IN THE FORM A SPEECH) OF DR. BLOOM.

The court below reversed the grant of Dr. Bloom's special motion to strike on the grounds that it found the underlying conduct that formed the basis for the challenged causes of action did not constitute "protected activity." (Slip Op. at 16, 17.)[1] However, in the section of the lower court's

[1] The Court of Appeal found that the misrepresentations forming the bases of the challenged causes of action were not made in furtherance of a public issue or an issue of public interest, or in connection with an issue under consideration by a legislative body pursuant to Code of Civil Procedure, section 425.16, subd. (e), "...but instead this conduct arises from the Bloom defendants' private conduct of their own business, not their free speech or petitioning activities."

discussion entitled "[d]etermining the applicability of the statute to a cause of action" the opinion can be fairly read to concede that the fraud-based causes of action in the Rand First Amended Complaint ("FAC") "arose from" alleged statements made by Dr. Bloom to third parties and/or his communications with Mayor Dear. (Slip Op. at 11 ["[i]n the anti-SLAPP context, the critical consideration is whether the cause of action is *based on* the defendant's protected free speech or petitioning activity." (*Navallier v. Sletten* (2002) 29 Cal.4th 82, 89.)

According to the Second Appellate District, not only must a cause of action be "based on" some protected activity, but the "'act underlying . . . [a] cause of action must *itself* have been an act in furtherance of the right of petition or free speech.'" (Slip Op. at 11.)[2] With this two-step criteria, the court below effectively acknowledged the correctness of the trial court's determination that causes of action four, five and six were all "base[d] on" or the "acts underlying . . . [the] cause[s] of action" alleged in the FAC.[3]

The court below found the underlying conduct that formed the basis for Rand's fourth through sixth causes of action were, "[a]s far as the Bloom defendants are concerned, the conduct at the heart of this cause of action is, in essence, their duplicitous attempts to pretend they were the City's official, authorized representative.... All of this pertains to the Bloom defendants' private conduct of their own business, not their free speech or petitioning activities.... Moreover, the identity of the person representing the City in its efforts to lure an NFL team to the City is not a matter of public interest,... To the extent the cause of action pertains to any communications, they are separate from any public issue and are instead unrelated private commercial conduct." (Slip Op. at 16-17.)

These alleged misrepresentations, while factually inaccurate and pure supposition on the part of the lower court, yet nonetheless, "fall[ ] squarely within the ambit of the anti-SLAPP statute's 'arising from' prong" similar to the misrepresentations cited approvingly in the *Park* opinion from its earlier *Navellier* decision. (*Park, supra*, 2 Cal.5th at 1063.)

The court below did, therefore, articulate a criteria which is consistent with this Court's *Park* opinion. However, the lower court ***never questioned*** whether the conduct of Dr. Bloom (in the form of speech) was what the fraud-based causes of action were "based on". It simply noted the criteria and immediately moved on to the legal issue of whether that conduct was protected and incorrectly found it

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[2] Pursuant to *Park*, a claim "arises from" protected activity "if the protected activity *itself* is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted." (*Park, supra,* 2 Cal.5th at 1060 [emphasis in original].)

[3] The Second Appellate District however, after reviewing the prior holdings of this Court and courts of appeal on when a cause of action triggers application of the anti-SLAPP statutory scheme, immediately decided Dr. Bloom's conduct (in the form on alleged misrepresentations or communications with Mayor Dear) were not free speech and thereafter never made the determination if they were made in (1) a matter of public interest or (2) involved a matter under consideration by the City Council. (Slip Op. at 16-18.) This failure to address or even reserve the "based on" element of an anti-SLAPP motion amounts to a concession that Dr. Bloom's alleged conduct was, "itself," what the fraud and interference based causes of action are "based on."

was not. The Second Appellate District focused its *de novo* review entirely on whether this alleged conduct (in the form of speech) constituted protected activity. (Slip Op. at 11-17.)

The question resolved in *Park* was under which circumstances does a challenged cause of action "arise from" conduct (which includes speech) protected by the anti-SLAPP statute. In the current appeal, the underlying conduct that forms the bases for the challenged causes of action is the "speech" of Dr Bloom and the communications with Mayor Dear. According to *Park*, this means that the "arising from" requirement has been met. To the contrary however, Rand's Supplemental Letter Brief makes a false distinction between "conduct" and "speech." Likewise the lower court's attempt to wordsmith clear statutory language as adopted by Rand is a distinction without a difference and in fact is completely contrary to the plain and unambiguous Anti-SLAPP statutory language. Speech *is* simply a type or form of conduct. Rand's reliance on *Park* is, therefore, taken out of context because *Park* focused on the "arising from" and not the "protected activity" element of the process to determine whether an action is a SLAPP. As originally noted and hereinagain, *Park's* application to the present appeal is limited to supporting the determination that the "arose from" element has been met by Dr. Bloom .

II. THE OPINION BELOW ERRONEOUSLY CONCLUDED THAT THE CONDUCT, IN THE FORM OF SPEECH, ALLEGED IN THE FOURTH FIFTH AND SIXTH CAUSES OF ACTION IN THE FAC WERE NOT "PROTECTED ACTIVITY" WITHIN THE MEANING OF THE ANTI-SLAPP STATUTORY SCHEME, AN ISSUE NOT ADDRESSED BY *PARK*

The lower court reversed the granting of the Dr. Bloom's anti-SLAPP motion because it found that the conduct of the Dr. Bloom (in the form of alleged misrepresentations and communications with Mayor Dear) did not constitute "protected activity" under Code of Civil Procedure, section 425.16, subd. (e)(2) or (e)(4). (Slip Op. at 16, 17.) *Park* did not address what conduct constituted "protected activity" under section 425.16, subd. (e), which remains for resolution by this Court in this appeal and has been previously briefed.

Therefore Rand's reliance on *Park* for the proposition that the current appeal has been mooted is simply misplaced. In analyzing the "arising from" element, *Park* stated the focus should be on the basis of liability, not the conduct that preceded or followed it. (*Park*, *supra*, 2 Cal.5th at 1070.) Specifically, *Park* determined that, in a cause of action for denial of tenure for alleged national origin discrimination, the basis of liability was the denial of tenure, not the speech or writings that preceded or followed it. (*Park*, *supra*, 2 Cal.5th at 1068.)

In this matter, the trial court properly found that "an action for breach of an exclusive commercial development with a public entity (containing causes of action for inducing breach of contract, intentional and negligent interference and Business and Professions Code section 17200) is subject to anti-SLAPP on the basis of rights of petition and free speech in connection with a public

issue." *Tuchscher Development Enterprises Inc. v. San Diego Unified Port District*, (2003) 106 Cal. App. 4th 1219, 1232-1235.[4]

The trial court further determined "[a]s stated in Tuchscher, communications involving the proposed development of such commercial property fall into the 'matter of public interest' portion of the [anti-SLAPP] statute and, as such, they need not be made in connection with an issue under consideration or review by a legislative, executive, or judicial body. [*Code of Civil Procedure* section 425.16 (e)(2; *Id.* 106 Cal App 4th at 1233; *Ludwig v. Superior Court, (1995)* 37 Cal App 4th 8, 17.

In *Tuchscher*, *supra*, the plaintiff-developer sued a city, public entity and its then-commissioner, and a rival developer, contending that the defendant public officials and rival developer interfered with the developer's exclusive negotiating agreement relating to the commercial development of certain bayfront property. This interference took place by means of communications with other public officials and the rival developer, such as "closed door meetings, telephone calls and emails" designed to take away the exclusivity rights from the plaintiff-developer to the rival developer. *Id.* at 1228.

"Under these circumstances, the fact that the defendants ceased negotiations with a particular developer and sought advice from a rival developer was protected action under the anti-SLAPP statute." *Id.* at 1228, 1233-34. Such communications are clearly encompassed by the anti-SLAPP statute per *Tuchscher* regardless of whether they were legitimate, or fraudulent as Rand and the lower court contend. *Navellier*, supra, 29 Cal. 4th at 94.

III. CONCLUSION

Park does not moot this appeal, The *Park* opinion actually supports Dr. Bloom's argument that the "arose from" element has been satisfied with respect to Rand's fraud and intentional interference based causes of action (four, five and six). *Park* does narrow the issues to be resolved on appeal to one; does the FAC's fourth, fifth and sixth causes of action rely on "protected activity" within the meaning of the anti-SLAPP statute to be the basis from which these causes of action arise. Correctly stated, they do.

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[4] Therefore, both defendants Dr. Bloom and U.S. Capital LLC met their burdens. The lower court however, misapplied *Code of Civil Procedure* section 425.16 by narrowly and incorrectly focusing on the premise that "[t]he identity of the City's representative is not a matter of public interest."

Respectfully Submitted,
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and Petitioners DR. LEONARD BLOOM
AND U.S. CAPTIAL LLC

PROOF OF SERVICE:
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 21700 Oxnard Street, Suite 1590, Woodland Hills, California, which is located in the county in which the within-mentioned mailing occurred.

On October 18, 2017, I served true copies of the following document(s) described as **Dr. Leonard Bloom and U.S. Capital LLC.'s Reply Letter Brief by order dated September 20, 2017** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY OVERNIGHT and US MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Tamborelli Law Group's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

I declare under penalty of perjury that the foregoing is true and correct.
Executed on October 18, 2017, at Woodland Hills, California.

Ronnie Gipson

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