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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ROBERT C. BARAL,

Plaintiff and Respondent,

v.

DAVID SCHNITT,

Defendant and Appellant.

SUPREME COURT
FILED

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Deputy

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

REPLY IN SUPPORT OF PETITION FOR REVIEW

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I. INTRODUCTION

There can be no serious dispute that the appellate courts are sharply divided over whether anti-SLAPP motions can strike "mixed" causes of action. As the court of appeal wrote in this very case, "reasonable minds" can—and do—differ on this issue. (See Slip Op. p. 22.) And differ they have. As of now, appellate courts have squarely reached this issue *fifteen separate times* since just May of 2011.[1] Indeed, in the two short months since the lower court filed its opinion in this case, the Second District Court of Appeal has rendered two *more* decisions on this very issue (albeit without publishing them), with each of those decisions *again* reaching opposite conclusions.[2]

The Court should end this chaos. It must decide, once and for all, whether the cryptic reference to the *Mann* rule in *Oasis West*—never once mentioned in the parties' briefing in that case—silently meant to overrule the Court's lengthy and reasoned analysis in *Taus*. Whatever the right rule

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[1] See Petition for Review pp. 24 to 29 & footnotes 9-10; see also discussion *infra* note 2.

[2] See *Becerra v. Jones, Bell, Abbott, Fleming & Fitzgerald LLP* (Feb. 27, 2015, B251189) [nonpub. opn.] (acknowledging a split of authorities, but adopting the *Mann* rule); *Weksler v. Weksler* (Feb. 25, 2015, B252276) [nonpub. opn.]("adher[ing] to the approach of striking the protected activities while allowing the nonprotected theories to remain" while acknowledging that "that prior decisions have disagreed with this approach").

on this issue may be, the lower courts and the litigants that practice before them need clarity.

Beyond offering the standard cliché that this case is "much ado about nothing" (Answer p. 14), Baral offers no valid reasons to deny review here. Instead, he simply pretends that the lower courts are in complete accord, failing to recognize that the courts themselves have *expressly registered* their disagreement with one another in numerous published opinions. Baral offers no legitimate explanation as to why this case is a bad vehicle to resolve this crucial question or why resolution of this issue should wait for another day. Accordingly, this Court should grant review.

A. BARAL'S CONFUSED "RIPENESS" ARGUMENT PROVIDES NO BASIS TO DENY REVIEW

Baral first argues that this case somehow is not "ripe" because the trial court should be given the opportunity to rule in the first instance on the merits of whether the litigation privilege applies. (Answer p. 4.) This argument is misguided on many levels.

First, it is important to note that this argument has nothing to do with "ripeness" as that doctrine is traditionally understood. "Ripeness" has solely to do with whether an underlying dispute between the parties to litigation is sufficiently concrete that the *judicial system as a whole* can proceed without improperly rendering an advisory opinion. (See *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170

[188 Cal.Rptr. 104, 655 P.2d 306].) It has nothing to do with whether an argument has been sufficiently presented to, or considered by, the trial court such that appellate review is warranted. (See Answer p. 4.) Baral's confused argument and citation to wholly inapplicable legal authorities regarding the ripeness justiciabilty doctrine should therefore be dismissed out of hand.

Second, regardless of label, Baral's claim that review by this Court is "premature" is baseless. He asserts that the trial court should be allowed to rule, in the first instance, on the merits of the litigation privilege. But, as Baral well knows, that will never actually happen in the context of the anti-SLAPP motion. That is because the *Mann* rule renders this issue irrelevant, which is precisely why the appellate court could assume without deciding that Schnitt would prevail on this issue. (See Slip Op. p. 14.) As long as some minimal part of the amalgamated cause of action can survive the summary-judgment-like review—which all parties concede is the case here—the merits of any other cause of action that happens to be lumped together under the same "count" are simply irrelevant under the misguided *Mann* rule.[3]

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[3] Baral also cannot now feign surprise that both the trial and appellate courts declined to reach the merits of the litigation privilege below. After all, he expressly asked them not to reach the merits precisely because, under *Mann*, he claimed that an attempt to strike anything less than a full

Third, although Baral's Answer never actually defends his position on the merits of whether the litigation privilege applies to the communications at issue, the outside possibility that the Court might accept review and nevertheless rule in Baral's favor on the merits is *still* no reason to deny review here. That is because the very fact that the Court would have to reach the merits would still resolve the central issue of what the proper analytical framework is for deciding anti-SLAPP motions. As it stands now, courts applying the *Mann* rule simply take the improper intellectual shortcut proscribed by *Mann*[4] of simply stopping the analysis of anything listed under a single "count" altogether once the most minute claim is found to have minimal merit. Changing this analytical framework to ensure that parties are not tactically pleading around the anti-SLAPP statute by lumping different claims under the same heading would be an important clarification that more than justifies grating review here. (See Cal. Rules. Ct. 8.500, subd. (b)(1).)

Fourth, Baral's contentions on the merits of the litigation privilege

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"count" was "procedurally improper and should be denied on that basis alone." (See AA801.)

[4] *Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 106 [15 Cal.Rptr.3d 215] ["[A] court need not engage in the time-consuming task of determining whether the plaintiff can substantiate all theories presented within a single cause of action and need not parse the cause of action so as to leave only those portions it has determined have merit."]

are baseless in any event. The litigation privilege protects communications made "in any . . . judicial proceeding." (Cal. Civ. Code § 47(b).) Schnitt's communications at issue here with Moss Adams are protected by the litigation privilege because they were made as part of an investigation into Baral's son's admitted embezzlement of funds and in anticipation of litigation with Baral and others regarding that misconduct. (AA276-277.) For the first time at oral argument on appeal, Baral made the bizarre argument that Schnitt lacks "standing" to assert the litigation privilege because it would have been *the Company* (IQ Backoffice) and not Schnitt himself who would have been a plaintiff in any possible lawsuit flowing from the investigation. (See January 5, 2015 Letter Brief of Respondent Robert Baral 7.) But case law is clear that one does not have to be a party to a lawsuit (or a potential party to a potential lawsuit) in order to claim the benefits of the litigation privilege. (*Adams v. Superior Court* (1992) 2 Cal.App.4th 521, 529 [3 Cal.Rptr.2d 49] ["We see no reason why mere lack of standing should have the effect of necessarily vitiating the privilege."].) Otherwise, *every* third party witnesses or anyone else who was not literally a party in litigation would *always* be subject to "derivative tort actions" for anything they said in court, which is exactly what the litigation privilege was meant to prevent. (See *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1063 [39 Cal.Rptr.3d 516, 128 P.3d 713].) Thus, Baral is mistaken that Schnitt somehow lacks standing to assert the litigation privilege here, and

his argument in this regard provides no basis for denying review.

In short, nothing about Baral's supposed "ripeness" argument justifies denying review here.

B. THIS COURT SHOULD ACCEPT REVIEW TO PREVENT THE *MANN* RULE FROM ALLOWING ARTFUL PLEADING AROUND THE ANTI-SLAPP STATUTE

Baral then argues that this Court should not accept review of this case because "this case is not the poster child for the artful pleading malady advocated by Schnitt." (Answer p. 1.) But even if correct, that extremely faint praise provides no justification for denying review here. Baral does not dispute that the *Mann* rule does, in fact, allow parties in general to combine two or more causes of action under a single heading to avoid the impact of the anti-SLAPP statute, as numerous published decisions have explicitly noted. (See *Cho v. Chang* (2013) 219 Cal.App.4th 521, 527 [161 Cal.Rptr.3d 846]; *City of Colton v. Singletary* (2012) 206 Cal.App.4th 751, 774 [142 Cal.Rptr.3d 74]; *Wallace v. McCubbin* (2011) 196 Cal.App.4th 1169, 1202 [128 Cal.Rptr.3d 205].) Whether or not that particular perverse incentive is what actually motivated Baral to reshuffle his causes of action here is beside the point. Either way, the Supreme Court here can eliminate this problem in all cases by granting review and rejecting the *Mann* rule.

In addition, and contrary to Baral's assertion, this case *does* involve a situation where the plaintiff merely re-alleged the very same cause of action under a different heading in order to circumvent the anti-SLAPP

statute, and thus highlights the problems inherent in the *Mann* rule. Baral has *always* alleged that Schnitt injured him by providing false and incomplete information to Moss Adams, publishing the ultimate Fraud Report to others, and later refusing to allow Baral to "correct" the Report's supposed misstatements or otherwise supplement the record. It is true that in the initial complaint Baral labeled this allegedly improper conduct as "defamation," whereas in the Second Amended Complaint he reformulated them under different headings, but the fundamental allegations of misconduct were always the same.[5]

C. DESPITE BARAL'S DOGGED INSISTENCE, THE COURTS THEMSELVES RECOGNIZE THAT THEY ARE HOPELESSLY SPLIT ON THIS ISSUE

Baral's final argument is his adamant insistence that Petitioner has simply imagined a split of authorities where there is none. But Petitioner is

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[5] For example, the Fifth Cause of Action for slander in the original complaint alleged that Schnitt engaged in conduct designed to block Baral from participating in the audit by "*direct[ing] that the accountancy firm not . . . interview Baral* . . . so as to predetermine conclusions that would discredit and disparage Baral and Foster." (AA21, ¶ 61 [italics added].) The Sixth Cause of Action for libel likewise contended that "Schnitt . . . when confronted with his wrongdoing, failed and refused, and *continues to fail and refuse*, *to take steps to correct* his wrongdoing, *authorize* the accountancy firm to perform due diligence and *correct* the Investigative Report or mitigate the damages suffered by Plaintiff Baral." (AA24, ¶ 69 [italics added].) This is precisely the same conduct on which Baral bases his Breach of Fiduciary Duty, Constructive Fraud, and Declaratory Relief causes of action in the Second Amended Complaint concerning the Moss Adams Claims under the First, Second and Fourth causes of action, respectively. (See AA372-378, ¶¶ 40(d), 43, 46(d), 47, 60.)

not alone in noting this obvious conflict. The courts themselves have expressly recognized it numerous times. (See, e.g., *Burrill v. Nair* (2013) 217 Cal.App.4th 357, 380 [158 Cal.Rptr.3d 332] [explicitly noting the Court's disagreement with *City of Colton* and related cases]; *Cho v. Chang* (2013) 219 Cal.App.4th 521, 527 [161 Cal.Rptr.3d 846][explicitly disagreeing with *Burrill*].) Indeed, the opinion below in this very case affirmatively notes that *Cho* and *City of Colton* "disagreed with *Mann*," before going on to state expressly with respect to these opinions "[w]e respectfully disagree with our colleagues." (Slip Op., p. 20.)

And those are just the published decisions. As Petitioner has noted previously, at least fifteen courts have expressly ruled on this very issue since May of 2011 alone, resulting in at least five published decisions, with courts consistently reaching opposite conclusions from one another and expressly recognizing as much. (See Petition for Review p. 28, fn. 10.) A clearer and more frequently arising split of authorities is frankly difficult to imagine.[6]

Baral then invents, out of whole cloth, the notion that somehow *Cho*

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[6] Ironically, in attempting to dispel the notion that there is any split of authorities, Baral expressly identifies several instances where such a split actually occurred. For example, Baral notes that "[n]eedless to say, it is inconceivable that this Court would cite to the *Mann* rule if it has already overturned it in *Taus*," before discussing several opinions that explicitly so held. (Answer pp. 10-12.)

and *City of Colton* merely hold that *courts* are permitted to strike less than full "counts" under the anti-SLAPP statute pursuant to their "inherent authority," but the *parties themselves* are barred from requesting that exact same relief directly. Nothing in those cases themselves even remotely suggests such a bizarre holding, nor is any legal authority offered to support this dubious proposition. Baral likewise never explains how such a counter-intuitive rule would be consistent with the text, legislative history, or public policy animating the anti-SLAPP statute, which it clearly would not.

More importantly, even if there were some theoretical way to harmonize all of the divergent authorities discussed above, the lower courts need to know that. As of now, the appellate courts themselves have written unequivocally that their published opinions flatly disagree, and trial courts interpreting those opinions are left without any clear way to resolve this split of binding authorities. Litigants as well are left without any reliable guide on whether anti-SLAPP motions will be successful, and have instantly meritorious appeals regardless of how the trial court rules. Only this Court can end this confusion.[7]

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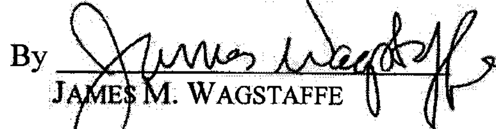
[7] Baral also makes a halfhearted argument in a footnote that Petitioner's policy arguments about the harmful effects of adopting the *Mann* rule are somehow "new." (Answer p. 13, fn. 6.) But Schnitt has always argued that the *Mann* rule was unwise and should be abandoned as inconsistent with the text, history, and policy animating the anti-SLAPP

II. CONCLUSION

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

Dated: April 15, 2015

KERR & WAGSTAFFE LLP

By 
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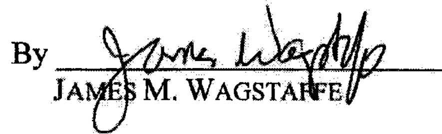
statute. To the extent Baral is arguing that a Petitioner cannot cite new *authority* for an issue which was clearly raised at all levels below, he is wrong as a matter of settled law. (See *Schmidt v. Bank of America, N.A.* (2014) 223 Cal.App.4th 1489, 1505, fn. 11 [168 Cal.Rptr.3d 240] ["Where an appellant has not waived his right to argue an issue on appeal, he is free to cite new authority in support of that issue."]; *Giraldo v. California Dept. of Corrections and Rehabilitation* (2008) 168 Cal.App.4th 231, 251 [85 Cal.Rptr.3d 371] ["We are aware of no prohibition against citation of new authority in support of an issue that was in fact raised below . . ."].)

CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

Pursuant to Rules of Court, rules and 8.504(d)(1), I certify that this Brief is proportionately spaced, has a typeface of 13-point, proportionally-spaced font, and contains 2,404 words.

Dated: April 15, 2015

KERR & WAGSTAFFE LLP

By 
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PROOF OF SERVICE

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

On, April 15, 2015 I served the following document(s):

REPLY IN SUPPORT OF PETITION FOR REVIEW

on the parties and entities listed below as follows:

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

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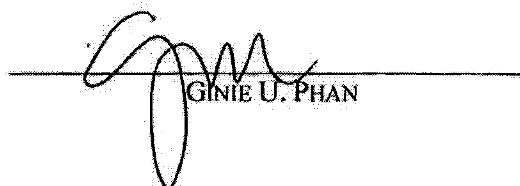
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 15, 2015, at San Francisco, California.



GINIE U. PHAN