Case No. S235735

SUPREME COURT OF CALIFORNIA

RAND RESOURCES, LLC et al.,

Plaintiffs and Appellants,

v.

LEONARD BLOOM, et al.,

Defendants and Respondents.

ANSWER TO PETITIONS FOR REVIEW

On Appeal From the California Court of Appeal for the State of California,
Second Appellate District, Division One
LASC CASE NO. BC564093
APPELLATE CASE NO. B264493

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

RULES

I. INTRODUCTION

Although the factual genesis of this case is unique (namely, the City of Carson's failed effort to lure one or more National Football League franchises), the legal question at issue—whether the anti-SLAPP statute is triggered by a commercial dispute involving claims for breach of contract and interference—has been addressed by the California Court of Appeal several times. The decision below is firmly in line with those prior decisions, and thus the petitions should be denied.

On the City's first issue for review, the Court of Appeal correctly held that, whereas bringing an NFL team to Carson is a matter of public interest, the selection of the City's agent for dealing with the NFL—the issue in dispute here—is not, and thus the anti-SLAPP statute is not triggered. (*Ibid*, (quoting C*ommonwealth Energy Corp. v. Investor Data Exchange, Inc.* (2003) 110 Cal.App.4th 26, 34).) Rather than address this holding—which is plainly correct—Petitioners create a straw-man, claiming that the Court of Appeal issued a blanket ruling that "an EAA [exclusive agency agreement] regarding the development of an NFL stadium was not an issue of public interest." (City Petition at 2.) But the Court of Appeal made no such ruling; it merely distinguished between the importance of the good being sold (here, an NFL expansion opportunity), which is not at issue in this case, and the mechanics of the sale (the identity of the City's agent), which constitutes the gravamen of

Plaintiffs' claims. Such a distinction is supported, indeed required, by established California case law. (*Commonwealth*, *supra*, 110 Cal.App.4th at 34 ["Just because you are selling something that is intrinsically important does not mean that the public is interested in the fact that you are selling it."].)

Moreover, the Opinion does not conflict with *Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219. As explained by the Court of Appeal, the communications at issue in *Tuchscher* involved the building of an actual, planned real estate development. (Op. at 14-15; *Tuchscher*, 106 Cal.App.4th at 1233.) Here, by contrast, the communications at issue are "not communications pertaining to the actual development of real estate, but who represented the City in luring an NFL team to move to the City—*a condition precedent to the development.*" (Op. at 15 (emphasis added).)

On the City's second issue for review, Petitioners again attempt to manufacture a decisional conflict with *Tuchscher* where none exists. In *Tuchscher*, the moving parties' communications (the Port District Commissioner's *discussions* with the City or other defendants regarding the proposed development) formed the basis for their potential liability. Here, by contrast, Plaintiffs' interference claims turn on the *actions* of the City Defendants and Bloom Defendants—actions that constituted breach of an exclusive agency agreement and interference with that contract, respectively. Although communications may be relevant to prove the

Defendants' liability (as would be the case with virtually any interference claim), that does not, in and of itself, trigger the anti-SLAPP statute. (*See Graffiti Protective Coatings*, 181 Cal.App.4th at 1224 ("Although the City's communications may be of evidentiary value in establishing that it violated the law, liability is not based on the communications themselves."].)

Finally, Bloom's sole additional issue for review entirely misses the mark, as Bloom asks the Court to review a question concerning the *second step* of the anti-SLAPP analysis—Plaintiffs' likelihood of success. The Court of Appeal reversed on Prong One of the anti-SLAPP test; it did not reach Prong Two. Thus, even if Bloom's substantive argument were correct (it is not), there is nothing in the Opinion on this point for the Court to address.

In short, Petitioners fail to identify any split in decisional authority or even address the actual reasoning of the Court below, instead creating a straw-man Opinion that the Court of Appeal did not issue. The Petitions should be denied.

II. BACKGROUND AND OPINION BELOW[1]

Richard Rand is a real estate developer and the sole or controlling owner of plaintiffs Rand Resources, LLC and Carson El Camino, LLC (collectively, "Rand").

[1] Unless otherwise stated, all facts are taken from the Background section of the Opinion below, which relies on the factual allegations in the First Amended Complaint ("FAC") and accepts them as true in light of the procedural posture.

Following a complex series of events, the City appointed Rand "as its sole and exclusive agent" for the purposes of "coordinating and negotiating with the NFL for the designation and development of an NFL football stadium ... in the City." Although the agreement was to expire in September 2014, Rand was promised that, so long as Rand showed reasonable progress with respect to bringing an NFL franchise to Carson, the [agreement] would be renewed."

Rand worked diligently on bringing an NFL franchise to Carson and spent hundreds of thousands of dollars and a significant amount of time in doing so. Unbeknownst to Rand, however, the City undercut him and violated the agreement by allowing defendants Leonard Bloom and U.S. Capital LLC (collectively, "Bloom") to act as the City's *de facto* agent in the same negotiations that Rand was supposed to be conducting. The City forwarded confidential documents to Bloom and otherwise violated its duties to Rand. Bloom, for its part, encouraged this breach—ghostwriting letters on behalf of the City's mayor, using promotional materials derivative of those Rand had developed, and creating a new entity called Rand Resources, LLC, presumably to impersonate Rand. When Rand asked the City's mayor about Bloom, the mayor lied to Rand, telling him that he did not know Bloom and that Rand's position as exclusive agent was secure. When the agency contract was up for renewal in late 2014, the City did not renew it notwithstanding Rand's progress.

The FAC states causes of action for (1) breach of contract, (2) tortious breach of contract, (3) promissory fraud, (4) fraud, (5) intentional interference with contract, and (6) intentional interference with prospective economic advantage. Defendants brought anti-SLAPP motions to strike causes of action two through six under Code of Civil Procedure section 425.16, which the trial court granted in their entirety. As relevant here, Defendants claimed that the FAC sought to hold them liable for communications involving the development of the subject property, and claimed that such communications were matters of public importance triggering the anti-SLAPP statute.

The Court of Appeal unanimously reversed. It held, first, that the five causes of action at issue are based on conduct and *not* on protected speech; thus the anti-SLAPP statute did not apply. (Op. at 13 [Second Cause of Action "is not premised upon protected free speech or the right to petition for redress of grievances, but upon the City's conduct in carrying out (or not) its contract with Rand Resources."]; *id.* at 16 ["[T]he gravamen of the [third] cause of action is the manner in which the City conducted itself in relation to the business transaction between it and Rand Resources, not the City's exercise of free speech or petitioning activity."]; *id.* at 16 ["The gravamen of the fourth cause of action with respect to the City is ... the City's violation of the terms of the EAA by allowing someone other than Rand Resources to act as its agent ... not the City's exercise of free speech or petitioning activity."];

id. at 17 ["The alleged wrongful conduct at the heart of [the fifth and sixth causes of action] is again the Bloom defendants' efforts to usurp Rand Resources's rights and role under the EAA."].) The Opinion relied on a line of California cases holding that the court must "distinguish between (1) speech or petitioning activity that is mere evidence related to liability and (2) liability that is based on speech or petitioning activity." (*Id.* at 10 [quoting *Graffiti Protective Coatings, Inc. v. City of Pico Rivera* (2010) 181 Cal.App.4th 1207, 1214–1215].)

Next, the Opinion held that even if Rand's claims were based on petitioning speech (and they were not), the speech was not of public importance because it concerned the identity of the agent that would represent the City in negotiations. (*Id.* at 13.) In so holding, the Opinion recognized that the question is not whether an overall project or development is of public importance, but rather whether the specific matter giving rise to liability is of public importance. It was required to draw this distinction by *Commonwealth*, *supra*, which explained the distinction as follows: "Just because you are selling something that is intrinsically important does not mean that the public is interested in the fact that you are selling it." (*Id.* at 14 [quoting *Commonwealth*, *supra*, 110 Cal.App.4th at 34].) Following *Commonwealth*, the Opinion held as follows:

> While having an NFL team, stadium, and associated developments in Carson is no doubt a matter of substantial public interest, plaintiffs' complaint does not

> concern speech or conduct regarding a large scale real estate development or bringing an NFL team to Carson and building it a stadium. It instead concerns the identity of the person(s) reaching out to the NFL and its teams' owners to curry interest in relocating to Carson. The identity of the City's representative is not a matter of public interest. In this regard, it is noteworthy that the City was not paying Rand Resources for its services or even reimbursing Rand Resources for its expenses. Furthermore, the particular communications alleged in the cause of action, i.e., the false representation that the EAA would be renewed, Dear's false denial about knowing Bloom, and communications entailed in meetings between the defendants, are also not matters of public interest.

(*Id.* at 14.)

The Opinion considered and distinguished *Tuchscher*, the case relied upon by Petitioners, on the grounds that (i) unlike this case, *Tuchscher* involved communications about the specifics of an actual planned development; and (ii) the parties there actually conceded that the development in interest was an issue of public interest. (*Id.* at 14-15.) Because Petitioners had not satisfied the first prong of an anti-SLAPP analysis, the Opinion did not address the second step, Plaintiff's probability of success on their claims. (*Id.* at 18.)

III. STATEMENT PURSUANT TO RULE 8.504(c)

In the event this Court grants the petitions, Plaintiffs seek review of all issues raised in Plaintiffs' appellate briefs, including but not limited to the issues of

whether Plaintiffs have a probability of success on their claims and whether the trial court should have permitted discovery on that issue.

IV. THE PETITIONS SHOULD BE DENIED.

A. The Court of Appeal Correctly Held That Communications Regarding the Identity of the City's Agent Are Not of Public Importance.

To trigger the anti-SLAPP statute outside the context of an official proceeding, the protected activity must concern a "public issue." (Cal. Code Civ. Proc. § 425.16, subd. (b)(1)). In making this determination, the trial court must focus on the importance of a particular communication to the public; it is not enough that the communication be related to selling something of public importance or that the generalities that could be extracted from a communication would hold significance. So, for example, union fliers falsely accusing a janitorial supervisor employed at a UC Berkeley residence of theft, bribes, and abusive treatment of inferiors do not concern a public issue, even though labor relations generally and the use of public funds are matters of important public policy debate. (*Rivero v. American Federation of State, County, and Municipal Employees, AFL-CIO* (2003) 105 Cal.App.4th 913, 925) Likewise, while the efficacy of herbal supplements in general may be important, specific advertising claims regarding a particular product are not. (*Consumer Justice Center v. Trimedica International, Inc.* (2003) 107

Cal.App.4th 595, 601.) As the Court of Appeal explained in *Commonwealth*, "[j]ust because you are selling something that is intrinsically important does not mean that the public is interested in the fact that you are selling it." (110 Cal.App.4th at p. 34.)

The Opinion below is squarely in line with these authorities. As it recognized, bringing the NFL to Carson is an issue of great public significance. But, as between two rival individuals vying to act as the City of Carson's agent in dealing with the NFL, the public at large has no particular interest. (Op. at 15) Such matters do not "go beyond the parochial particulars of the given parties," and as such do not implicate the anti-SLAPP statute. (*Id.* at 14 [*quoting Commonwealth*, *supra*, 110 Cal.App.4th at 34].)

Petitioners appear to concede this point, nowhere claiming that the identity of the City's agent is a matter of public import. Instead, they spill much ink on the undisputed point that bringing the NFL to Carson was important, and then quickly pivot to the fallacious argument that any communication "bringing up the NFL" must – logical consistency and factual accuracy notwithstanding –be of equal significance. (City Petition at 11.) Petitioners' fantastic argument – which would sweep in not just the communications here but also millions of barbeque and barbershop conversations around the country – has already been rejected by multiple California Courts of Appeal, and there is no reason for this Court to give it any further credence by granting the Petitions. (*I.e.*, *Commonwealth*, *supra*, 110

Cal.App.4th at p. 34 [When analyzing the public interest requirement, "[t]he part is not synonymous with the greater whole."].)

Attempting to create the appearance of a decisional split, the Petitions cite to *Tuchscher* for the proposition that *any* communication relating to an exclusive development agreement is a matter of public interest. (City Petition at 11-16.) *Tuchscher* did not so hold, and it would have been wrong if it had. As the Opinion below recognized, *Tuchscher* involved an actual planned development of a mixed-use project in Chula Vista, California. (106 Cal.App.4th at p. 1227) Plaintiff Tuchscher Development Enterprises ("TDE") had a 1.5-year exclusive right to negotiate a development agreement for the project before the project opened up to other developers. (*Ibid.*) During that exclusive period, the defendants allegedly had a number of conversations and communications regarding whether TDE was capable of completing the project, and how the project might look (including which specific roadways would be constructed, which parcels demolished, and which parcels developed) if given to another developer. (*Id.* at p. 1229-30.) TDE sued, alleging that *those particular communications* interfered with its exclusive negotiating right. (*Id.* at p. 1227-28.) Perhaps not surprisingly given the facts, neither any party nor the Court of Appeal drew any distinction between the overall importance of the project and the importance of the particular issues under discussion: there was no distinction to be drawn in *Tuchscher*.

In subsequent cases where, as here, a distinction exists between the importance of a development and the importance of a particular communication, courts have distinguished *Tuchscher* and focused on the particular facts of the case. (*E.g. Wang v. Wal-Mart Real Estate Business Trust* (2007) 153 Cal.App.4th 790, 803 [distinguishing *Tuchscher* and holding that applying for environmental permits associated with a development was not a matter of public importance triggering the anti-SLAPP statute].). That is exactly what the Opinion below did, consonant with both *Tuchsher* and subsequent cases limiting it to its particular facts. (*Graffiti Protective Coatings, Inc. v. City of Pico Rivera* (2010) 181 Cal.App.4th 1207, 1224 [explaining that the Court of Appeal has "essentially limited *Tuchscher* to its facts – the development of scenic Bayfront property."].)

B. The Court of Appeal Correctly Held Plaintiffs' Claims Are Based on Conduct, Not Speech.

Petitioner's second attempt to manufacture a decisional conflict—which contends that, because the renewal of the agency agreement would ultimately be the subject of legislative action, any lawsuit that relates to or uses as evidence communications about the agency agreement must be barred by the anti-SLAPP statute (City Petition at 17-19)—is equally tortured.

To implicate the anti-SLAPP statute, the "acts on which liability is based" must consist of protected speech. (*Renewable Resources Coalition, Inc. v. Pebble Mines Corp.* (2013) 218 Cal.App.4th 384, 387.) In making that determination, the trial court must "distinguish between (1) speech or petitioning activity that is mere evidence related to liability and (2) liability that is based on speech or petitioning activity." (*Graffiti Protective Coatings, Inc. v. City of Pico Rivera* (2010) 181 Cal.App.4th 1207, 1214–1215.) In *Tuchscher*, as described above, the plaintiff alleged that "communicating with the mayor and other agents and employees of the city" and "facilitating communications and meetings between defendants" were the basis of liability. (*Tuchscher*, *supra*, 106 Cal.App.4th at p. 1228) Hence the gravamen of the complaint was communication, and the anti-SLAPP statute applied; this does not appear to have been even disputed.

Here, by contrast, Plaintiffs' interference claims turn on the *actions* of private citizens (the Bloom Defendants), who served as a competing, *de facto* agent for the City at a time when Plaintiffs were contractually entitled to be the City's exclusive agent for dealing with the NFL, and the Defendants' fraud in covering up that interference. Although communications may be relevant to prove liability, that is not enough to trigger the anti-SLAPP statute. (*See Wang*, *supra*, 153 Cal.App.4th at 808 [reversing a trial court order striking claims for breach of contract and fraud arising out of a real estate development because the alleged wrongdoing arose from

Defendants' conduct in "carrying out...contractual duties, seeking to extend escrow, requesting the execution of documents, and other practices within the scope of the parties' contractual relationship."]; *Graffiti Protective Coatings*, 181 Cal.App.4th at 1224 ["Although the City's communications may be of evidentiary value in establishing that it violated the law, liability is not based on the communications themselves."].).

The Opinion below understood and engaged with this distinction, recognizing that Plaintiffs' claims are based on conduct and therefore do not trigger the anti-SLAPP statute. Moreover, the mere fact that the City would later decide whether or not to renew the Exclusive Agency Agreement is entirely immaterial to Petitioners' breach of (and interference with) that agreement while it was in place. Nothing in *Tuchscher* states otherwise, and no intervention by this Court is needed to harmonize or reconcile the cases.

C. The Bloom Defendants' Petition Should Be Denied

The Bloom Defendants seek review of two issues. The first is substantively identical to the City Petition's first issue, and should be denied for the same reason. Second, the Bloom Defendants contend that Rand's claim is doomed to fail because Rand Resources, LLC was a suspended corporation and therefore purportedly lacks standing to pursue the claims at issue here. But even if that argument had a shred of merit (it does not), it would come into play at the second stage of an anti-SLAPP

analysis, which analyzes Plaintiffs' probability of success. The Court of Appeal reversed at the first stage and stopped there. (Op. at 18.) Thus, there is nothing in the Opinion about Rand's corporate status for this Court to correct, harmonize, or otherwise address.[2]

V. CONCLUSION

The Court of Appeal's decision below is firmly in line with California jurisprudence and presents no conflict with *Tuchscher* or other decisions. The Petitions should be denied.

DATED: July 25, 2016

Respectfully submitted,

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[2] To the extent the Bloom Petition attempts to recast this argument in terms of Rand's standing to proceed in the courts at all, Bloom is wrong. Whatever Rand Resources's former corporate status, it is presently in good stead and has the power to sue in court. (*See, e.g., Friends of Shingle Springs Interchange, Inc. v. County of El Dorado*, (2011) 200 Cal.App.4th 1470, 1484 [holding that once the delinquent taxes have been paid, corporate powers are restored, including the power to sue and defend].)

CERTIFICATE OF WORD COUNT

(Cal. Rule of Court 8.204)

The text of this brief consists of 3,236 words, as counted by the Microsoft Word program used to generate this brief.

DATED: July 25, 2015

Respectfully submitted,
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is: 550 South Hope Street, Suite 1850, Los Angeles, California 90071.

On July 25, 2016, I served the foregoing document(s) described as:
ANSWER TO PETITIONS FOR REVIEW; APPLICATION FOR PERMISSION TO FILE JOINT ANSWER
on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

SEE ATTACHED SERVICE LIST

[ ] BY FIRST CLASS MAIL. I placed such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

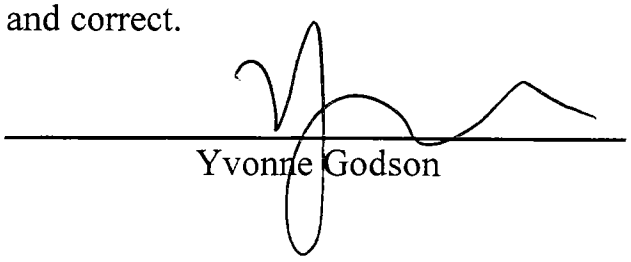
[X] BY OVERNIGHT COURIER. I am familiar with the practice at my place of business for collection and processing of packages for overnight delivery by Federal Express. Such correspondence with delivery fees paid will be deposited with a facility regularly maintained by Federal Express for receipt on the next business day.

[ ] BY ELECTRONIC MAIL. I caused a copy of the document(s) to be sent from email address yvonne.godson@hysmlaw.com to the persons at the email addresses listed on the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

[ ] BY PERSONAL SERVICE. I caused the documents described above to be served on the parties to this action by requesting that a messenger from ASAP Legal Solution Attorney Services deliver true copies of the above-named documents, enclosed in sealed envelopes.

Executed on July 25, 2016, at Los Angeles, California.

[X] (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.



Yvonne Godson

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