Case No. S239777

IN THE SUPREME COURT 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 Court of Appeal
Fourth Appellate District, Division Three
Court of Appeal Case No. G052660
Orange County Superior Court Case No. 30-2013-00665314
Honorable Deborah C. Servino

ANSWER BRIEF ON THE MERITS

Bradley P. Knypstra (SBN 177901)
Grant Hermes (SBN 291822)
KNYPSTRA HERMES LLP
18200 Von Karman Avenue, Suite 730
Irvine, CA 92612
Tel: (949) 679-9202
Fax: (949) 679-9088
brad@khtriallawyers.com
grant@khtriallawyers.com

Attorneys for Plaintiffs and Respondents Newport Harbor Ventures, LLC and Vertical Media Group, Inc.

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brad@khtriallawyers.com
grant@khtriallawyers.com

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SUMMARY OF ARGUMENT

1. After waiving their right to file an anti-SLAPP motion, Appellants should not get the benefit of being able to reassert an anti-SLAPP motion to challenge causes of action and allegations of protected conduct that and were pled and remained unchanged in the Complaint filed 24 months prior, the First Amended Complaint ("FAC") filed 19 months prior, the Second Amended Complaint ("SAC") filed 16 months prior, all because plaintiff elected to amend its complaint and add new theories of liability supported by allegations of the same protected conduct that were previously pled in every complaint and the merits of which were thoroughly tested through the following litigation:
    a. Demurrer to Complaint, FAC, SAC, Third Amended Complaint ("TAC")
    b. Motion to Strike to Complaint, SAC
    c. Motion for Judgment on the Pleadings against SAC
    d. Motion for Summary Judgment against SAC
    e. Motions to Compel Depositions
    f. Motions to Compel Answers to Interrogatories
    g. Motions to Compel Production of Documents
    h. Motions to Compel Further Responses to Form Interrogatories
2. Enabling an automatic reset of the 60 day deadline to file an anti-SLAPP motion to all causes of action regardless of the fact that the protected conduct that is at the heart of each cause of action has been pled in every complaint will allow Appellants to continue their litigation strategy—delay and postpone the jury trial at all costs by using the anti-SLAPP proceedings' stays as a tactic to cause further delay.
3. This is not a case where Respondents are utilizing artful pleading and trying to sneak in allegations of protected conduct that were not present in prior complaints, instead this is a case where Appellants are utilizing

artful litigation tactics through every imaginable dispositive motion to delay Respondents' right to have this case tried before a jury.

4. Nothing in the anti-SLAPP statute requires a plaintiff to make an election between the breach of contract and quantum meruit causes of action in response to the anti-SLAPP motion and forcing a plaintiff to make this election 60 days into the litigation would be severely prejudicial, would serve no purpose, would unduly limit the scope of discovery, and only cause delay by forcing plaintiffs to file motions to amend a complaint after evidence obtained during discovery better supports the causes of action plaintiff was forced to abandon.
5. Respondent NHV should not be affected by the ruling of this Court as it has only pled two equitable claims and no breach of contract claims.

STATEMENT OF FACTS

I. THE PROPERTY, SUBLESSOR, AND SUBLESSEE

Appellant/Defendant Morris Cerullo World Evangelism ("MCWE") acquired a ground lease for 3101 West Coast Highway, Newport Beach, CA ("Property") that terminates on November 18, 2018. (Volume 1 of Clerk's Transcript at pp. 135[1]; 2 CT 341; 4 CT 1028). MCWE also owned the office building, marina, and parking structure ("Improvements") on the Property. On January 26, 2004, MCWE subleased the Property to Newport Harbor Offices and Marina ("NHOM") that also expired on November 18, 2018. ("Sublease"). (4 CT 1026:6-11; 2 CT 393). As part of the Sublease, MCWE lease the land and sold the Improvements to NHOM. (4 CT 1027:12-16). To finance part of the purchase of the Improvements, a wholly owned subsidiary of MCWE, Plaza Del Sol Real Estate Trust ("PDSRET") loaned NHOM $1,150,000. (4 CT 1030:5-24).

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

II. SUBLESSEE'S DEFAULT

After entering into the Sublease, NHOM began operating in default of the Sublease by failing to make required payments and failing to maintain the Improvements ("Default"). (4 CT 1031:3-24; 1 CT 135-136, para. G). Due to NHOM's failure to maintain the Property, MCWE wanted NHOM evicted because at the expiration of NHOM's Sublease, MCWE would be obligated to fix and pay for the deferred maintenance NHOM failed to perform on the Improvements. (4 CT 1032:15-20, 1039:3-14; 1 CT 135-137).

III. APPELLANTS HIRE RESPONDENTS TO INITIATE AN UNLAWFUL DETAINER ACTION AGAINST SUBLESSEE

As a solution to MCWE's problem with NHOM's Default, Dennis D'Alessio, on behalf of his company Newport Harbor Ventures ("NHV"), agreed to take the necessary actions to evict NHOM for its Default and in exchange, MCWE would assign its ground lease for the Property to NHV so NHV could take over the Property and Improvements once NHOM was evicted and have the opportunity to operate a successful business venture at the Property. (4 CT 1065 para. 2-3).

Thus, on March 3, 2011, NHV, MCWE, and PDSRET entered into a contract titled Asset Management Agreement with Option to Acquire Assignment of Ground Lease. ("Asset Management Agreement"). (4 CT 1065 para. 4). **As consideration for the Asset Management Agreement, NHV agreed to pay for all the expenses and costs associated with evicting NHOM and in return, Appellants agreed to give NHV an irrevocable option to acquire MCWE's ground lease with the Property owner**, resulting in NHV acquiring the Property and Improvements so NHV could operate its business venture until November 18, 2018. (4 CT

1065 para. 4). Appellants also promised NHV that they would try to extend the ground lease past November 18, 2018. (4 CT 1065-1066 para. 4).

IV. MODIFICATION OF ASSET MANAGEMENT AGREEMENT

In light of NHOM's Default, NHV and Appellants anticipated that the eviction of NHOM would be a quick two to three month process, even if an unlawful detainer action had to be filed and prosecuted. (4 CT 1066 para. 5). Once NHV realized that it would have possession of the Property and Improvements in two to three months, Mr. D'Alessio (Manager of NHV) wanted to have the entity who was going to operate the Property after NHOM was evicted to also have a real estate broker's license so that it could take over the property management of all the subleases that NHOM had established with the subtenants at the Property. (4 CT 1066 para. 5). As a result, NHV and Appellants agreed to modify the Asset Management Agreement to have another company of Mr. D'Alessio, Vertical Media Company ("VMG"), be the Asset Manager and evict NHOM. (4 CT 1066 para. 6). Thus, on April 22, 2011, NHV, MCWE, and PDSRET modified the Asset Management Agreement to replace NHV as the asset manager with VMG. ("Modification"). (4 CT 1066 para. 6).

V. RESPONDENTS INITIATED THE UD ACTION AND PAID ALL THE ATTORNEYS' FEES AND COSTS

In April of 2011, Respondents retained Darryl Paul, Esq. to begin the eviction process of NHOM. (4 CT 1067 para. 9). Mr. Paul drafted and served the required notices on April 22 and May 26 of 2011 for the eviction process of NHOM. (4 CT 1067 para. 9). On June 20, 2011, Mr. Paul also entered into a retainer agreement with Appellants wherein Mr. Paul informed Appellants that Mr. D'Alessio and his related companies VMG and NHV choose Mr. Paul to file an unlawful detainer action against

NHOM on behalf of MCWE. (4 CT 1067 para. 10, 1100-1104). On June 21, 2011, Mr. Paul, on behalf of plaintiff MCWE filed an unlawful detainer action against NHOM. ("UD Action"). (4 CT 1067 para. 11). Mr. Paul then litigated the UD Action for over 14 months and billed Respondents for the attorneys' fees and costs. (4 CT 1067 para. 11, 1042:12-21).

VI. APPELLANTS UNILATERALLY ENTER INTO A SETTLEMENT AGREEMENT OF THE UD ACTION AND DEPRIVE RESPONDENTS THE BENEFIT OF THEIR BARGAIN

Without notifying their attorney, Mr. Paul, or Respondents, Appellants began settlement discussions with NHOM. (4 CT 1043:2-10, 1067 para. 12). On August 15, 2012, Appellants entered into a settlement agreement for the UD Action wherein they agreed to dismiss the UD Action in exchange for a lump sump payment of $400,000, of which Appellants received $300,000 and promised to get NHOM a lease extension past the expiration of their lease. ("Settlement Agreement"). (4 CT 1041:6-7, 1044:19-22 148:17-22, 1106-1109). Appellants' actions were in direct violation of paragraph 10 and 18 of the Asset Management Agreement. (1 CT 140, 143-144; 4 CT 1068 para. 13).

By deciding to put their interest ahead of Respondents and enter into the Settlement Agreement, which caused the October 9, 2012 trial date in the UD Action to not to go forward, Appellants deprived Respondents of the ability to evict NHOM and exercise the option to take over the Property and operate a business venture. (4 CT 1068 para. 15).

ARGUMENT

I. THE FOURTH DISTRICT CORRECTLY HELD THAT AN ANTI-SLAPP MOTION CANNOT BE USED TO ATTACK CLAIMS THAT COULD HAVE BEEN CHALLENGED IN PREVIOUS COMPLAINTS

The Fourth District succinctly stated:

> 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. [*Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism* (2016) 6 Cal. App. 5th 1207, 1219]

After two years, four Demurrers, two Motions to Strike, three amended Complaints, oral and written discovery, depositions, Motion for Judgment on the Pleadings, Motion for Summary Judgment, and this ant-Slapp motion, the bedrock of Respondents' allegations and causes of action throughout every pleading have remained the same—Appellants' act of signing the Settlement Agreement caused Plaintiff to suffer damages. (4 CT 1738).

a. Appellants' would receive an unfair and unjust benefit if they could automatically file an anti-Slapp motion anytime an amended complaint was filed, despite choosing to waive their right to bring this motion by not filing within 60 days of the first time the protected conduct was alleged and that remained unchanged through each amended complaint

If Appellants wish to avail themselves of the anti-Slapp motion and strike causes of action or allegations of protected speech, they should be

required to file the motion within 60 days of those allegations and causes of action first appearing in a complaint. Instead, Appellants choose to waive their right to file an anti-Slapp motion by not filing this motion within 60 days of the alleged protected conduct being pled in the Complaint, and arguably the FAC, and SAC. Rather, Appellants choose to attack the complaint, FAC, and SAC through every other possible law and motion tool (Demurrer, Motion to Strike, Motion for Judgment on Pleadings, Motion for Summary Judgment) and only after those were exhausted, Appellants filed this anti-Slapp motion two years after the protected conduct was first alleged in a complaint.

Simply because Respondents elected to file a Motion to Amend its SAC to add new theories of liability (promissory estoppel and quantum meruit for Respondent VMG—who also has a breach of contract and breach of covenant of good faith and for Respondent NHV who has only these equitable claims) based on the same alleged protected conduct that was in every pleading, Appellants, who willingly choose to waive their right to file an anti-Slapp motion 24 months prior against the Complaint, should not get a renewed right and benefit of being able to refile and reassert a right they waived two years ago.

The purpose of resetting the 60-day time period is to prevent a plaintiff from artfully pleading around the anti-Slapp statutes.

> 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. (*See Lam, supra*, 91 Cal. App. 4th 832, 840–841 ["Causes of action subject to a special motion to strike could be held back from an original complaint...."].) 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 *Brar*, *supra*, 115 Cal. App. 4th 1315, 1318. (*Hewlett-Packard Co.*, 239 Cal. App. 4th 1174, 1192 n.11).

Respondents have not artfully omitted the allegations containing the protected speech that make them subject to an anti-Slapp motion. The alleged act of Appellants' entering into the Settlement Agreement has been the bedrock of contentious litigation between Appellants and Respondents from day one and explicitly present in the Complaint, FAC, and SAC.

Appellants could have filed their anti-Slapp motion attacking those allegations and causes of action containing the protected speech 60 days after the Complaint was filed. Instead, Appellants filed their anti-Slapp motion only after their attempts to dispose of Respondents' SAC through a Motion for Judgment on the Pleadings and Motion for Summary Judgment failed—likely in recognition of their failure to file the motion at the inception of the case. Simply put, Appellants should not get another chance to bring a dispositive motion at this late stage of the litigation after both parties have invested hundreds of hours of resources, thousands of dollars in costs, over two years of litigation, and four complaints, all of which have the alleged protected speech at the heart of each complaint and cause of action—Appellants act of entering into the Settlement Agreement.

b. Enabling an automatic reset of the 60 day clock to file an anti-Slapp motion allows Appellants' to continue their litigation tactics, which contradict, frustrate, and diminish the purpose of the anti-Slapp statute

"An anti-SLAPP motion is not a vehicle for a defendant to obtain a

dismissal of claims in the middle of litigation; it is a procedural device to prevent costly, unmeritorious litigation at the initiation of the lawsuit." (*San Diegans for Open Government v. Har Construction, Inc.* (2015) 240 Cal. App. 4th 611, 625-626). "When a case has been pending long after the 60-day period, the parties have presumably engaged in pretrial litigation and the purposes of an anti-SLAPP motion are no longer applicable." (*Id.* at 626). In *San Diegans for Open Government*, the parties served and responded to written discovery, appeared before the court on multiple motions, and the court stated "[a]t that point, the parties were free to bring other dispositive motions (e.g., a motion for summary judgment or judgment on the pleadings), but the procedurally complex anti-SLAPP statutory scheme was no longer applicable." (*Id.*)

Appellants' failure to timely act has subverted the statutory purpose of the anti-Slapp statute:

> By failing to act within this time, a defendant incurs costs—and permits the plaintiff to incur costs—that a timely motion might be able to avert. As these costs accumulate in the course of conventional discovery and motion practice, the capacity of an anti-SLAPP motion to satisfy the statutory purpose diminishes. And as the utility of the motion diminishes, so does the justification for the statute's deviations from more conventional modes of disposition. It is therefore to be expected that every case will come to a point beyond which an anti-SLAPP motion simply cannot perform its intended function. (*Hewlett-Packard Co. v. Oracle Corp.* (2015) 239 Cal. App. 4th 1174, 1189)

The parties are well beyond the middle of litigation and every available procedural device and dispositive motion to prevent costly, unmeritorious litigation of this lawsuit has been filed by the Appellants and ruled on. This case is ready to be tried before a jury. The pleadings have been well vetted and have proven their merit through a Motion for Summary Judgment and all the evidence presented to the lower court

through countless filings.

In addition to testing the foundation of a meritless lawsuit, "the statutory deadline also seeks to avoid tactical manipulation of the stays that attend anti-SLAPP proceedings." (*San Diegans for Open Government*, 240 Cal. App. 4th at 624). All that is being accomplished by Appellants' anti-Slapp motion and appeal at this late stage of the litigation is unreasonable delay in presenting this case to a jury.

c. The 60 day time limit allows Appellants to test the foundation of Respondents' action before having to devote time, energy and resources litigating a "meritless" lawsuit

The proper time to file the anti-Slapp motion would have been no later than September 27, 2013, 60 days after the complaint was filed to test the "foundation" of Respondents' claims and allegations that give rise to the protected conduct, which have been consistently pled in every pleading, before devoting hundreds of hours in law in motion practice, discovery, and motions to compel. The purpose of the 60-day time limitation to file a anti-Slapp motion is to permit the defendant "to test the foundation of the plaintiff's action before having to 'devote its time, energy and resources to combating' a 'meritless' lawsuit." (*San Diegans for Open Government*, 240 Cal. App. 4th 611, 624 (citing *Platypus Wear, Inc. v. Goldberg* (2008) 166 Cal. App. 4th 772, 783)). An anti-Slapp motion's statutory purpose cannot be fulfilled "if the parties have already incurred substantial expense preparing the case for a more conventional disposition." (*Hewlett-Packard*, 239 Cal. App. 4th at 1190). The purpose of these timing requirements is to facilitate the dismissal of meritless actions early in the litigation to minimize the cost to the defendant.

Appellants could have filed their anti-Slapp motion within the first 60 days after the complaint was filed to test the foundation of Respondents'

claims and allegations, but choose not to. Instead, Appellants undertook a costly and highly litigious strategy. The filing of four Demurrers, two Motions to Strike, Motion for Judgment on the Pleadings, Motion for Summary Judgment, and countless discovery requests that resulted in lengthy meet and confer letters and motions to compel is indicative of a scorched earth litigation strategy. After all of this, only then did Appellants decide to file their anti-Slapp motion "to test the foundation of the plaintiff's action before having to 'devote its time, energy and resources to combating' a 'meritless' lawsuit." (*San Diegans for Open Government*, 240 Cal. App. 4th at 624).

> As we have said, where the parties have already incurred substantial expense and the case has progressed to its later stages, it is almost certain to be too late for the motion to accomplish any legitimate purpose. No showing of blamelessness or justification on the part of the defendant can restore what time has destroyed. All the motion can accomplish is delay. (*Hewlett-Packard Co.*, 239 Cal. App. 4th at 1192).

Appellants were presented with multiple opportunities to file their anti-Slapp motion—after the Complaint, FAC, and SAC was filed. Appellants choose not to avail themselves of the protections the anti-Slapp statutes provide to a defendant who seeks to minimize the time, energy, and resources to combat a "meritless" lawsuit. Instead, Appellants choose to attack each pleading aggressively with law and motion and file multiple dispositive motions, which required a huge evidentiary undertaking to support and oppose. Appellants' litigation strategy should not be rewarded at this late stage of the litigation and all that has been accomplished is unreasonable delay.

d. *Baral* does not apply to this case as Appellants never asserted their right to file an anti-Slapp motion and the protected conduct has been pled from the start of the lawsuit and continued throughout each amended complaint

Baral is distinguishable from the facts in this case. First, the defendant in that case choose to attack the allegations and causes of action within 60 days of filing the initial complaint. (*Baral v. Schnitt* (2016) 1 Cal. 5th 376, 383). They then went on and filed another anti-Slapp motion to an amended complaint. (*Id.*) The defendant in *Baral* believed that their protected conduct was being unduly burdened by a frivolous litigation and chose to file an anti-Slapp motion. (*Id.*) The defendant's then continued to avail themselves of the anti-Slapp motion throughout the amended complaints to continue to attack what they believed was a frivolous lawsuit. (*Id.* at 383-84) At no point did they let the 60 day deadline lapse and waive their right to file this motion. (*See Id.*)

On the other hand, Appellants could have filed an anti-Slapp motion within 60 days of the initial complaint as that pleading contained the same allegations and facts giving rise to the protected conduct. They could have availed themselves of the protections and expediency of the anti-Slapp motion two months into the litigation to "shield [their] constitutionally protected conduct from the undue burden of frivolous litigation." (*Id.* at 393). Instead, they choose to let the 60 day deadline lapse, file countless demurrers, propound and respond to written discovery, depositions, oppose motions to compel, file motion for judgment on the pleadings, and go through the costly and time consuming process of filing a motion for summary judgment to the SAC.

Only after exhausting all of their litigation tactics to dispose of the

complaint (namely the breach of contract and breach of covenant, which have remained throughout the complaints and supported by the same allegations that are considered the protected conduct), do they attempt to get yet another bite at the apple.

Baral clearly stated that "courts may rule on plaintiffs' specific claims of protected activity, rather than reward artful pleading by ignoring such claims if they are mixed with assertions of unprotected activity." (*Id.*) This however does not apply to the facts of this case. The specific claims of protected activity have been pled, been at the heart of, and remained the same throughout every complaint. If Appellants wanted to avail themselves of the case law established in *Baral*, Appellants were required to file an anti-Slapp motion within 60 days after the first time the protected conduct (i.e. – Appellants' act of signing the Settlement Agreement caused Plaintiff to suffer damages) was pled in a complaint on July 29, 2013.

This is not a case where Respondents are utilizing artful pleading and trying to sneak in allegations of protected conduct that were not present in prior complaints, instead this is a case where Appellants are utilizing artful litigation tactics through every imaginable dispositive motion to delay Respondents right to have this case tried before a jury.

e. The Fourth District's ruling upholds the ruling in *Baral* contrary to Appellants' argument

Appellants are misinterpreting the Fourth District's ruling and how it interacts with the ruling in *Baral*. Appellants state:

> After all, the Fourth District held that only "newly added claims" can be stricken from an amended complaint. Excising only the new "claims" - the new legal theories of recovery - would allow allegations of protected activity to remain in the complaint, because those allegations are necessary to support the old claims. This contradicts *Baral v. Schnitt*, which allows an anti-SLAPP motion, "like a conventional motion to

> strike," to "attack parts of a count" and "challeng[e] particular allegations within a pleading." *Baral*, supra, 1 Cal. 5th at 393-394. (Opening Brief pp 19-20).

However, the Fourth District held:

> **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**. (*Newport Harbor Ventures, LLC,* 6 Cal. App. 5th at 1219)

The Fourth district's holding reopens the time to file an anti-Slapp motion when new allegations that are protected conduct are added to an amended complaint or cause of action. Unlike Appellants' argument, this ruling does not require the Court to overrule *Baral*, which allowed anti-Slapp motions to strike allegations arising out of the right of petition, regardless of how they are organized in the complaint. The Fourth District specifically states that adding new allegations that make previously pled causes of action subject to anti-Slapp motion reopens the 60 day deadline.

Specifically for this case, allegations of protected activity have not been added to the amended complaints, they have been pled and used to support the causes of action from the initial complaint through the TAC.

II. ANTI-SLAPP MOTIONS ARE INTENDED TO WEED OUT, AT AN EARLY STAGE, AND TEST THE FOUNDATION OF *MERITLESS* CLAIMS—NOT CLAIMS THAT ARE INCONSISTENT AS THIS WOULD BE SEVERELY PREJUDICIAL TO FORCE RESPONDENT TO MAKE AN ELECTION OF WHICH CAUSES OF ACTION TO PURSUE 60 DAYS AFTER FILING A COMPLAINT, ESPECIALLY

BEFORE ANY DISCOVERY IS CONDUCTED

Unlike a summary judgment motion or trial were a plaintiff has all of the evidence to support the claims it wants to pursue, a plaintiff does not know what evidence will be obtained during discovery and the course of litigation, and what theories of liability will be best supported by the evidence 60 days into the litigation. This is why typically, a complaint starts out with a dozen causes of action and only a few actually get presented at trial and ruled upon by the trier of fact.

Forcing a plaintiff to choose one cause of action over another, if they are inconsistent with one another, at the early stage of litigation when an anti-Slapp motion is brought would serve no purpose, would unduly limit the scope of discovery, and only cause delay. If a plaintiff were forced to elect breach of contract claims over equitable promissory estoppel claims two months into the litigation, then a plaintiff would be forced to seek leave to amend its complaint in the future to add back those equitable promissory claims if the evidence obtained during discovery supported those claims and abandon the breach of contract claims. Then, under Appellants' arguments, they could file another anti-Slapp motion because an amended complaint was filed. This cycle could occur multiples times throughout the litigation. Applying a summary judgment standard over a demurrer standard as Appellants are requesting would simply go way beyond the purpose of an anti-Slapp motion.

The central purpose of anti-Slapp motions are to "screen[] out meritless claims that arise from protected activity, before the defendant is required to undergo the expense and intrusion of discovery." (*Baral v. Schnitt* (2016) 1 Cal. 5th 376, 392; *see Platypus Wear, Inc. v. Goldberg* (2008) 166 Cal. App. 4th 772,776 [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"].

"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*, 1 Cal.5th at 384-385, fn. omitted.)

If the Court does not weigh evidence nor resolve conflicting factual claims, then the Court should similarly not limit the types of claims and whether they legally conflict (i.e. – inconsistent legal and equitable claims). Whether Respondent has one, two, or ten causes of action, they simply need to have the requisite "minimal merit" to proceed. Respondents should not be forced into an election of causes of action at the earliest stages of the case, this would be severely prejudicial and limit Respondents' right to sue, conduct discovery, and pursue valid claims and remedies that individually have "merit" and are viable claims against Appellants. Appellants have other means of limiting and disposing of claims that are inconsistent with one another once the case gets closer to trial or even during trial based on the evidence that gets presented to the trier of fact.

As the Fourth District properly stated "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." (*Newport Harbor Ventures,* LLC, 6 Cal. App. 5th at 1219).

III. RESPONDENTS CAN SHOW THEY WILL PREVAIL ON ALL CAUSES OF ACTION

a. Respondent VMG already established a probability of success as to the breach of contract and covenant of good faith claims as the court denied Appellant's Motion for Summary Judgment as to these two causes of action

Appellants also ask the Court to consider the second prong of the anti-Slapp motion with respect to the breach of contract and breach of covenant of good faith. Appellants should not get what would be now multiple bites at the apple to attack these allegations and causes of action through an anti-Slapp motion. It is illogical that the "central purpose" of "screening out meritless claims that arise from protected activity, before a defendant is required to undergo the expense and intrusion of discovery" is upheld when these two causes of action have survived countless demurrers, a motion for judgment on the pleadings, and a motion for summary judgment. After a summary judgment motion, the only thing left is to present the same evidence at trial to a jury—not restart the clock and go through the whole "summary-judgment-like procedure" again as you do in the second step of the anti-Slapp process.

As with Appellants' Motion for Summary Judgment, which the Court denied on July 31, 2015, the anti-Slapp motion raises the exact same arguments and Appellant's Opening Brief specifically focuses on whether there was a breach of the Asset Management Agreement and whether Respondents suffered any damages. Other issues were raised by Appellants in their anti-Slapp motion and their brief for the Fourth District appeal, such as standing issues and contract illegality, but these are not raised in their Opening Brief and are not addressed in this Brief.

b. Respondent VMG can establish it suffered damages due to Appellants' breach of the Asset Management Agreement

Appellants attempt to argue that they did not breach the Asset Management Agreement because the Asset Management Agreement "does not forbid Appellants from settling the UD Action."

The reason why Respondents agreed to act as MCWE's Asset Manager and pay for all the expenses and costs associated with evicting MCWE's defaulting tenant, NHOM, was to receive an irrevocable option to acquire MCWE's rights under the ground lease as expressly contemplated in the Asset Management Agreement. (4 CT 1065 para. 3-4). After NHOM was evicted, Respondents wanted to take over control of the Property and Improvements and operate a profitable business at the Property. (4 CT 1065 para. 3-4).

Paragraph 18 of the Asset Management Agreement states in part:

> **No party will take any act in derogation of the rights of any other party hereto, nor will any party take any act that would or could or will deprive the other party of the benefits under this Agreement.** (1 CT 143-144) (emphasis added).

Under the Asset Management Agreement, Respondents were given an irrevocable option to acquire an assignment of the ground lease that MCWE had with the Property owner. **By executing the Settlement Agreement, Appellants violated paragraph 18 of the Asset Management Agreement by taking an act in derogation of the rights of Respondents that "would or could or will deprive [Plaintiffs] of the benefits under [the Asset Management Agreement]."**

By taking this action of executing the Settlement Agreement, Appellants received $300,000 and deprived Respondents the opportunity to

exercise their option under the Asset Management Agreement. (4 CT 1067 para. 12-14, 1044:19-22, 1048:13-25). This conduct constitutes a breach of contract. Further, due to Appellants' acts, the trial in the UD Action was continued. (4 CT 1068 para. 15). At a minimum, Respondents suffer damages by having to wait 3 years before the opportunity to try the UD Action. Appellants used Respondents' resources to litigate the UD Action on their behalf, as MCWE was the plaintiff in the UD Action, then took receipt of $300,000 by settling the case, and left Respondents will the bill for the attorneys fees and costs of litigating the UD Action and deprived Respondents the benefit of their bargain. (4 CT 1068 para. 14-15). Thus, Respondents can establish a probability of success on the breach of contract claims, just like the trial court determined when it denied Appellants' summary judgment motion as to this breach of contract claim.

c. Respondent VMG did not bear any risk of it own injuries

The only reason Respondents have been damaged is because Appellants put their interests ahead of Respondents when **Mr. Artz, on behalf of Appellants decided "I wanted to be paid off on my Note that I was owed, and I wanted to get rid of all the headaches and everything, dealing with lawsuits."** (4 CT 1044:19-22). In fact, Appellants received $300,000 of the $400,000 they were to receive from the Settlement Agreement. (4 CT 1048:20-25). Respondents did not bear any risk of not being able to exercise its option under the Asset Management Agreement because they specifically contracted for a provision that Appellants would take no "act that would or could or will deprive the other party of the benefits under this Agreement." Respondents had no idea that Appellants intended to settle the UD Action without Mr. Paul or Respondents' knowledge. (4 CT 1043:2-10, 1067 para. 12). Thus, Respondents did not

bear any risk of their own injuries and can establish that they suffered damages.

d. Respondent VMG can prevail on the breach of covenant of good faith claim

As discussed above and ruled on by the trial court multiples times, a valid contract exists between the parties and as a result, a valid claim for breach of the covenant of good faith exists as well.

e. Respondents can prevail on their quantum meruit claim and can plead inconsistent claims

As discussed above and as the Fourth District correctly held "NHV and VMG were permitted to plead inconsistent counts....NHV and VMG cannot recover for both breach of contract and common counts....Nothing in the anti-Slapp statute required NHV and VMG to make an election between [these claims] in response to the anti-Slapp motion." (*Newport Harbor Ventures, LLC*, 6 Cal. App. 5th at 1222-23). Further, for purposes of this inconsistent claim argument, it would only apply to VMG as NHV has only pled in the TAC a Quantum Meruit and Promissory Estoppel claim and has no breach of contract claims.

"The underlying idea behind quantum meruit is the law's distaste for unjust enrichment. **If one has received a benefit which one may not justly retain, one should 'restore the aggrieved party to his [or her] former position by return of the thing or its equivalent in money.'** 'The measure of recovery in *quantum meruit* is the reasonable value of the services rendered *provided* they were of direct benefit to the defendant.'" (*E. J. Franks Construction, Inc. v. Sahota* (2014) 226 Cal. App. 4th 1123, 1127-28) (emphasis added). To establish a claim for quantum meruit, the following must be proved (1) that defendant requested, by words or

conduct, that plaintiff perform services for the benefit of defendant; (2) that plaintiff performed the services as requested; (3) that defendant has not paid plaintiff for the services; and (4) the reasonable value of the services that were provided. (CACI 371).

Respondents have provided evidence, as detailed above and in Mr. D'Alessio's declaration that (1) Appellants requested Respondents perform all the services under the Asset Management Agreement, which would have benefited Appellants as discussed below; (2) that Respondents performed these services by serving the appropriate notices of default on April and May of 2011, ordering necessary reports to prove the deferred maintenance, and retaining Mr. Paul to litigate the UD Action; (3) that Respondents have never been compensated by Appellants for these services; (4) that Appellants have been unjustly enriched by the services Respondents' performed, including but not limited to receiving $400,000; and (5) that the total services provided total well over $700,000, specifically $791,605.73. (4 CT 1065-1068).

i. Appellants unjustly benefited from Respondents' asset management services

An "individual may be required to make restitution if he is unjustly enriched at the expense of another. A person is enriched if he receives a benefit at another's expense. The term 'benefit' 'denotes any form of advantage.'" (*Federal Deposit Ins. Corp. v. Dintino* (2008) 167 Cal. App. 4th 333, 346-47) (internal citations omitted). **Respondents can prove that Appellants have unjustly benefited because Appellants expended no costs in litigating the UD Action, yet received $400,000 in exchange for dismissing the UD Action.** (4 CT 1041:25-1042:21, 1048:20-22). The common theme throughout the TAC and this litigation is that Appellants had a tenant, NHOM, who was not maintaining the Property and was in

breach of the lease agreement it had with Appellants. In order to either get NHOM to remedy its violations of the lease or to evict NHOM, certain steps need to be taken—which takes resources and considerable expenses. Appellants requested Respondents perform these services, either get NHOM to remedy the deferred maintenance on the Property or to evict them. Respondents undertook these tasks for over a year. As a result of all of the Asset Management services Respondents provided, Appellants benefited by receiving $400,000 at zero expense. Respondents on the other hand, received nothing and incurred over $700,000 in costs. (4 CT 1068 para. 14-15). As a result, Respondents can show they will likely prevail on their quantum meruit cause of action to remedy this injustice.

f. Respondents' agreed to bear the costs of the UD Action in exchange for the option to acquire the Property and operate a business for the remainder of the Ground Lease—Respondents would never have offered their services otherwise

Appellants attempt to argue that Respondents' quantum meruit claim fails because Respondents expressly agreed to bear all of the costs associated with the Asset Management Agreement and the UD Action. However, the only reason Respondents agreed to act as Asset Manager and pay for all the expenses and costs associated with evicting Appellants' defaulting tenant, was for Respondents to receive something of value in return—an irrevocable option to acquire Appellants' rights under the ground lease for the Property. (4 CT 1065 para. 3). Respondents would never have undertaken the expense and provided the services it rendered to Appellants for free. Had Appellants not entered into the Settlement Agreement, Respondents would have had their opportunity evict NHOM and take over the Property and operate a business for the remainder of the

ground lease. The simple fact is, at the end of the day Appellants have been unjustly enriched by receiving $400,000 through the Settlement Agreement, which resulted from the services Respondents provided under the Asset Management Agreement and Respondents have not received any form of compensation for these services.

g. Respondents can prevail on their promissory estoppel claim and plead inconsistent claims

As discussed above and in length by the Fourth District, "NHV and VMG do not have to elect between a promissory estoppel remedy and a breach of contract remedy. (*Newport Harbor Ventures, LLC*, 6 Cal. App. 5th at 1225). However, to be clear, VMG is the only plaintiff who would have to make this election as NHV does not have any breach of contract remedies pled in the TAC.

The Fourth District correctly analyzed and in doing so, held that the evidence presented in opposition to the anti-Slapp motion established the promissory estoppel cause of action as having the "requisite minimal merit" to proceed. (*Id.* at 1226). Now, instead of reiterating all the arguments they provided to the Fourth District in support of their anti-Slapp motion, Appellants for the first time raise an argument that this claim fails as there is no conduct that would manifest itself into an implied in fact contract. However, this simply is not true from the facts and evidence presented in opposition of the anti-Slapp motion.

At no point while Respondents were acting as the Asset Manager did Appellants ever question or ask Respondents why they were undertaking these responsibilities of an Asset Manager. At no point did Appellants do anything to stop or prevent Respondents from evicting NHOM from the Property, which was being done for the benefit of Appellants to save them from having to be responsible at the end of the lease to fix and pay for the

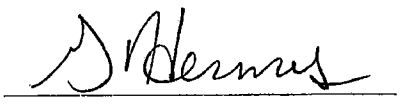
deferred maintenance NHOM failed to perform on the Improvements during their sublease. Appellants were happy sitting on the sideline, being silent, and allowing another person to undertake the burden of evicting their tenant. It is this conduct, in addition to the promises previously made, that require equity to do justice and create an implied in fact contract. No person would ever expend time and resources for the benefit of another without also receiving some benefit. Respondents are not in the charitable business of providing free services to Appellants. The sole purpose for Respondents burdening themselves with evicting NHOM, instituting the UD Action, and incurring over $700,000 in expenses while acting as Asset Manager, was to be able to acquire the Property after NHOM was evicted, so that Respondents could operate a successful business on the Property. (4 CT 1065-1068). Instead what occurred was that Appellants put their interests ahead of all others when Mr. Artz, on behalf of Appellants decided "I wanted to be paid off on my Note that I was owed, and I wanted to get rid of all the headaches and everything, dealing with lawsuits" and entered into the Settlement Agreement to receive $400,000.

CONCLUSION

For the foregoing reasons, Respondents pray that this Court affirm the Court of Appeal's decision.

Respectfully submitted this 20th day of July, 2017, by:

KNYPSTRA HERMES LLP



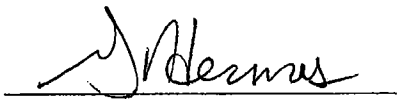
Grant Hermes
Attorney for Plaintiffs and Respondents
Newport Harbor Ventures, LLC and
Vertical Media Group, Inc.

WORD COUNT CERTIFICATION [CRC 8.204(c)(1)]

Counsel for Respondents hereby certifies that this brief contains 6,953 words as measured by Microsoft Office Word for Mac 2011 word processing software.

Dated: July 20, 2017

KNYPSTRA HERMES LLP



Grant Hermes
Attorney for Plaintiffs and Respondents
Newport Harbor Ventures, LLC and
Vertical Media Group, Inc.

PROOF OF SERVICE AND DELIVERY

STATE OF CALIFORNIA)
) SS
COUNTY OF ORANGE)

I, Grant Hermes, declare that:

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action, my business address is 18200 Von Karman Avenue, Suite 730, Irvine, CA 92612.

On July 20, 2017, I served the foregoing document(s):

ANSWER BRIEF ON THE MERITS

on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Steven W. Blake, Esq.
Daniel T. Watts, Esq.
Galuppo & Blake APLC
2792 Gateway Road, Suite 102
Carlsbad, CA 92009

Attorneys for Defendants and Appellants:

Clerk for the Honorable Deborah C. Servino
Orange County Superior Court
Central Justice Center
700 West Civic Center Drive
Santa Ana, CA 92701

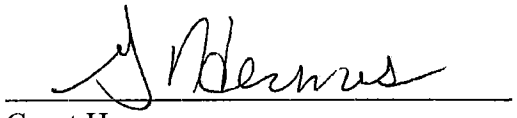
I am readily familiar with the firm's practice of collecting and processing of documents and correspondence for mailing with the United States Postal Service. Under that practice, on the above date, the envelope was sealed and placed for collection and mailing following the ordinary business practices of our office. This results in the envelope being delivered to the United States Postal Service that same day, with postage thereon fully prepaid.

I deposited each such envelope in the mail at Irvine, CA, with postage thereon fully paid.

Service was also made on the Supreme Court of California by depositing an envelope, containing 2 copies of the Answer Brief on the Merits pursuant to California Rules of Court, Rule 8.500-8.552, in the mail at Irvine, CA, with postage thereon fully paid and addressed to: Supreme Court of California, 350 McAllister Street, San Francisco, CA 94102-4797.

Service was also made on the California Supreme Court and California Court of Appeal, Fourth Appellate District, Division Three by filing an electronic copy of the Answer Brief on the Merits through the Court's electronic filing system (TrueFiling).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 20, 2017, Irvine, California.



Grant Hermes