S225090

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. B53620, Affirmed a Judgment Entered by the Superior Court for the County of Los Angeles, Case No. BC475350, The Honorable Maureen Duffy-Lewis presiding

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OPENING BRIEF OF DEFENDANT AND APPELLANT
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I. ISSUES FOR REVIEW

Can a plaintiff avoid application of the anti-SLAPP law, Code of Civil Procedure section 425.16, by merely combining claims arising from protected conduct with claims that do not so arise into what is denominated as a single "cause of action"?

a. Did this Court in *Oasis West* intend to overrule the statement-by-statement analysis of *Taus* when it quoted, without discussion, the "any part of the claim" standard announced as an issue of first impression in *Mann* despite the fact that no party cited or discussed *Mann* or its standard in the briefs before the Court in *Oasis West*?[1]

b. Is what constitutes a "cause of action" under the anti-SLAPP statute different than the well-recognized meaning of that term for purposes of demurrers, motions for summary adjudication, and application of res judicata?

c. Can a plaintiff who loses an anti-SLAPP motion avoid the settled prohibition on amending causes of action stricken by that motion by simply re-alleging the very same conduct under a different name, provided that some *other* conduct—whether protected or not—is then

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[1] (See *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820 [124 Cal.Rptr.3d 256, 250 P.3d 1115]; *Taus v. Loftus* (2007) 40 Cal.4th 683 [54 Cal.Rptr.3d 775, 151 P.3d 1185]; *Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90 [15 Cal.Rptr.3d 215].)

added to the stricken allegations and the plaintiff styles the new amalgamation as a "single" cause of action?

II. SUMMARY OF ARGUMENT

This case squarely presents the issue of whether a plaintiff can avoid the risk of losing an anti-SLAPP motion—and thus insulate himself from the powerful deterrence effect of the anti-SLAPP statute—by combining a "cause of action" alleging protected conduct under a single "count" with another "cause of action" alleging unprotected conduct. In its ruling below, the Second District Court of Appeal ruled that a plaintiff can, in fact, defeat the anti-SLAPP statute by this pleading artifice. In reaching that conclusion, the appellate court ignored the plain meaning of the anti-SLAPP statute and over a century-and-a half of settled precedent about what constitutes a "cause of action" in California. In so doing, the lower court dramatically undermined the anti-SLAPP statute's effectiveness.

In order to combat "the disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances," the anti-SLAPP statute provides a procedure whereby a "*cause of action*" must be stricken if it arises from the exercise of such rights and lacks minimal merit. (See Code Civ. Proc. § 425.16, italics added.) The term "cause of action" for purposes of the anti-SLAPP statute should mean the same thing that "cause of action" has meant in every other area of California jurisprudence in the

past 164 years: a single "primary right" predicated on a single injury, no matter how many legal theories or "counts" that primary right is organized into for purposes of the complaint.[2] California courts routinely use this definition at all stages of litigation, for example when dealing with motions for summary adjudication, demurrers, and res judicata.

Rather than conducting a "primary right" analysis to see whether Baral's *admittedly discrete* allegations constituted two separate "causes of action," the court of appeal applied the so-called *Mann* rule to hold that an anti-SLAPP motion cannot be used to strike anything less than whatever a plaintiff[3] happens to style as a single *count* in his or her complaint. (See *Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 106 [15 Cal.Rptr.3d 215] (hereafter *Mann*).) *Mann* and its progeny reach that widely criticized conclusion by simply assuming, without analysis, that the phrase "cause of action" in the anti-SLAPP statute refers to a count as organized by the plaintiff. (See *ibid.*)

The *Mann* rule is not justified by the anti-SLAPP statute or any

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2 (See *Holmes v. David H. Bricker, Inc.* (1969) 70 Cal.2d 786, 788 [76 Cal.Rptr. 431, 452 P.2d 647] [noting that California adopted the primary right theory in 1851].)

3 For ease of reference, this Brief refers to "defendants" and "plaintiffs" as a shorthand for the parties who are bringing and responding to anti-SLAPP motions, respectively. Defendant Schnitt recognizes that anti-SLAPP motions can also be brought by cross-defendants.

applicable precedent. Perhaps more importantly, it also frustrates the multiple public policies underlying the statute because it allows a plaintiff to plead around the anti-SLAPP statute's protections by combining truly baseless claims (brought solely to chill the exercise of free speech and petition) under a single count with other claims that indisputably could survive a special motion to strike.

This case provides a perfect illustration of why this Court should reject the *Mann* rule. Plaintiff Baral initially filed a complaint against Defendant Schnitt that included two different "counts" for defamation arising out of Schnitt commissioning, participating in, and refusing to "correct" a report known as the Moss Adams Fraud Audit. The Moss Adams Fraud Audit, triggered by admitted embezzlement of corporate funds by Baral's son, both quantified the amount of that embezzlement and identified evidence showing that Baral had also embezzled corporate funds. (Appellant's Appendix ["AA"] 21-24.) The trial court granted Schnitt's special motion to strike, holding that Schnitt's conduct regarding the Moss Adams Fraud Audit arose from protected petitioning activity and that Baral could not show a probability of success due to the litigation privilege. (AA264, 276-277.)

But the baseless litigation did not end. After abandoning his appeal of that adverse anti-SLAPP order (AA337, 357), Baral simply amended his complaint to re-allege the very same conduct. (AA372-AA379.) He did so

by combining the previously stricken allegations regarding the Moss Adams Fraud Audit into a single count with other conduct that all parties agreed could not be stricken under the anti-SLAPP statute. (*Id.*) Baral then claimed that, as long as he could survive an anti-SLAPP motion with respect to this *other* conduct, it simply did not matter whether his already-stricken claim could survive a special motion to strike. (AA801-804.) Instead, he argued that he could continue to pursue these already-stricken allegations without any scrutiny from the court whatsoever. (See *id.*) Applying the *Mann* rule, and rejecting the reasoned opinion of their colleagues from the same judicial district,[4] the justices of the Second District Court of Appeal sided with Baral.

This Court should definitively reject the *Mann* rule. The Court should hold that a "cause of action" for purposes of the anti-SLAPP statute is defined by the well-established "primary right" doctrine California has used since 1851. Thus, the Court should hold that a defendant can use a special motion to strike to dispose of a "cause of action" in a complaint, irrespective of how many other "causes of action" happen to be cobbled together with it to form a single "count."

Applying that analysis to the facts of this case, the Court should hold

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[4] (See *Cho v. Chang* (2013) 219 Cal.App.4th 521, 527 [161 Cal.Rptr.3d 846] [rejecting the *Mann* rule].)

that Baral's allegations regarding Schnitt's conduct in connection with the Moss Adams Fraud Audit constitute a distinct "cause of action" that is independently subject to a special motion to strike (just as these allegations were when they were stricken for the first time). It should then reverse the trial court order denying Schnitt's anti-SLAPP motion.

III. BACKGROUND AND FACTS

A. THE FORMATION OF IQ BACKOFFICE

Plaintiff Robert C. Baral ("Baral") alleges that he worked with Defendant David Schnitt ("Schnitt") to form a new business entity called IQ BackOffice, LLC ("IQB") in 2003. (AA892.) IQB was in the business of providing "outsourcing" services to other companies, including accounting and finance services. (AA138.)

The exact nature of Schnitt and Baral's agreement concerning IQB is disputed in this lawsuit, although that dispute is largely immaterial to the issues under review. Schnitt presented admissible evidence that IQB was a single-member LLC in which he was the sole member and sole manager, and that Baral was merely an "economic interest holder" (under former Corporations Code § 17001(n)), who had no right to participate in management. (AA688.) Baral, in contrast, asserts that he and Schnitt entered into an oral agreement supposedly making Baral a co-managing member of IQB, and that Baral therefore had a right to participate in IQB management decisions. (AA892.)

B. SCHNITT PREPARES TO SELL IQB AND BARAL ACCUSES SCHNITT OF FREEZING HIM OUT OF THAT PROCESS

Baral alleges that, sometime in 2010, Schnitt began efforts to sell IQB without Baral's knowledge and approval. (AA894.) When Schnitt told Baral about his efforts to sell the company, Baral became upset. (AA138-139, AA894.) Baral contended that he, as a supposed co-managing member of IQB, should have had input into decisions concerning the sale. (AA139.)

C. SCHNITT UNCOVERS EVIDENCE OF BARAL'S SON'S EMBEZZLEMENT FROM IQB AND COMMISSIONS THE MOSS ADAMS FRAUD AUDIT IN ANTICIPATION OF LITIGATION

In compiling records in preparation for the sale of IQB, Schnitt identified a series of unauthorized IQB checks. (AA688.) Schnitt investigated the matter, and found that the checks were made payable to Baral's son Mitch, who at the time was acting as IQB's bookkeeper. (AA688.) He also uncovered the fact that IQB's QuickBooks accounting records were being deleted, presumably in an attempt to conceal the theft. (AA688.)

Schnitt confronted Baral, who *admitted* that his son had been embezzling money from IQB, agreed to pay the money back, and begged Schnitt not to report the matter to the police. (AA734-736.) Schnitt told Baral that the company needed to do a full investigation in order to identify any additional instances of misconduct and determine the full damage to

the company. (AA735.) Schnitt hired the accounting firm of Moss Adams to conduct an independent forensic analysis. (AA688.) He did so in anticipation of possible litigation with Baral (who admitted that he failed to supervise his son), Baral's company RC Baral & Co. (which provided accounting services to IQB), Baral's son Mitch, potential purchasers of IQB, and others. (AA101-103, 688, 692-693.) It is this audit, referred to in this litigation as "The Moss Adams Fraud Audit," that is at the heart of the dispute currently before this Court.

D. THE MOSS ADAMS FRAUD AUDIT IMPLICATES BARAL IN MISCONDUCT

The Moss Adams Fraud Audit was completed on February 2, 2011, and a written report was issued. (AA59, AA688-89, AA738-748, AA895.) The report not only concluded that Baral's son Mitch had embezzled over $120,000, but also implicated Baral, RC Baral & Co., and others in serious misconduct. (AA738-748.) Among other things, it concluded: Baral paid himself $65,000 in transactions that did not appear to be authorized or supported; Baral conspired to give the company's Chief Operating Officer an unauthorized raise of $220,000; RC Baral & Co. had provided incomplete support for checks Baral wrote on behalf of IQB to RC Baral & Co. totaling $244,072.79; and there was a discrepancy associated with a check for $2,685.72 written out to Baral, suggesting further misconduct. (AA738-748.) Schnitt later disclosed the report to IQB's investors and its

potential purchaser. (AA167-168.) Ultimately, IQB was sold to a company called LiveIt Investments, Ltd. ("LiveIt"). (AA169; AA895.)

Baral was livid about the Moss Adams Fraud Audit and Schnitt's disclosure of its contents. (AA167-169, AA895.) Baral claimed that the allegations of his own misconduct, combined with those regarding his son, threatened to destroy his reputation and consequently hurt him in his business ventures. (AA167-169.)

E. BARAL SUES SCHNITT, ALLEGING THAT SCHNITT DEFAMED HIM AND FROZE HIM OUT OF THE SALE OF IQB

On December 16, 2011, Baral sued Schnitt in Los Angeles Superior Court alleging 18 different counts of misconduct. (AA2.) Sixteen of those counts related to Schnitt allegedly freezing Baral out of the negotiations regarding the sale of IQB to LiveIt (hereafter, "the LiveIt Claim"). (AA16-20, AA24-41.)

The other two—counts Five and Six (collectively, "the Moss Adams Claim")—related solely to an entirely different wrong. (AA21-24, ¶¶ 60-74.) These counts alleged that Schnitt had defamed Baral in connection with the Moss Adams Fraud Audit. Specifically, they asserted that Schnitt had defamed Baral by (1) providing slanderous information to Moss Adams "so as to predetermine conclusions that could discredit and disparage Baral" (AA21, ¶ 61), (2) later publishing the Moss Adams Fraud Audit report to IQB's eventual purchaser and to the other investors in IQB

(AA21-24, ¶¶ 63, 69), and (3) subsequently refusing to allow supposed "errors" in the report to be corrected (AA24, ¶ 69).

F. THE COURT STRIKES BARAL'S COUNTS FOR DEFAMATION AND BARAL DOES NOT PURSUE AN APPEAL OF THAT RULING

Schnitt moved to strike the Fifth and Sixth counts of the complaint under the anti-SLAPP statute, Code of Civil Procedure section 425.16. The trial court granted the motion, holding that "communications made by defendant to accountancy firm and vendors [with] respect to alleged misappropriation of funds" "fall under CCP 425.16 as they are an act in furtherance of the person's right of petition or free speech as 'all activities in connection [with] litigation, including communications preparatory to or in anticipation of litigation, are included in the definition." (AA276.) The court also held that "it is undisputed that plaintiff's son embezzled monies. The defendant had a right to hire Moss Adams to conduct an investigation into the corporate books to determine whether there were other misappropriations made. The declaration of defendant indicates the investigation was made in anticipation of litigation. [¶] Further, the plaintiff is not able to demonstrate a possibility of prevailing on the merits as the Litigation Privilege of [Civil Code section] 47(b) applies to the statements allegedly made by defendant while conducting the investigation in anticipation of litigation." (AA264, 276-277.)

Schnitt had also filed a demurrer to several of the counts alleging the

LiveIt Claim. (See AA16-20, AA24-41.) On the same day that it granted Schnitt's anti-SLAPP motion, the trial court also sustained Schnitt's demurrer in part, with leave to amend. (AA264, 267-272.) The court explicitly—and correctly—did not grant leave to amend with respect to claims stricken by the anti-SLAPP motion. (AA265.)

Baral initially appealed the order granting the anti-SLAPP motion. (AA337.) He later abandoned this appeal. (AA357.)

G. BARAL ATTEMPTS TO AMEND AROUND THE ANTI-SLAPP RULING AND RE-PLEADS LIABILITY BASED ON THE SAME CONDUCT

In an effort to resurrect his stricken allegations, Baral filed a sprawling First Amended Complaint that—in blatant disregard of the trial court's ruling and in violation of the settled ban on pleading around successful anti-SLAPP motions[5]—added an additional sixteen pages of allegations concerning the Moss Adams Claim. (AA279.) Schnitt again moved to strike those counts under Code of Civil Procedure section 425.16. (AA340.)

Before the court could rule on that motion, Baral filed a Second

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[5] It is settled law that a party cannot amend a complaint to re-assert a cause of action previously stricken by an anti-SLAPP motion. (See, e.g., *Simmons v. Allstate Ins. Co.* (2001) 92 Cal.App.4th 1068, 1073 [112 Cal.Rptr.2d 397]; *Schaffer v. City and County of San Francisco* (2008) 168 Cal.App.4th 992, 1005 [85 Cal.Rptr.3d 880]; *Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 Cal.App.4th 1049, 1055-1056.)

Amended Complaint—the one primarily at issue in this appeal. (AA359.) It asserted just four counts for (1) Breach of Fiduciary Duty, (2) Constructive Fraud, (3) Negligent Misrepresentation, and (4) Declaratory Relief. (*Id.*) This time, in an artful attempt to plead his way around the court's prior anti-SLAPP ruling, Baral combined the Moss Adams Claim in the same counts as the separate LiveIt Claim. The misconduct alleged—that Schnitt had slandered Baral to Moss Adams, that he had re-published the Moss Adams Fraud Audit to others, and that he was engaged in an ongoing effort to prevent Baral (and Moss Adams) from supposedly setting the record straight (AA372-AA379)—was *identical* to what he had previously pled as "defamation." (See discussion *supra* p. 9.) Baral, however, claimed that, because he had affixed the labels "breach of fiduciary duty," "constructive fraud," and "declaratory relief" to these allegations, they were no longer the same "cause of action." (AA801.)

Schnitt again filed an anti-SLAPP motion directed solely at the allegations regarding the Moss Adams Claim, arguing that they should again be stricken for the very same reasons that the court struck them the first time. (AA646.) Schnitt did not move to strike the LiveIt Claim. (AA1080.)

The trial court, in a decision by a different judge than the one who had granted the first special motion to strike, denied the anti-SLAPP motion, holding that section 425.16 did not allow striking of "allegations

per se." (AA1116.) Schnitt promptly appealed that decision. The Court of Appeal, following *Mann*, affirmed the trial court's ruling. (Slip. Op., at pp. 20-22.)

IV. STANDARD OF REVIEW

"Review of an order granting or denying a motion to strike under section 425.16 is de novo." (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325 [46 Cal.Rptr.3d 606, 139 P.3d 2].)

Scrutiny under the anti-SLAPP statute involves a familiar two-pronged analysis. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one 'arising from' protected activity. (Code Civ. Proc., § 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim." *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76 [124 Cal.Rptr.2d 519, 52 P.3d 695].

V. ARGUMENT

The Court of Appeal incorrectly concluded that what constitutes a "cause of action" for purposes of the anti-SLAPP statute is whatever a plaintiff arbitrarily combines into a single "count." This Court should reverse that decision by definitively rejecting the *Mann* rule. Not only does that widely criticized rule violate the plain language of the anti-SLAPP statute and the prior reasoned opinion of this Court in *Taus v. Loftus* (2007)

40 Cal.4th 683 [54 Cal.Rptr.3d 775, 151 P.3d 1185] [hereafter *Taus*], it also undermines the fundamental policies for which the anti-SLAPP statute was enacted, by allowing an easy end-run around its protections through artful pleading.

This Court should clarify that the term "cause of action" in the anti-SLAPP statute means the same thing as it does in other areas of California procedure: the alleged violation of a single primary right. The Court should therefore hold that allegations constituting a "cause of action" can be stricken by an anti-SLAPP motion even where a plaintiff seeks to shield them by combining them under a single count with allegations asserting a violation of a different primary right.

Applying that reasoning here, the Court should examine the Second Amended Complaint and hold that the Moss Adams Claim constitutes a distinct "cause of action" that is subject to a special motion to strike. As such, the Moss Adams Claim should have been stricken—just as it was the first time around—because it was barred by the litigation privilege.

A. INDIVIDUAL CAUSES OF ACTION, AS DEFINED BY A PRIMARY RIGHT ANALYSIS, CAN BE STRICKEN BY AN ANTI-SLAPP MOTION

Like other procedural means of resolving part of a lawsuit, an anti-SLAPP motion may be directed at any "cause of action" based on a primary right analysis.

1. The anti-SLAPP statute applies to each "cause of action," a term with a universal meaning in California civil procedure having nothing to do with the organization of the complaint

The language of the anti-SLAPP statute is directed towards an entire "cause of action." It reads:

> A *cause of action* against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

(Code Civ. Proc., § 425.16, subd. (b)(1), italics added.) The anti-SLAPP statute's focus on a "cause of action" is not, of course, unique. At every step, California civil procedure is focused on discerning the causes of action at issue in a case because, ultimately, that is what defines the res judicata effect of a judgment.

As this Court has explained, the violation of a primary right creates one cause of action, no matter how many different legal theories are pled in different counts of a complaint:

> California's res judicata doctrine is based upon the primary right theory. ... "It provides that a 'cause of action' is comprised of a 'primary right' of the plaintiff, a corresponding 'primary duty' of the defendant, and a wrongful act by the defendant constituting a breach of that duty. The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action...."

(*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 904 [123 Cal.Rptr.2d 432] [citations omitted].)

Thus, "[w]hether a complaint in fact asserts one or more causes of action for pleading purposes depends on whether it alleges invasion of one or more primary rights." (*Hindin v. Rust* (2004) 118 Cal.App.4th 1247, 1257 [13 Cal.Rptr.3d 668].) The way in which the complaint is organized is totally irrelevant to this analysis:

> The manner in which a plaintiff elects to organize his or her claims within the body of the complaint is irrelevant to determining the number of causes of action alleged under the primary right theory. "...[I]f a plaintiff alleges that the defendant's single wrongful act invaded two different primary rights, he has stated two causes of action, and this is so even though the two invasions are pleaded in a single count of the complaint."

(*Ibid.* [citations omitted]; see also, *McCoy v. Gustafson* (2009) 180 Cal.App.4th 56, 102-103 [103 Cal.Rptr.3d 37].) As this passage suggests, although the terms "cause of action" and "counts" are "often used imprecisely and indiscriminately" by litigants and courts alike, they actually have separate and precise meanings. (*Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.* (1993) 5 Cal.4th 854, 860, fn. 1 [21 Cal.Rptr.2d 691, 855 P.2d 1263].) "'The cause of action is simply the obligation sought to be enforced.' [Citations.] The same cause of action, of course, may be stated variously in separate counts." (*Eichler Homes of San Mateo, Inc. v. Superior Court of San Mateo County* (1961) 55 Cal.2d 845,

847 [13 Cal.Rptr. 194, 361 P.2d 914].)[6] The two ways of talking about a complaint—one focusing on the substance of a complaint and the other on how it is organized—frequently have little to do with one another. A single cause of action can readily be asserted in multiple counts. At the same time, multiple causes of action could be combined (as they are in this lawsuit) into a single count. The labeling of "counts" has nothing to do with what is at issue or how many causes of action there are.

The primary-right-based definition of "cause of action" is equally applicable at the demurrer and summary adjudication stages as it is to a res judicata analysis. Both demurrers and motions for summary adjudication must be brought against an entire "cause of action," as determined by a primary right analysis. (*Skrbina v. Fleming Companies* (1996) 45 Cal.App.4th 1353, 1364, 53 Cal.Rptr.2d 481 [involving successive demurrers]; *Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848, 1853-1854 [16 Cal.Rptr.2d 458] [involving summary adjudication].) Thus, in both pre- and post-trial phases, California civil procedure uses the term "cause of action" to refer to the invasion of a primary right.

This "primary right" approach is deeply rooted in California law, having been used in this state since 1851. (See *Holmes v. David H.*

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[6] Following this Court's admonitions in this regard, this Brief uses both the terms "count" and "cause of action" in their technical senses.

Bricker, Inc. (1969) 70 Cal.2d 786, 788 [76 Cal.Rptr. 431, 452 P.2d 647].) Although the "primary right" approach is of relatively old vintage, this Court has continued to affirm its centrality to the present day. (See, e.g., *Hayes v. County of San Diego* (2013) 57 Cal.4th 622, 631 [160 Cal.Rptr.3d 684, 305 P.3d 252]; *Mycogen Corp. v. Monsanto Co.*, *supra*, 28 Cal.4th at p. 904; *DKN Holdings LLC v. Faerber* (July 13, 2015, S218597) __ Cal.4th __ [p. 1, fn. 1] [2015 WL 4182820].)

There is no basis whatsoever for concluding that the term "cause of action" means anything different under the anti-SLAPP statute than it means for demurrers, summary adjudication motions, or in evaluating the effect of a judgment. "[I]in enacting a statute, the Legislature is presumed to have knowledge of existing judicial decisions and to have acted in light of those decisions." (*Watts v. Crawford* (1995) 10 Cal.4th 743, 755 [42 Cal.Rptr.2d 81, 896 P.2d 807].) Thus, when a statute uses a word that has a "commonly understood meaning" at the time of the statute's enactment, the court must construe the word in that statute according to its prior usage. (*Ibid.* [defining the phrase "amenable to process" with reference to prior judicial usage of the term]; see also *S.B. Beach Properties v. Berti* (2006) 39 Cal.4th 374, 382 [46 Cal.Rptr.3d 380, 138 P.3d 713] [courts "may not 'ignore the plain statutory language" [of the anti-SLAPP statute] or reach conclusions inconsistent with this language."].) Here, "cause of action" was a well understood term when the anti-SLAPP statute was enacted and

there is no evidence that the Legislature intended to redefine this storied term. Accordingly, this Court must construe "cause of action" to mean what it has always meant in California: the alleged invasion of a single primary right. Indeed, several courts have explicitly so held in the specific context of the anti-SLAPP statute. (*South Sutter, LLC v. LJ Sutter Partners*, L.P. (2011) 193 Cal.App.4th 634, 659 [123 Cal.Rptr.3d 301]; *Marlin v. Aimco Venezia, LLC* (2007) 154 Cal.App.4th 154, 162 [64 Cal.Rptr.3d 488].)

It is true that the anti-SLAPP statute alternatively uses the words "cause of action" and "claim." (Code Civ. Proc. § 425.16, subd. (b) ["A *cause of action* . . . arising from . . . the person's right of petition or free speech . . . shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the *claim*." (Italics added.)].) But, unlike the term "count," there is no reason to believe that "cause of action" and "claim" have different meanings. Indeed, this Court regularly uses the words "cause of action" and "claim" interchangeably, even when discussing primary rights. (See, e.g., *Hayes v. County of San Diego*, *supra*, 57 Cal.4th at p. 631 [noting that "one injury gives rise to only one *claim* for relief" and thus only one "cause of action."]; *Pooshs v. Philip Morris USA, Inc.* (2011) 51 Cal.4th 788, 800, fn. 6 [123 Cal.Rptr.3d 578, 250 P.3d 181].) Thus, the statute's alternative use of the terms "cause of action" and

"claim" only further supports application of a primary right analysis because both refer to the primary right asserted.

Therefore, this Court should hold that a "cause of action" for purposes of the anti-SLAPP statute means what it has always meant in any context under California procedure: the alleged violation of a single "primary right." As such, the trial and appellate courts should have applied a primary right analysis to determine whether the Moss Adams Claim was distinct from the LiveIt Claim, such that the Moss Adams Claim could be subject to a special motion to strike.

2. The lower court erroneously applied the *Mann* rule, which focuses on counts rather than true causes of action

Instead of engaging in a primary right analysis, the appellate court mechanically applied a rule, first announced in *Mann*, *supra*, 120 Cal.App.4th at p. 106, that solely focuses on "counts." *Mann* involved defamation and trade libel claims arising from a contentious falling-out between two companies. The allegations involved both reports to government agencies and other alleged communications. The court of appeal, without any analysis of the definition of "cause of action" or settled defamation law, considered all of these allegations to be part of the same cause of action. (*Id.* at pp. 103-106.)

Mann interpreted a "cause of action" (or claim) to be the same thing as a "count." It did so by holding that no part of a single count for

defamation involving multiple statements could be stricken because the plaintiff could show minimal merit with respect to at least some of the individual statements. (*Id.* at p. 109.) Thus, the court held, as a matter of first impression, that "[w]here a cause of action refers to both protected and unprotected activity and a plaintiff can show a probability of prevailing on *any part of its claim*, the cause of action is not meritless and will not be subject to the anti-SLAPP procedure. ... Thus, 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." (*Id.* at p. 106, emphasis in original.)

The *Mann* court did not explain how different defamatory publications could be part of the same "cause of action."[7] Instead, it seemed to draw a distinction between "theories within a cause of action" and an overall "cause of action," which it interpreted to mean a whole

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[7] Each alleged act of defamation gives rise to a separate cause of action. (See *Martinelli v. Int'l House USA* (2008) 161 Cal.App.4th 1332, 1336 [75 Cal.Rptr.3d 186] ["Martinelli alleges defendant published three libelous statements about her, thus giving rise to three causes of action."] [summary adjudication]; *McGarry v. Univ. of San Diego* (2007) 154 Cal.App.4th 97, 111, fn. 10 [64 Cal.Rptr.3d 467] ["McGarry's defamation claims rest on two distinct sets of allegedly defamatory statements. Accordingly, we evaluate separately each set of statements to determine whether McGarry has shown there is a reasonable probability he will prevail on the merits as to either set of statements."] [anti-SLAPP].)

count. For example, it contended that procedures other than the anti-SLAPP statute could eliminate "any distinct claim within a cause of action" citing case law allowing for summary adjudication. (*Id.*)[8] *Mann*'s citation of summary adjudication authorities for the notion that there are other methods to dispose of "claims" within a "cause of action" was rather curious. After all, the summary adjudication statute, like the anti-SLAPP statute, is directed at resolving entire causes of action. (Code Civ. Proc., § 437c, subd. (f)(1) ["A motion for summary adjudication shall be granted only if it completely disposes of a cause of action...."]; *Hindin v. Rust*, *supra*, 118 Cal.App.4th at p. 1256.) Indeed, the two summary adjudication cases *Mann* cited apply the well-established primary right definition to conclude that parts of the same count can actually be separate causes of action and thus subject to summary adjudication. (*Edward Fineman Co. v. Superior Court* (1998) 66 Cal.App.4th 1110, 1118 [78 Cal.Rptr.2d 478]

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[8] As the above quotation indicates, *Mann* was somewhat imprecise regarding its terminology. On certain instances, it correctly used the words "claim" and "cause of action" interchangeably. (See *Mann*, *supra*, 120 Cal.App.4th at p. 106 [alternatively referring to "parts of a cause of action" and "part of its claim"].) Later, however, the court suggested that a claim is something less than a cause of action. (*Id.* [noting that a defendant "can move for summary adjudication of any distinct claim within a cause of action."].) Defendant respectfully suggests that the confusion may be a result of the fact that the *Mann* court never squarely considered the body of case law concerning what constitutes a "cause of action," "claim," or "count."

["notwithstanding the aggregation of the 23 1991-1993 checks, each constitutes a separate cause of action"]; *Lilienthal & Fowler v. Superior Court*, *supra*, 12 Cal.App.4th at pp. 1853-1854 [complaint based on legal services performed for the same client on two matters alleges two distinct causes of action, no matter how pled, and each can be independently disposed of via summary adjudication].) Nevertheless, the *Mann* court did not appear to notice this error in its reasoning. It instead appears to have concluded that although plaintiff Mann had combined separate causes of action into one count, the court could just avoid "the time consuming task" of parsing the poorly organized complaint.

Many courts have since rejected *Mann*'s reasoning,[9] but those that have followed its lead have likewise assumed, for purposes of the rule, that a "cause of action" was the same thing as a "count." (See *Wallace v. McCubbin* (2011) 196 Cal.App.4th 1169, 1211 [128 Cal.Rptr.3d 205] (hereafter *Wallace*) ["Where a cause of action (*count*) is based on protected activity, the entire cause of action may proceed as long as the plaintiff

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[9] (See *City of Colton v. Singletary* (2012) 206 Cal.App.4th 751, 774 [142 Cal.Rptr.3d 74]; *Cho v. Chang* (2013) 219 Cal.App.4th 521 [161 Cal.Rptr.3d 846]; cf. *Wallace v. McCubbin* (2011) 196 Cal.App.4th 1169, 1202, 1212 [128 Cal.Rptr.3d 205] [rejecting *Mann's* underlying reasoning but ultimately following its holding due to *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820 (124 Cal.Rptr.3d 256, 250 P.3d 1115)].)

shows a probability of prevailing on at least one of the asserted bases for liability." (Italics added.)]; *Burrill v. Nair* (2013) 217 Cal.App.4th 357, 383 [158 Cal.Rptr.3d 332] [refusing to examine separately published instances of alleged defamation].) None have engaged in a "primary right" analysis.

The one court that came closest to engaging in a primary right analysis was *Wallace*, which vigorously criticized the *Mann* rule before reluctantly adopting it. It first noted that "cause of action" in the context of the anti-SLAPP statute should properly mean the same thing as how that term is "classically defined under the primary right doctrine." (*Wallace v. McCubbin*, *supra*, 196 Cal. App. 4th at p. 1190 [citing *McDowell v. Watson* (1997) 59 Cal.App.4th 1155, 1159 [69 Cal.Rptr.2d 692]; see also *id.* at. p. 1181 fn. 5 [discussing the "primary right" analysis in detail].) But, because the *Wallace* court felt it had to apply the *Mann* rule (due solely to this Court's passing mention of it *Oasis West*),[10] it reluctantly held that "cause of action" instead means "count."

Thus, the *Mann* rule seems to have sown a basic confusion in courts, not just about what the anti-SLAPP statute requires, but also on the fundamental issue of what constitutes a "cause of action" under California law.

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[10] As discussed in detail below, *Oasis West* does not, in fact, compel adoption of the *Mann* rule.

3. The *Mann* rule is inconsistent with this Court's holding in *Taus*

The *Mann* rule should also be rejected because it is inconsistent with this Court's reasoned opinion in *Taus*, issued three years after *Mann.* (See *Taus*, *supra*, 40 Cal.4th 683.) *Taus* involved allegations that an academic had committed various unlawful acts in researching and subsequently publishing information about a participant in a prior academic study. (*Id.* at pp. 701-702.) The plaintiff had styled her complaint into four different "counts" for (1) negligent infliction of emotional distress, (2) invasion of privacy, (3) fraud, and (4) defamation. (*Id.*) By the time the case reached the Supreme Court, only two of the legal theories corresponding to those four initial "counts" remained: invasion of privacy and defamation. (*Id.* at p. 711-712.)

Nevertheless, in ruling on the anti-SLAPP motion, this Court did not simply constrain itself to the way the plaintiff had organized the operative complaint to see if she had shown a probability of success[11] on each of her "counts." Instead, the Court examined each distinct act giving rise to liability—i.e., each primary right, even if the Court did not call it that—to see whether plaintiff had stated a valid claim. (*Ibid.*)

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[11] Virtually all of this Court's opinion was focused on prong two of the anti-SLAPP analysis because the Court readily concluded that all of the alleged conduct arose from protected activity. (*Taus*, *supra*, 40 Cal.4th at pp. 712-713.)

As a result of framing the analysis in this way, this Court did exactly the opposite of what the *Mann* rule would require. For example, even though it found that the plaintiff had shown a probability of success for "improper disclosure of private facts" regarding *one* of defendant's acts—falsely representing her identity to obtain private information—the Court did not immediately stop its analysis. (See *id.* at pp. 740-741.) Instead, it conducted a nine-page analysis of each of the other acts supposedly giving rise to an invasion-of-privacy tort[12] and struck *all* of those other claims under the anti-SLAPP statute as lacking merit. (*Id.* at pp. 715-719, 723-726.) The Court's meticulous claim-by-claim analysis, irrespective of how the primary rights violations happened to have been organized in the complaint, is the antithesis of the "find-one-issue-and-deny-the-whole-motion" approach advocated by *Mann*. (See generally, *Wallace*, *supra*, 196 Cal.App.4th at p. 1210 ["One would think that *Taus* would be the death knell for the rule ventured earlier in *Mann*."]; *City of Colton*, *supra*, 206 Cal.App.4th at p. 774 ["From the *Taus* opinion, we learn 'that each challenged basis for liability must be examined individually to determine if the plaintiff has demonstrated a probability of prevailing, and if the plaintiff

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[12] Those acts were: making certain statements about the plaintiff's occupation at an academic conference, obtaining supposedly private information from juvenile court records, and uttering the plaintiff's initials during a deposition. (*Taus*, *supra*, 40 Cal.4th at pp. 717-719, 723-726.)

has failed to do so, then that basis [and that basis alone must be] stricken from the plaintiff's pleading.'" (Citation omitted.)]; *Cho v. Chang* (2013) 219 Cal.App.4th 521, 526 [161 Cal.Rptr.3d 846] [hereafter *Cho*] [same].) Thus, this Court should reject *Mann* as inconsistent with its prior reasoned analysis in *Taus*, as several appellate courts have already done.

4. Adoption of the *Mann* rule is not required by dicta in *Oasis West*

The lower court's reasoning was also based on the incorrect conclusion—reluctantly adopted by some other courts as well[13]—that this Court adopted the *Mann* rule in *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811 [124 Cal.Rptr.3d 256, 250 P.3d 1115] [hereafter *Oasis West*]. *Oasis West* involved an attorney who was sued by a former client for publicly campaigning to thwart that client's redevelopment project on which the attorney had previously represented the client. (*Id.* at pp. 821-825.) The attorney brazenly claimed that the anti-SLAPP statute protected him from being sued for this clear breach of his professional duties, a position rejected by both the trial court and this Court. (*Ibid.*) This Court readily concluded that an attorney could not use the anti-SLAPP statute to

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[13] (See *Wallace*, *supra*, 196 Cal.App.4th at p. 1210 [criticizing the *Mann* rule at length but nevertheless applying it solely because of *Oasis West*].)

protect himself from allegations that he violated his duties of loyalty and confidentiality to a former client in this context. (*Ibid.*)

In generally describing the standard for an anti-SLAPP claim, the Court quoted the "any part of the claim" standard invented by *Mann*:

> If the plaintiff "can show a probability of prevailing on any part of its claim, the cause of action is not meritless" and will not be stricken; "once a plaintiff shows a probability of prevailing on *any part of its claim*, the plaintiff *has established* that its cause of action has some merit and the entire cause of action stands." (*Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 106, 15 Cal.Rptr.3d 215, original italics.)

(*Id.* at p. 820.) No other citation to *Mann* is made in the Court's opinion, and no discussion is provided concerning why this standard, created in *Mann* as a matter of first impression, states the law or how it is to be applied. Rather, it appears the citation was part of a generically described backdrop to the statute, which played no role in the decision.

It is unclear how this quotation from *Mann* found its way into the *Oasis West* opinion. None of the parties before the Court made any argument concerning *Mann* or whether each allegedly protected act needed to be evaluated independently for anti-SLAPP purposes—that simply was not an issue in *Oasis West*. Indeed, *Mann* was not even cited once by any party in the petition for review briefs *or* in the briefs on the merits before

the Court.[14] Nor was there any briefing before the Court about the erroneous nature of the *Mann* standard, how it is inconsistent with *Taus* and longstanding California law concerning the meaning of "cause of action," the criticisms of the *Mann* rule that have been articulated by various courts of appeal,[15] or any of the other matters that one would expect to be discussed before this Court purportedly adopted a new standard for application of the anti-SLAPP statute that is different than that applied on motions for summary adjudication or demurrers. Thus, because the validity of the *Mann* rule was never briefed to the Court nor properly before it, the Court's recitation of it does not suggest that the Court was intending to make new law on this issue with such far-reaching consequences. Defendant respectfully submits that, the Court's quotation of *Mann* was not

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[14] Neither the *Mann* case nor any discussion of this issue appears in the *Oasis West* Petition for Review (2010 WL 1901054), Answer to Petition for Review (2010 WL 2692315), Reply in Support of Petition for Review (2010 WL 2624900), Opening Brief on the Merits (2010 WL 3216311), Answering Brief on the Merits (2010 WL 3973562), Reply Brief on the Merits (2010 WL 4716572), Amicus Curiae Brief of Lawrence J. Fox (2010 WL 5587062), or Response to Brief of Amicus Curiae Lawrence J. Fox (2011 WL 597372).

[15] (See, e.g., *Wallace*, *supra*, 196 Cal.App.4th at pp. 1203-1208; *City of Colton*, *supra*, 206 Cal.App.4th at p. 774; *Cho*, *supra*, 219 Cal.App.4th at p. 527.)

intended as a definitive determination that the anti-SLAPP statute applies a different meaning of "cause of action" than every other procedural statute.

5. The *Mann* rule also should be rejected as antithetical to the underlying purposes of the anti-SLAPP statute

In addition to ignoring the plain language of the anti-SLAPP statute, breeding confusion in lower courts as to what constitutes a "cause of action," and being contrary to this Court's reasoned analysis in *Taus*, this Court should also reject the *Mann* rule because it runs counter to the very goals the Legislature sought to achieve in enacting the statute. These important arguments (which largely animated the persuasive rulings in *City of Colton* and *Cho*, as well as the reasoning of *Wallace*) are discussed in detail below.

a) The Mann rule dramatically undermines the anti-SLAPP statute by allowing the statute's protections to be easily pled around

As this Court has previously stated, "the fundamental purpose of the anti-SLAPP statute [is] to minimize the chilling of conduct undertaken in furtherance of the constitutional right of free speech" and petition. *Taus*, *supra*, 40 Cal.4th at pp. 742-743. It does so by affording numerous—and powerful—protections to anti-SLAPP defendants to deter such meritless lawsuits: staying discovery, requiring a plaintiff to demonstrate at an early stage and with admissible evidence that his or her case is meritorious, awarding attorneys' fees and costs to a prevailing defendant, and providing

an immediate right to an appeal. (See Code Civ. Proc. § 425.16.)

The policy goals of deterring baseless litigation apply equally to deterring meritless individual causes of action—however organized—as they do to deterring whole meritless lawsuits. As this Court previously explained in the analogous context of malicious prosecution, defending against "invalid theories of liability may well be so burdensome . . . that it amounts to an impairment of the defendant's interest in freedom from unjustifiable and unreasonable litigation" even if the plaintiff also has other, concededly meritorious claims that will continue regardless. (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 687 [34 Cal.Rptr.2d 386, 881 P.2d 1083].) In the context of anti-SLAPP motions involving multiple causes of action combined under a single count, "the part frivolously targeting protected activity still increases the defendant's costs—not for the purpose of obtaining relief, but for the purpose of punishing the defendant for speaking and petitioning activity, and thus deterring the defendant and others from exercising their First Amendment rights in the future." (*Wallace, supra*, 196 Cal.App.4th at p. 1203.)

None of the important protections of the anti-SLAPP statute can serve their intended purpose of deterring meritless litigation if the statute can simply be pled around, as the *Mann* rule readily allows. Under *Mann*, a plaintiff may shield baseless attacks on a person's rights of petition and free speech from *any scrutiny whatsoever* by combining them under the same

"count" as some other claim that could survive scrutiny under the anti-SLAPP statute. (See *Wallace*, *supra*, 196 Cal.App.4th at p. 1202; see also *City of Colton*, *supra*, 206 Cal.App.4th at p. 774; *Cho*, *supra*, 219 Cal.App.4th at p. 527; *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 308 [106 Cal.Rptr.2d 906].) Through such artful pleading, there would no longer be much, if any, impediment to bringing multiple baseless claims disguised under a single count simply to drive up an opponent's litigation costs.[16] A plaintiff would need just one cause of action for which the he or she could show minimal merit and then there would be no limit to how many meritless allegations the plaintiff could assert along with it.

As the *Wallace* court noted, this is a particularly perverse result because it allows allegations having nothing to do with free speech or petitioning rights to control the result of the anti-SLAPP analysis:

> [A]ll the plaintiff would have to do would be to show some modicum of merit to the claims based on *un*protected activity, and the trial court would never even have to look at the merit of the claims targeting protected activity. That seems to be an odd way of protecting the activity the statute calls us to protect.

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[16] This risk is well illustrated here, where preserving the Moss Adams Claim means opening up both Schnitt and Moss Adams to discovery into their protected communications surrounding the preparation of the Moss Adams Fraud Audit.

(*Wallace*, *supra*, 196 Cal.App.4th at p. 1202, original italics.) This Court should reject such a counterintuitive result, which is wholly at odds with the basic purposes for which the anti-SLAPP statute was enacted.

b) The Mann rule burdens the parties and the court with early summary adjudication of unprotected claims.

The harmful effects of the *Mann* rule are not limited to allowing allegations of protected conduct to survive the anti-SLAPP process, as the *Wallace* court observed. (*Wallace*, *supra*, 196 Cal.App.4th at pp. 1205-1206.) Rather, the rule also improperly requires plaintiffs to offer, and defendants to challenge, evidence on the likelihood of prevailing on plaintiff's allegations of *un*protected conduct:

> Assume that a plaintiff has alleged a cause of action (count) containing protected activity and unprotected activity. The defendant files a special motion to strike. In prong two, the plaintiff would try to show the merit of its claims based on protected activity. Unless the plaintiff is extremely confident that it can establish this merit at such an early point in the case, the plaintiff would also attempt to show a probability of prevailing based on the unprotected activity, not only to save the allegations of protected activity (under the *Mann* rule), but also to save the remainder of the cause of action from being stricken. If the plaintiff *can* make that showing, the plaintiff has saved the cause of action, albeit at additional effort and expense. But if the plaintiff *cannot* make that showing, the entire count—protected activity and *unprotected*—is stricken with prejudice, before the plaintiff has had the usual opportunity to develop the case, and even though there is no stated authority in the statute or legislative history for testing the merit of claims based on unprotected activity.

(*Ibid.*, original italics.) In the process, the *Mann* rule also necessarily

burdens courts by forcing them to slog through and analyze in detail evidentiary submissions concerning wholly unprotected activity.

Further, because a party cannot amend around a previously successful anti-SLAPP motion (*Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 Cal.App.4th 1049, 1055-1056 [18 Cal.Rptr.3d 882]), the grant of an anti-SLAPP motion on a mixed count would permanently bar the plaintiff from asserting even the claims of unprotected conduct alleged in that count.[17] Thus, "[*Mann*] permits the defendant to force the court to test (and strike) claims of unprotected activity under the banner of a statute that does not even purport to protect such activity" and, in so doing, impermissibly "turn[s] the statute's 'special motion to strike' . . . into a 'broad-brushed' premature summary adjudication motion." (*Wallace*, *supra*, 196 Cal.App.4th at p. 1206.) That anomalous result cannot have been the intent of the Legislature in passing the anti-SLAPP statute.

In contrast, the primary right approach advocated here, and consistent with the holdings of *Cho* and *City of Colton*, ignores the way the complaint is organized, and instead only subjects to anti-SLAPP scrutiny

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[17] Indeed, in his Answer to the Petition for Review, Baral does not even attempt to dispute this settled prohibition. (See Answer to Petition for Review pp. 6-7.)

those causes of action alleging protected conduct. The allegations of unprotected conduct, in contrast, pass through the anti-SLAPP analysis.

c) Courts are capable of identifying and disposing of single "causes of action"

The primary justification offered for adopting the *Mann* rule is also unsound. *Mann* was mainly concerned that courts would be burdened with the "time-consuming task of determining whether the plaintiff can substantiate all theories presented within a single cause of action" because of the tedious need to "parse the cause of action" (which *Mann* read to be "counts") that such an analysis might require. (See *Mann*, *supra*, 120 Cal.App.4th at p. 106.) But courts routinely analyze complaints to look beyond mere "counts" to determine what actually constitutes an individual "cause of action." (See discussion *supra* pp. 15-17.) The fact that courts are regularly asked to determine what is a "cause of action" at all stages of the litigation—at demurrer, for summary adjudication, and for purposes of res judicata—demonstrates that they are amply equipped to analyze the same issue when it arises in an anti-SLAPP motion.

The justification of needing to spare the courts from a primary right analysis becomes particularly unpersuasive when the supposed benefit of the *Mann* rule is weighed against its clear cost. As a trade-off for not requiring a court to engage in a task they perform every day—determining what is a separate "cause of action"—plaintiffs would be permitted to

impose on defendants the expensive burdens of litigating baseless claims involving protected conduct that the anti-SLAPP statute was specifically designed to intercept and terminate at an early stage.

d) The existence of weaker alternatives to the anti-SLAPP statute is insufficient to deter SLAPP claims, and thus such "other options" provide no basis for adopting the Mann rule

Mann also incorrectly asserted that a defendant had "other options" that sufficiently addressed the problem of baseless allegations being pled with other claims as a single "count." For example, *Mann* claimed that a party could file a motion to strike under Civil Code section 436 or "move for summary adjudication of any distinct claim within a cause of action." (*Mann*, supra, 120 Cal.App.4th at p. 106.) But it was, of course, the very insufficiency of these remedies in the face of SLAPP suits that spurred the Legislature to adopt the anti-SLAPP statute in the first place. None of these alternative procedures carries anywhere near the deterrent effect of the anti-SLAPP statute. Motions to strike under section 436 do not provide for attorneys' fees, result in a discovery stay, or require that a plaintiff present admissible evidence to support his or her claims. [18] Motions for summary

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[18] *Mann*'s assertion that a plaintiff could simply file a motion to strike is puzzling for another reason: the anti-SLAPP motion *is* a motion to strike. (Code Civ. Proc., § 425.16, subd. (b)(1) ["shall be subject to a special motion to strike"]); see also *Cho*, *supra,* 219 Cal.App.4th at p. 527 [striking allegations listed under the same count "is consonant with the historic

adjudication occur only after significant and costly litigation has already been conducted, do not prevent further discovery, and likewise do not provide for cost- or fee-shifting. Thus, the legislature has already determined these "other options" are patently insufficient to combat the "disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (Code Civ. Proc. § 425.16, subd. (a).) The mere existence of these other, far weaker, mechanisms does not somehow counsel in favor of adopting the *Mann* rule.

e) The Mann rule does not discourage abuse of the anti-SLAPP statute's automatic discovery stay provision

The appellate court below also posited another justification for the *Mann* rule not raised in *Mann* itself: that anti-SLAPP motions aimed at trivially material allegations could be used for strategic purposes to delay litigation via the statute's automatic discovery stay provision. (Slip Op., at p. 21.) But the risk of abuse of the statute for delay is not something unique to cases involving mixed counts, but is instead inherent in the automatic stay provision itself. (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 195-196 [25 Cal.Rptr.3d 298, 106 P.3d 958].) Further, that

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effect of a motion to strike: 'to reach certain kinds of defects in a pleading that are not subject to demurrer.' (See 5 Witkin, Cal. Procedure (5th ed.2008), Pleading, § 1008, p. 420.)"].)

risk is mitigated by allowing courts to "award attorney's fees and costs to prevailing plaintiffs if the 'special motion to strike is frivolous or is solely intended to cause unnecessary delay.'" (*Ibid.*) In any event, to the extent there is a question to be answered regarding whether the benefits of the automatic stay provision (preventing continued litigation on frivolous claims while the motion is resolved) are really worth its potential detriments (encouraging misuse of the automatic stay in frivolous cases), that "is . . . a question for the Legislature, and the Legislature has already answered it" in favor of adopting the automatic stay. (*Ibid.*)

Further, *Mann* does nothing to prevent a defendant from filing a frivolous anti-SLAPP motion and then appealing its denial. Thus, the choice is not between encouraging frivolous anti-SLAPP motions or following *Mann* to discourage such motions. Rather, the choice is between serving the purposes of the anti-SLAPP statute by examining each "cause of action" at issue or undercutting its effectiveness by limiting a court's power to strike allegations of protected conduct.

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In short, this Court should adopt a primary right approach to what constitutes a "cause of action" under the anti-SLAPP statute and reject the contrary *Mann* rule. Doing so is necessary to adhere to the plain language of the statute, to avoid unnecessary confusion and inconsistency under California law as to what constitutes a "cause of action," and to adhere to

this Court's reasoned analysis in *Taus*. In addition, the primary right approach best serves the underlying policy goals of the anti-SLAPP statute: it maintains the key deterrent effect against frivolous claims, avoids turning the anti-SLAPP statute into a broad-brushed early summary judgment motion even on claims not arising from free speech or petitioning rights, does not ask the courts to do anything different than what they do every day in defining a "cause of action" for purposes of demurrers, summary adjudication, and res judicata, and does nothing to increase the potential risk of abuse of the anti-SLAPP statute's automatic discovery stay provision.

B. THE MOSS ADAMS CLAIM ASSERTS A DISTINCT PRIMARY RIGHT, AND THEREFORE CONSTITUTES A SEPARATE "CAUSE OF ACTION"

Properly analyzed, the Moss Adams Claim alleges the violation of a distinct "primary right" and therefore constitutes a separate "cause of action" that can be stricken under the anti-SLAPP statute regardless of how many counts Baral strategically incorporates it into.

As discussed above, "the primary right is simply the plaintiff's right to be free from the particular *injury* suffered." (*Crowley v. Katleman*, *supra*, 8 Cal.4th at p. 681 [emphasis added].) As this Court has previously explained:

> [The primary right] must therefore be distinguished from the *legal theory* on which liability for that injury is premised: "Even where there are multiple legal theories upon which

> recovery might be predicated, one injury gives rise to only one claim for relief." [*Slater v. Blackwood* (1975) 15 Cal.3d 791, 795 [126 Cal.Rptr. 225, 543 P.2d 593.] The primary right must also be distinguished from the *remedy* sought: "The violation of one primary right constitutes a single cause of action, though it may entitle the injured party to many forms of relief, and the relief is not to be confounded with the cause of action, one not being determinative of the other." (*Wulfjen v. Dolton*, *supra*, 24 Cal.2d 891, 895-896, italics deleted.)

(*Id.* at pp. 681-682.) Thus, for example, where attorneys are sued for legal malpractice regarding legal services on two matters they provided to a single client at different times, any complaint alleging malpractice for both sets of services "involve[s] two separate and distinct causes of action regardless of how pled in the complaint." (*Lilienthal & Fowler v. Superior Court*, *supra*, 12 Cal.App.4th at p. 1854.) Similarly, where an employee is terminated for three distinct unlawful reasons—due to discrimination on the basis of age, national origin, and disability—he has alleged three separate causes of action even though all three distinct injuries related to the same employment relationship. (*Skrbina v. Fleming Companies*, *supra*, 45 Cal.App.4th at pp. 1364-1365.)[19]

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[19] (See also *Exxon Corp. v. Superior Court* (1997) 51 Cal.App.4th 1672, 1688 [60 Cal.Rptr.2d 195] [antitrust claims assert separate primary rights from contract-based claims]; *Scripps Clinic v. Superior Court* (2003) 108 Cal.App.4th 917, 928-929 [134 Cal.Rptr.2d 101] [breaches of two separate contracts constitute separate causes of action, no matter how organized in the complaint].)

Here, the distinction between the primary rights asserted is clear. Baral alleges that his reputation was injured by the Moss Adams Fraud Audit (the Moss Adams Claim); and he alleges that Schnitt injured IQB by engaging in self-dealing in connection with the sale of IQB to LiveIt (the LiveIt Claim).[20] Indeed, *Baral himself* admitted in his briefing below that he is alleging two entirely different injuries. He first said that "the causes of action at issue include the 'Moss Adams Claims' and the 'LiveIt Claims.'" (AA808.) As he then put it:

> The Moss Adams Claims' are those attacked by the anti-SLAPP motion, which relate to Schnitt refusing to authorize Moss Adams to consider additional information in connection with the Investigative Report. The 'LiveIt Claims', on the other hand, relate to Schnitt's misconduct in connection with the sale of IQ, including excluding Baral from initial negotiations, retaining an ownership interest in the resulting company without giving Baral the same opportunity, and negotiating for an employment position in the resulting company without giving Baral the same opportunity.

(*Id.* at fn. 9.) Thus, Baral conceded that the Moss Adams Claim was distinct from the LiveIt Claim. Indeed, he even later attempted to use this

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[20] Baral actually lacks standing to assert the LiveIt Claim because it alleges damage to IQB—not Baral individually—and thus can only be brought by the corporation itself (or through a derivative action). (*Schuster v. Gardner* (2005) 127 Cal.App.4th 305, 312 [25 Cal.Rptr.3d 468].) The standing issue is not directly before the Court because Mr. Schnitt did not move to strike the LiveIt Claim, but the fact that the Moss Adams Claim alleges individual harm to Baral while the LiveIt Claim alleges harm to the body of IQB stockholders further illustrates the different primary rights at issue.

admitted difference in order to oppose a stay of litigation pending this appeal. (AA 1170-1172.)

Baral's current contention that the Moss Adams Claim, as alleged in the Second Amended Complaint, is somehow different from the Moss Adams Claim, as alleged in his original complaint, is belied by comparison of the two pleadings. Baral has *always* alleged that Schnitt injured him by providing false and incomplete information to Moss Adams, publishing the Moss Adams Fraud Audit to others, and later refusing to allow Baral to "correct" the audit report's supposed misstatements or otherwise to supplement the record. 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 [emphasis added].) The Sixth Cause of Action 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 [emphasis added].) This is precisely the same conduct on which Baral now bases his Breach of Fiduciary Duty, Constructive Fraud, and Declaratory Relief causes of action concerning the Moss Adams Fraud

Audit under the first, second and fourth causes of action, respectively. (AA372-379, ¶¶ 40(d), 43, 46(d), 47, 60.)

Thus, as Baral himself admitted, the Moss Adams Claim and the LiveIt Claim allege distinct sets of actions that allegedly caused different injuries that occurred at separate points in time. They therefore assert the violation of different "primary rights." As such, Schnitt should be able to strike the separate "cause of action" constituting the Moss Adams Claim, just as he was able to do in the first anti-SLAPP motion. This Court should therefore reverse the appellate court's refusal to analyze these "causes of action" individually.

C. BECAUSE THE MOSS ADAMS CLAIM IS BARRED BY THE LITIGATION PRIVILEGE, IT SHOULD BE STRICKEN AS LACKING MINIMAL MERIT

The anti-SLAPP motion under review should have been granted because it is directed towards a single "cause of action" [21] on which Baral

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[21] The appellate court below properly held in prong one of the anti-SLAPP analysis that the allegations at issue here relating to the Moss Adams Claim "arose from" protected activity. (Slip Op., at. p.13.) "The *apparently unanimous* conclusion of published appellate cases is that 'where a cause of action alleges both protected and unprotected activity, the cause of action will be subject to section 425.16 unless the protected conduct is 'merely incidental' to the unprotected conduct. [Citations.]'" (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 672 [35 Cal.Rptr.3d 31] [italics added].) Here, the protected conduct of investigating Baral and others' wrongful conduct via the Moss Adams Fraud Audit in anticipation of litigation is far more than merely incidental to the Moss Adams Claim.

cannot demonstrate a probability of success due to the existence of the litigation privilege.

The litigation privilege under Civil Code section 47(b) is an "absolute" privilege that "serves the important public policy of assuring free access to the courts and other official proceedings." (*Hagberg v. California Federal Bank FSB* (2004) 32 Cal.4th 350, 360 [7 Cal.Rptr.3d 803, 81 P.3d 244] (hereafter *Hagberg*).) "The privilege . . . is referred to as an 'absolute' privilege, and it bars all tort causes of action except a claim for malicious prosecution." (*Id.*) '"[I]n furtherance of the public policy purposes it is designed to serve, the privilege prescribed by section 47[(b)] has been given broad application."' (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1063 [39 Cal.Rptr.3d 516, 128 P.3d 713].) "Any doubt as to whether the privilege applies is resolved in favor of applying it." (*Adams v. Superior Court* (1992) 2 Cal.App.4th 521, 529 [3 Cal.Rptr.2d 49].)[22]

Investigations undertaken in anticipation of potential litigation are squarely within the scope of the privilege. "For well over a century, communications with 'some relation' to judicial proceedings have been

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[22] In addition, privileged statements made in anticipation of litigation do not lose their absolutely privileged status simply because no actual lawsuit is ever filed. (*Aronson v. Kinsella* (1997) 58 Cal.App.4th 254, 271-272 [68 Cal.Rptr.2d 305].)

absolutely immune from tort liability by the privilege codified as section 47 (b)." (*Rubin v. Green* (1993) 4 Cal.4th 1187, 1193 [17 Cal.Rptr.2d 828, 847 P.2d 1044].) "[S]ection 47(b) encompasses not only testimony in court and statements made in pleadings, but also statements made prior to the filing of a lawsuit, whether in preparation for anticipated litigation *or to investigate the feasibility of filing a lawsuit*." (*Hagberg, supra*, 32 Cal.4th at p. 361, italics added; see also *Rubin v. Green, supra*, 4 Cal.4th at p. 1195 [pre-litigation meetings to discuss merits of a potential claim and related communications and acts are absolutely privileged]; *Picton v. Anderson Union High School Dist.* (1996) 50 Cal.App.4th 726, 739 [57 Cal.Rptr.2d 829] [the litigation privilege extends to proceedings before a teaching credentialing body concerning allegations that a teacher had committed sexual misconduct]; *Block v. Sacramento Clinical Labs, Inc.* (1982) 131 Cal.App.3d 386, 393 [182 Cal.Rptr. 438] [coroner's inaccurate conclusions communicated to a district attorney were absolutely privileged].)[23]

Here, all of the conduct relating to the Moss Adams Fraud Audit is covered by the absolute litigation privilege. Schnitt presented admissible

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[23] (See also *Aronson v. Kinsella, supra*, 58 Cal.App.4th at p. 268 [prelitigation demand letter absolutely privileged]; *Lebbos v. State Bar* (1985) 165 Cal.App.3d 656, 668 [211 Cal.Rptr. 847] ["it is well settled that absolute privilege extends . . . to preliminary interviews and conversations with potential witnesses."].)

evidence that he undertook the Moss Adams Fraud Audit in anticipation of potential litigation against Baral's son Mitch—who all parties concede embezzled money—so that the full extent of the fraud could be determined. (AA688, 692-693, 734-736.) He also did so in anticipation of litigation with Baral himself, Baral's company RC Baral & Co., and others. (AA 692-693, 734-736.) Thus, the hiring of Moss Adams, the provision of any information to Moss Adams (AA367-368 at ¶¶ 25, 28), and any refusal to allow Baral to compel Moss Adams to rewrite its report are absolutely protected under Civil Code section 47(b).

Baral cannot get around the litigation privilege by claiming that the "failure to correct" the supposed "inaccuracies" in the Moss Adams Audit is somehow a "non-communicative act" that is therefore not subject to the litigation privilege. "[W]here the cause of action is based on a communicative act, the litigation privilege extends to those noncommunicative actions which are necessarily related to that communicative act." (*Rusheen v. Cohen*, *supra*, 37 Cal.4th at p. 1052.) "The distinction between communicative and noncommunicative conduct hinges on the gravamen of the action. [Citations.] That is, the key in determining whether the privilege applies is whether the injury allegedly resulted from an act that was communicative in its essential nature." (*Id.* at p. 1058; see also *Rubin v. Green*, *supra*, 4 Cal.4th at p. 1195 ["the fact that defendants' communications with the Cedar Village residents necessarily

involved related acts" does not "destroy the privilege"].)

Here, the gravamen of Baral's cause of action regarding Moss Adams is clearly communicative. The only concrete injury Baral has ever alleged regarding the Moss Adams Fraud Audit is that it has unfairly tarnished his reputation, which is the definition of an injury from a communicative act. (AA167-169.) Further it defies logic to contend that the act of making a purportedly defamatory statement (or, in Schnitt's case, assisting someone else in drafting such a statement) is communicative, whereas the "refusal to correct" that very same supposedly "inaccurate" statement is not. [24] Thus, the gravamen of Baral's cause of action regarding the Moss Adams Claim is communicative in nature and the litigation privilege applies to Schnitt's conduct.

Therefore, the Court should hold that Baral cannot demonstrate a probability of success on the Moss Adams Claim because his conduct was absolutely protected by the litigation privilege. As such, this Court should reverse the appellate court's contrary ruling, with instructions to remand the matter to the trial court to grant Schnitt's anti-SLAPP motion in its entirety.

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[24] Indeed, as even the appellate court below noted in the analogous context of examining whether Schnitt's activity was protected under the anti-SLAPP statute, the gravamen of Baral's Moss Adams Claim is communicative in nature. (Slip op., at pp 10-13.)

VI. CONCLUSION

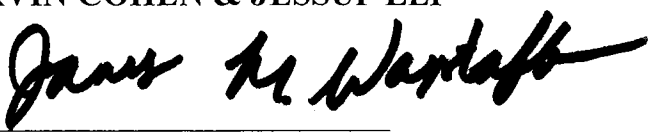
This Court should reject the ill-conceived *Mann* rule once and for all. The *Mann* rule is inconsistent with how California defines "cause of action" in the context of every other aspect of procedural law. It also eviscerates the very protections the anti-SLAPP statute was enacted to create in the first place by allowing plaintiffs to readily plead (or amend) around the statute's prophylactic mechanisms. It also improperly gives rise to what is effectively an early summary adjudication of causes of action alleging *un*protected activity.

In rejecting the *Mann* rule, this Court should hold that, as with other procedural motions, what constitutes a "cause of action" for purposes of the anti-SLAPP statute is the "primary right" asserted. Thus, individual "causes of action" can be stricken from a complaint, even if they are combined into a single count.

Accordingly, this Court should reverse the decision of the Second District Court of Appeal and remand this matter to the trial court with instructions to grant Schnitt's anti-SLAPP motion in full and to award him his costs and attorneys' fees both below and on this petition.

Dated: July 16, 2015

KERR & WAGSTAFFE LLP
ERVIN COHEN & JESSUP LLP

By 
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CERTIFICATION OF COMPLIANCE WITH WORD LIMIT

Pursuant to Rules of Court, rules and 8.520(c), we certify that this Brief is proportionately spaced, has a typeface of 13-point, proportionally-spaced font, and contains 11,572 words.

Dated: July 16, 2015

KERR & WAGSTAFFE LLP
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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, July 16, 2015 I served the following document(s):

OPENING BRIEF OF DEFENDANT AND APPELLANT
(The Petitioner in this Court)

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	Clerk of Court **LOS ANGELES SUPERIOR COURT** 111 N. Hill Street, Los Angeles, CA 90012
CALIFORNIA COURT OF APPEAL Second Appellate District, Div. 1 300 S. Spring Street 2nd Floor, North Tower Los Angeles, CA 90013	**CALIFORNIA SUPREME COURT** 350 McAllister Street San Francisco, CA 94102 http://www.courts.ca.gov *via e-submission*

☒ **By first class mail** by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid and placing the envelope in the firm's daily mail processing center for mailing in the United States mail at San Francisco, California.

☐ **By personal service** by causing to be personally delivered a true copy thereof to the address(es) listed herein at the location listed herein.

☐ **By Federal Express** or overnight courier.

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

Executed on July 16, 2015, at San Francisco, California.

GINIE U. PHAN