Case No. S239777

In the

Supreme Court

of the

State 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 CALIFORNIA COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION THREE, CASE NO. G052660
ORANGE COUNTY SUPERIOR COURT CASE NO. 30-2013-00665314
HONORABLE DEBORAH C. SERVINO

REPLY BRIEF ON THE MERITS

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I. REPLY

A defendant who declines to file an anti-SLAPP motion against the original complaint has not "waived" its right to strike an amended complaint. In their answering brief, Plaintiffs-Respondents[1] argue that Defendants-Appellants[2] waived their right to file an anti-SLAPP motion because they did not file one at the outset of this lawsuit. But that is not the law in this state, nor should it be. A motion filed within 60 days of service of the most recently amended complaint is timely and should be considered on its merits.

On the merits of the anti-SLAPP motion, Respondents argue they have shown a "probability" of succeeding on both their contract and quasi-contract claims. This is impossible. The existence of a contract automatically defeats quasi-contract claims, and there is definitely a contract here – the parties agree on that much. The contract claims are defeated by the contract itself, which says Respondents, not Appellants, must pay for the costs of the UD Action, the only "damages" claimed in the complaint. When evidence defeats a plaintiff's claim, it is axiomatic that the plaintiff has not shown a "probability that the plaintiff will prevail on the claim." Code Civ. Proc. §425.16(b)(1). Each cause of action in Respondents' Third Amended Complaint is subject to strike because Respondents failed to show a probability of success.

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1 Newport Harbor Ventures, LLC and Vertical Media Group, Inc. are the plaintiffs in the trial court, respondents in the intermediate court of appeal, and respondents in this Court. This brief will refer to them collectively as "Respondents."

2 Morris Cerullo World Evangelism, Inc., and Roger Artz and Lynn Hodge, as trustees of the Plaza Del Sol Real Estate Trust, are the defendants in the trial court, appellants in the intermediate court of appeal, and petitioners/appellants in this Court. This brief will refer to them collectively as "Appellants".

A. The statutory purpose of ending meritless litigation before trial is served when the motion is filed within the 60-day period expressly provided by statute.

The anti-SLAPP statute says the motion "may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper." Code Civ. Proc. §425.16. It has been settled law for nearly two decades that the term "complaint" includes amended complaints. See, e.g., *Lam v. Ngo* (2001) 91 Cal.App.4th 832, 840. If "complaint" includes amended complaints, and an anti-SLAPP motion filed within 60 days of a complaint is timely, then an anti-SLAPP motion filed within 60 days of Respondents' Third Amended Complaint is also timely. When an anti-SLAPP motion is timely, the whole thing is timely, not just part of it. There is nothing in the statute that allows a judge to dismember an anti-SLAPP motion and declare parts of it timely and parts of it untimely, as the trial court did in this case. A motion is either timely or it is not, and this one was timely because it was filed within 60 days of service of the complaint it targeted.

Could Appellants also have filed an anti-SLAPP motion against one of the older complaints? They had that option, yes. But their decision not to strike an earlier complaint does not "waive" their right to target later complaints. A defendant's ability to file an anti-SLAPP motion "arises as a matter of right" whenever the plaintiff files an amended complaint. *Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, 315, *as modified on denial of reh'g* (Nov. 25, 2002) (defendant's opportunity to file anti-SLAPP motion "arose as a matter of right only because the [plaintiffs] were required to file a third amended complaint, which deleted many more allegations than it added, and added nothing that implicated the anti-SLAPP law."). A defendant is not required to challenge every complaint by every conceivable method, or else risk losing the right to use those tools in the

future. Respondents characterize a defendant's right to target amended complaints as an "unfair and unjust benefit", but that is a grievance best addressed to their state senator, not this Court. *Respondents' Answering Brief ("RAB")* at p. 11. By design, a defendant's ability to file an anti-SLAPP motion arises as a matter of right each time the plaintiff serves a complaint. *Yu*, supra, at 315; Code Civ. Proc. §425.16(f).

There are solid policy reasons for this rule. An original complaint might have lacked self-defeating language appearing in a later complaint, as was the case here, where the earlier complaints lacked the mutually exclusive contract/quasi-contract claims. Or perhaps a defendant discovered new evidence supporting an anti-SLAPP motion that was not available at the outset of the lawsuit, as is the case here, where Appellants just discovered Respondent Vertical Media Group, Inc. is a non-existent corporation. *See Request for Judicial Notice, filed concurrently.* Filing an anti-SLAPP motion without evidentiary support is unethical; filing it when uncovered evidence defeats the plaintiff's claims is prudent because it spares everyone the pain of trial, and that is the primary purpose of an anti-SLAPP motion: To strike unsupported claims before trial. As Respondents admit, "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**." *RAB* at p. 15 (emphasis added). Literally any type of resolution short of a trial "minimize[s] the cost to the defendant". A motion filed on the day before trial would still serve its purpose because it would eliminate the need for trial. From a defendant's point of view, any end to litigation short of trial is an enormous cost savings.

Although Respondents argue that filing a motion "long after the 60-day period" frustrates the purpose of the anti-SLAPP motion, that is neither true nor relevant to this lawsuit, where the motion was filed *within* the 60-day period. *RAB* at pp. 13-14. They bemoan Appellants' "failure to timely act" within "the statutory deadline", complaining about the alleged "late stage of the litigation" in which the anti-SLAPP motion was filed. *RAB* at pp. 14-15. But Appellants timely filed their motion within the 60-day period. They complied with that "statutory deadline". Yes, the original complaint was filed in 2013, but the Third Amended Complaint – the complaint that was actually targeted – had been pending for only 28 days before Appellants filed their motion to strike. This case was not even at issue yet, thanks to the Respondents' belated insertion of doomed causes of action into their Third Amended Complaint, their fourth such attempt at pleading a valid claim. When a plaintiff files a complaint, the defendants are entitled to challenge it by demurrer, a motion for judgment on the pleadings, a conventional motion to strike, or an anti-SLAPP motion. Just as a new complaint resets the defendant's 30-day deadline to file an answer, so, too, does it reset the 60-day deadline to file an anti-SLAPP motion. A plaintiff fearing challenges to the complaint should avoid filing complaints susceptible to them.

Respondents are correct that the "purpose" of the anti-SLAPP motion is to end meritless lawsuits at an early stage by striking a plaintiff's claims. But that "early stage" is not the fuzzy, ad hoc period implied by Respondents' brief. The Legislature statutorily defined that "early stage" to mean "within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper." Code Civ. Proc.

§425.16(f). Any motion filed within that period[3] serves the statute's purpose according to the plain language of the statute itself. The Legislature considered other timeframes when it enacted the anti-SLAPP statute, but ultimately settled on the 60-day period. Any motion filed "within 60 days of the service of the complaint" is timely and serves the statute's purpose.

B. Cases cited by Respondents are inapposite because they did not involve anti-SLAPP motions filed within 60 days of the targeted pleadings.

The cases cited by Respondents make this clear, though one would not know it from how they are portrayed in Respondents' brief. They cite *San Diegans for Open Gov't*, for example, where defendant Har Construction, Inc. filed its anti-SLAPP motion more than 16 months after the complaint it targeted. *San Diegans for Open Government v. Har Construction, Inc.* (2015) 240 Cal.App.4th 611, 624. This was obviously untimely, and everyone knew it. So Har Construction tried to avoid the 60-day rule by arguing that the clock started ticking from the date a stipulation was filed, rather than from the date the complaint was served. That stipulation had changed a party's status from "defendant" to "real party in interest." *Id.* at 625. This clerical correction, Har Construction argued, was "akin to amending the complaint." *Id.* The trial judge bought it, but the appellate court disagreed – and the appellate court was correct. A stipulation to correct a party's name is not the same as an amended complaint. Its effect was a clerical correction to the name of a party in an

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[3] Motions filed beyond that period serve a purpose too, but those are allowed "in the court's discretion." A motion filed *within* the 60-period automatically serves the statutory purpose. Incidentally, Respondent's argument, if adopted, would nullify the language in Section 425.16(f), which allows an anti-SLAPP motion to be filed "in the court's discretion" at "*any later time*". One must presume the Legislature did not intend to imbue the trial judge with power to subvert the statute's "purpose," and yet that is what it seems to have done, if Respondents are believed.

existing complaint, nothing more. The defendant's "exposures and defenses remained the same" before and after the stipulation. *Id.* The allegations had not changed. The stipulation was just that – a stipulation, not a complaint. With no complaint served, the 60-day period did not start anew.

Unlike *San Diegans for Open Gov't*, in this lawsuit the plaintiffs served a whole new complaint. The plaintiffs had to seek leave of court before filing it, unlike a stipulation to correct a party's name. The pleading in this lawsuit was called the "third amended complaint", it added a dozen new paragraphs of allegations, and it required Defendants-Respondents to file a new answer. Defendants-Respondents' "exposures and defenses" did not remain the same (if they had, Respondents would not have needed to file an answer). Quite the opposite, as Plaintiffs-Appellants inserted quasi-contract claims that had never been there before. *San Diegans for Open Gov't* involves completely different circumstances.

Hewlett-Packard is similarly inapposite. See *RAB* at pp. 15, 16 (citing *Hewlett-Packard Company v. Oracle Corporation* (2015) 239 Cal.App.4th 1174). In that case, plaintiff Hewlett-Packard had sued Defendant Oracle Corporation in a complaint filed June 15, 2011. *Id.* at 1180. The court bifurcated the lawsuit and conducted a bench trial on Phase One of the action in August 2012, with Phase Two to begin in 2013. *Id.* No other complaints were filed by Hewlett-Packard during this time period. In March 2013, **three years** after the operative complaint had been filed, Defendant Oracle Corporation filed an anti-SLAPP motion targeting that complaint. This was obviously untimely. Compounding the untimeliness of filing a motion three years late, they filed it in the middle of trial. *Id.* at 1183. The trial court understandably denied the motion because it was filed years after the complaint it sought to strike. *Id.* On appeal, the trial court's decision was affirmed. The trial court was held to have "discretion to entertain an anti-SLAPP motion proffered after expiration of the 60-day

period," but since Oracle could not explain why it filed the motion three years after the targeted pleading, the trial court did not abuse its discretion in deciding not to hear the untimely motion to strike. *Id.* at 1187-1188. The motion was filed on March 8, 2013, more than 558 days after the 60-day period expired. *Id.* at 1190. When an anti-SLAPP motion is filed late, the trial court has discretion to hear it, but it is not forced to hear it. *Id.* The *Hewlett-Packard* trial judge was within his discretion to deny a motion filed outside the 60-day period.

Here, unlike in *Hewlett-Packard*, the anti-SLAPP motion was filed only **28 days** after service of the targeted complaint – well within the 60-day period. 1 CT 43 (Third Amended Complaint filed June 24, 2015), 46 (anti-SLAPP motion filed July 23, 2015). *Hewlett-Packard* dealt with an anti-SLAPP motion filed late, while the case before this Court involves an anti-SLAPP motion filed on time. See *Hewlett-Packard Company*, 239 Cal.App.4th at 1191 ("the central question raised by any **late** anti–SLAPP motion...is the extent to which it can *serve the statutory purpose* of providing an *expedited disposition* of *meritless claims* burdening the exercise of speech and petition rights.") (bold text added, italics in original).

Platypus Wear, Inc. v. Goldberg, one of the other cases cited in Respondents' brief, is similar to *Hewlett-Packard. Platypus Wear, Inc. v. Goldberg* (2008), 166 Cal.App.4th 772. The complaint targeted by an anti-SLAPP motion in *Platypus Wear* was filed in October 2004. *Id.* at 776-778. The anti-SLAPP motion, however, was filed in November 2006, after a two-year delay. Absent unusual circumstances, allowing an anti-SLAPP motion to target a complaint filed two years earlier is an abuse of discretion. *Id.* at 799.

Here, however, Appellants' motion was filed within the first 60 days of service of the complaint, a period in which the appellate courts have

universally said the defendant's ability to file an anti-SLAPP motion arises "as of right." *Id.* at 777; *Morin v. Rosenthal* (2004) 122 Cal.App.4th 673, 681, as modified on denial of reh'g (Oct. 15, 2004) (referring to "The 60 day period in which a defendant may file a SLAPP motion as a matter of right"); *Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, 315, as modified on denial of reh'g (Nov. 25, 2002) (holding defendants' opportunity to file anti-SLAPP motion against third amended complaint "arose as a matter of right" even though amended complaint "deleted many more allegations than it added, and added nothing that implicated the anti-SLAPP law"); *Globetrotter Software v. Elan Computer Group* (N.D.Cal.1999) 63 F.Supp.2d 1127, 1129 (60–day period for filing the motion runs from service of most recent amended complaint, rather than original complaint); *Lam v. Ngo* (2001) 91 Cal.App.4th 832, 840–842 ("the purpose of the anti-SLAPP suit law would be readily circumventable if a defendant's only opportunity to strike meritless SLAPP claims were in an attack on the original complaint."). The sole exception to this unanimity, of course, is the decision of the Fourth District in this case.

The other courts of appeal in this state, including a different panel of the Fourth District, are under the impression that this Court already implicitly adopted the holding urged by Appellants here. They have been relying since 2000 on what they assumed was settled law. In *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 565, this Court directed an appellate court to reconsider, in light of *Briggs v. Eden Council for Hope and Opportunity* (1999) 19 Cal.4th 1106, the summary denial of a petition for a writ of mandate seeking to compel the trial court to grant a special motion to strike. The summary denial had been based on the fact that the special motion was untimely because the 60 days began running from the original, as distinct from the amended, complaint. The appellate court took the direction and the reference to *Briggs* as a signal

from the Supreme Court to consider the petition on the merits. The inference from *DuPont* is that this Court saw nothing wrong in considering an anti-SLAPP suit motion directed against an amended complaint, even though more than 60 days had elapsed since the service of the original complaint. Decisions from intermediate courts like *Lam v. Ngo*[4] have relied on this inference from *DuPont* for over 16 years. The Fourth District's decision below is the only one to adopt the opposite holding. Other than the decision below, the prevailing opinion among appellate courts is that serving an amended complaint resets the 60-day period, as long as the amendment results in service of a new complaint, rather than merely correcting a clerical error in an existing complaint.

For purposes of this Court clarifying the timeliness clause, the content of the Third Amended Complaint matters less than its nature: It is a complaint, not a stipulation. "Service of the complaint" – including amended complaints – reopens the 60-day period in which to file an anti-SLAPP motion to strike. CCP §425.16(f). The entirety of an anti-SLAPP motion filed within that period is timely, not just part of it.

Comparing the anti-SLAPP statute to the recently enacted demurrer statute reaffirms this point. Unlike an anti-SLAPP motion, a demurrer cannot challenge a "portion" of an amended pleading "on grounds that could have been raised by demurrer to the earlier version" of the pleading. Code Civ. Proc. §430.41(b). Section 430.41(b) directs the trial judge to look at discrete "portions" of an amended complaint, compare those "portions" to earlier complaints, and determine if the new demurrer raises challenges that could have been raised earlier in the litigation. The timeliness clause of the anti-SLAPP statute gives no such instructions to the

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4 A Fourth District decision from a different panel. *Lam v. Ngo* (2001) 91 Cal.App.4th 832, 842

court. The only question when considering timeliness on an anti-SLAPP motion is this: Has the anti-SLAPP motion been filed within 60 days of service of the complaint it targets? If yes, then the motion – the *entire* motion – is timely, and the court moves on to the merits.

C. Except for the decision below, every published decision in California treats timely anti-SLAPP motions like motions for summary judgment, not demurrers.

A court considering a timely anti-SLAPP motion applies a two-pronged analysis. There is the first, or threshold, prong of whether the challenged activity in the complaint arises from the right of petition. If the defendant meets their burden on the first prong, the burden of proof shifts to the plaintiff to prove, with admissible evidence, that their claims are factually and legally sufficient to prevail at trial. Contrary to Plaintiffs-Respondents' arguments, every court to consider the question – with the exception of the decision below – has likened this second prong to a motion for summary judgment where "the plaintiff has the burden of proof." *Comstock v. Aber*, (2012) 212 Cal. App. 4th 931, 947 ("anti-SLAPP statute operates like a 'motion for summary judgment in 'reverse.'"); *Simmons v. Allstate Ins. Co.* (2001) 92 Cal. App. 4th 1068, 1073 (anti-SLAPP motion "like a summary judgment motion, *pierces* the pleadings and requires an evidentiary showing...SLAPP motion is similar to that of a motion for summary judgment, nonsuit, or directed verdict."). This Court itself has said that the anti-SLAPP motion "establishes a procedure where the trial court evaluates the merits of the lawsuit using a summary-judgment-like procedure at an early stage of the litigation." *Flatley v. Mauro* (2006) 39 Cal.4th 299, 312. It reiterated this point just last year, in *Baral v. Schnitt*, stating: "We have described this second step as a 'summary-judgment-like procedure.'" *Baral v. Schnitt* (2016) 1 Cal.5th 376, 384–85. This Court

stated that a plaintiff must state a "legally sufficient" claim *and* make a "factual showing" sufficient to sustain a favorable judgment. *Id.* If the plaintiff's evidence is insufficient, or if the defendant's evidence "defeats the plaintiff's claim as a matter of law," then the anti-SLAPP motion must be granted. *Id.*

Plaintiffs-Respondents, however, ask this Court to overrule all these appellate decisions and treat the anti-SLAPP motion like a weakened demurrer rather than an early motion for summary judgment. They rely not on the language of the statute, its legislative history, or decisional law, but on an idiosyncratic policy argument: They believe it unfair to put such a burden on a plaintiff without the benefit of discovery. First of all, this ignores that "The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision." Code Civ. Proc. §425.16(g). If a plaintiff needs discovery, all they have to do is ask.

Second, in making this argument, Respondents jarringly switch tactics in the middle of their brief. The first 19 pages are spent arguing that the anti-SLAPP motion was filed after "a huge evidentiary undertaking" at a "late stage of the litigation." RAB at p. 16. "Hundreds of hours" had been spent in discovery, they claim. RAB at p. 15. But on page 20, Respondents argue that the motion was actually filed very *early* in litigation – so early, in fact, that the plaintiff "does not know what evidence will be obtained during discovery" or "what theories of liability will be best supported by the evidence." RAB at p. 20. After all, the anti-SLAPP motion was filed only "60 days into the litigation." *Id.* The glaring contradiction in their positions – it was filed too early to be effective, yet too late to serve its purpose – exposes the errors in reasoning on which Respondents rely. An anti-SLAPP motion places an evidentiary burden on the plaintiff, which is quite like summary judgment and quite *unlike* a demurrer. An anti-SLAPP

plaintiff must produce admissible evidence to sustain each claim; any claim which lacks evidence, or which is defeated by the defendant's evidence, must be stricken. *Lam v. Ngo* (2001) 91 Cal.App.4th 832, 844. This test is similar to the test for granting summary judgment, though the anti-SLAPP burden rests with the plaintiff, not the defendant.

Respondents object that this burden unfairly requires them to elect a remedy among the potential "dozen causes of action" a typical plaintiff includes in his initial complaint. RAB at p. 20. Once again, the irony is jarring. Respondents spent 19 pages arguing that the anti-SLAPP motion arrived too late to accomplish its goals, but now expect this Court to believe that the motion was actually filed too *early* to justify its burden. They say the typical complaint "starts out with a dozen causes of action," of which "only a few" are ultimately "supported by the evidence"; they apparently expect to be allowed to litigate these frivolous claims until they decide to stop. *RAB* at p. 20. This unexpected candor does not support their argument, but instead reflects the unfortunate reality that sometimes plaintiffs file lawsuits that lack probable cause. It is precisely because of this problem – plaintiffs who file a "dozen" causes of action, most of which turn out to be frivolous – that the Legislature enacted the anti-SLAPP statute in the first place. Respondents are right that it indeed imposes a tough burden on plaintiffs at the pleading stage.

It does so, however, *by design.*

It was in response to the "disturbing increase" in meritless lawsuits brought "to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances" that the Legislature overwhelmingly enacted California's anti-SLAPP law. Stats. 1992, ch. 726, §2. Because courts were improperly construing it narrowly, in 1997 the Legislature unanimously amended the statute to expressly state that it "shall be construed broadly." Stats. 1997, ch. 271, §1; amending §425.16(a); CCP

§425.16(a) ("To this end, this section shall be construed broadly."). In 1999, this Court underscored this requirement of broad construction, directing that courts, "whenever possible, should interpret the First Amendment and section 425.16 in a manner 'favorable to the exercise of freedom of speech, not to its curtailment.'" *Briggs v. Eden Council for Hope and Opportunity* (1999) 19 Cal.4th 1106, 1119, quoting *Bradbury v. Superior Court* (1996) 49 Cal.App.4th 1170, 1176.

The question is not whether plaintiffs are allowed to plead legally inconsistent claims in their complaint without fear of incurring sanctions – obviously they are "allowed" to do that. The question is whether claims defeated by the ***evidence*** may survive an anti-SLAPP motion to strike. For the anti-SLAPP statute to have any meaning at all, the answer to that question must be a resounding "No." Of course a plaintiff may *plead* inconsistent claims when filing a lawsuit, but when it comes time to *prove* those claims – as on a motion for summary judgment or an anti-SLAPP motion – claims which conflict with the evidence cannot survive.

D. The burden is on SLAPP plaintiffs, not defendants, to show a "probability" of prevailing, and Respondents' own evidence defeats their claims.

Respondents believe they can discharge their obligation by showing their claims have "minimal" merit, but the statutory language firmly sets their burden of proof higher. A cause of action is subject 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(b)(1). "In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." Code Civ. Proc. §425.16(b)(2). This language has four important effects:

First, by stating that a claim is subject to strike "unless" the plaintiff establishes a probability of prevailing, subdivision (b)(1) shifts the burden of proof to the plaintiff. The default presumption is that a cause of action arising from the right of petition is subject to strike – "unless" the plaintiff can prove otherwise. To overcome this presumption, a plaintiff must marshal evidence to prove a "probability" of prevailing, and must overcome the defendant's defenses in the same way.

Second, by requiring the court to consider not just pleadings but also affidavits, the statute requires the court to look at admissible evidence – not just allegations. Whether a complaint's claims are legally inconsistent with each other is immaterial to this determination. The court must look at each cause of action individually, compare it to the "supporting and opposing affidavits", and determine if the claim can survive in the face of such evidence.

Third, by instructing the court to consider "opposing affidavits" upon which a "defense" is based, the statute enables a defendant's evidence to defeat a plaintiff's claim, even if the plaintiff's claim is well-pleaded in the complaint. It does not matter how well-organized the complaint is; if the "opposing affidavits stating the facts upon which the...defense is based" prevent the plaintiff from establishing a probability of success, then the anti-SLAPP motion must be granted. CCP §425.16(b)(2). Subdivision (b)(2) allow both parties to submit evidence and argue their positions: "Supporting" and "opposing" affidavits must be considered, and one's "liability *or* defense" must be evaluated. *Id.*

Fourth, by demanding a plaintiff prove a "probability" of success, the statute tilts the scales against the plaintiff much more than would a motion for summary judgment. A defendant's motion for summary judgment is granted only if "there is no triable issue as to any material fact" and the "moving party is entitled to a judgment as a matter of law." Code

Civ. Proc. §437c. The burden is on the moving party on a motion for summary judgment. But on an anti-SLAPP motion, it is the plaintiff's responsibility to prove a "probability" of succeeding. The burden is on the SLAPP plaintiff, not the moving party.

Here, Plaintiffs-Respondents pleaded four claims, each of which is inconsistent not only with the evidence offered by *both* sides in this dispute, but also with the facts pleaded in the Third Amended Complaint. These undisputed facts are:

- There exists a contract supported by consideration.
- That contract says that Plaintiffs-Respondents, not Defendants-Appellants, must pay for all the costs of the UD Action.

All parties agree on these facts. See *RAB* at pp. 8 ("As consideration for the Asset Management Agreement, NHV agreed to pay for all the expenses and costs associated with evicting NHOM"), 23 ("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"), 24 ("As discussed above...a valid contract exists between the parties"). Respondents ask the court not to "weigh evidence" or resolve conflicting "factual claims", which is fine – there is no conflicting evidence here. The parties agree that a contract supported by consideration requires Respondents to bear the costs of the UD Action. *RAB* at p. 21.

This evidence makes it impossible for Respondents to show the "probability of prevailing" required by Section 425.16(b)(1). The causes of action for breach of contract and the covenant of good faith allege that Respondents were damaged in only one way: They had to pay for the costs of the UD Action. 1 CT 123-150. It alleges that these damages were caused by MCWE signing a settlement agreement without Respondents' permission. To show a "probability" of prevailing on these claims, Respondents must show a number of things, including: (a) there is a

contract between the parties, (b) the contract forbids Appellant MCWE from settling the UD Action, and (c) the contract requires Appellants to pay for the costs of the UD Action. But the contract between the parties expressly states that *Respondents*, not Appellants, must pay for the UD Action. Those costs of the UD Action cannot be damages. The decision below recognized this, stating that "NHV and VMG had the obligation under the Management Agreement of paying for the costs of the Unlawful Detainer Action." *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism* (2016) 6 Cal.App.5th 1207, 1222. If Respondents had the obligation to pay for these costs, they can't ask to recover the costs as damages. The only reason the Fourth District didn't strike the contractual claims is that it decided the anti-SLAPP motion was untimely. A timely anti-SLAPP motion would have stricken those claims. If the Supreme Court finds the motion timely, the contractual claims should fail. The contract also does not prevent Appellant MCWE from settling its own lawsuits, so MCWE's "breach" is not a breach. With no breach and no damages, Respondents have failed to show a probability of prevailing, so these causes of action must be stricken.

The Fourth District correctly pointed out that "NHV and VMG had the obligation under the Management Agreement of paying for the costs of the Unlawful Detainer Action." *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism* (2016) 6 Cal.App.5th 1207, 1222. If they had the obligation to pay for these costs, they cannot ask to recover the costs as damages. The only reason the Fourth District did not strike the contractual claims is that it decided the anti-SLAPP motion was untimely. A timely anti-SLAPP motion would have stricken those claims. If the Supreme Court finds the motion timely, the contractual claims fail.

Like the contractual claims, the causes of action for promissory estoppel and quantum meruit ask for damages consisting solely of money

Respondents spent on the UD Action. To show a probability of prevailing on these two claims, Respondents must offer evidence[5] showing (a) there is no contract between the parties and no exchange of consideration, and (b) it is equitable to force Appellants to pay for the cost of the UD Action.[6] However, the parties agree that a contract *does* exist, and it *is* supported by consideration. They also agree that the contract requires Respondents, not Appellants, to pay for the UD Action, and that all the "services" Respondents performed for Appellants were performed in reliance on the written contract. 1 CT 131:1-8; 1 CT 131:24-26 ("Defendants have unjustly benefited from the services Plaintiffs performed on Defendants' behalf under the Management Agreement"). The quasi-contract causes of action *expressly* invoke a written contract – which defeats them. Both causes of action fail because quasi-contract claims depend on the *non*-existence of a

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[5] They must also allege these facts in the complaint. When a plaintiff pleads the existence of a contract but fails to plead the opposite in the alternative, he is precluded from asserting a quasi-contract claim. *Klein v. Chevron U.S.A., Inc.* (2012) 202 Cal.App.4th 1342, 1389, as modified on denial of reh'g (Feb. 24, 2012); *Lance Camper Mfg. Corp. v. Rep. Indem. Co.*, 44 Cal. App. 4th 194, 203 (1996) (plaintiff "must allege that the express contract is void or was rescinded in order to proceed with its quasi-contract claim"). Respondents did not allege or prove the non-existence of a contract.

[6] In addition, promissory estoppel requires a promise, or some conduct sufficient to induce reliance. In the trial court, Respondents failed to provide any proof Appellants actually made oral promises or did anything to induce reliance other than signing a written contract. Their sole evidence offered in opposition to the anti-SLAPP motion consisted of D'Alessio's declaration, and it was completely silent on the subject. 4 CT 1064-1068. D'Alessio's declaration does not state that Appellants made any affirmative oral promises at all. *Id.* It was Respondents' burden to provide this evidence in opposition to the anti-SLAPP motion, and they failed. See *Schertzinger v. Williams* (1961) 198 Cal.App.2d 242, 245 ("Obviously the creation of a different or separate agreement cannot be inferred from mere silence on the subject by both parties").

contract, and everyone agrees that there *is* a contract. They fail not just because they are legally inconsistent with contractual claims, but because Respondents failed to show a probability of prevailing using the "supporting and opposing affidavits" required by Section 425.16(b)(2). The undisputed evidence of a contract prevents Respondents from recovering on these claims.

E. Respondents' evidence is inadmissible and insufficient to carry their burden of showing a probability of prevailing.

Respondents' only evidence consists of a declaration from Dennis D'Alessio, the owner of Newport Harbor Ventures and Vertical Media Group. But a declaration regurgitating allegations from the complaint is nothing more than a verified pleading, and an anti-SLAPP "plaintiff cannot rely on his pleading at all, even if verified, to demonstrate a probability of success on the merits." *Comstock v. Aber* (2012) 212 Cal.App.4th 931, 950. Because a self-serving, uncorroborated declaration would be insufficient to defeat a motion for summary judgment, D'Alessio's uncorroborated declaration cannot defeat the anti-SLAPP motion. *Martin v. Inland Empire Utilities Agency*, 198 Cal. App. 4th 611, 625 (2011) (applying summary judgment standard in anti-SLAPP context and holding "uncorroborated and self-serving declaration" insufficient to prove prima facie case) (citing *King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 433) (holding plaintiff's "subjective beliefs" and "uncorroborated and self-serving declarations" do not create a "genuine issue of fact")).

That D'Alessio's declaration flatly contradicts his deposition testimony also renders it inadmissible. *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 22 (court should disregard summary judgment opponent's self-serving declarations when they contradict credible discovery admissions and purport to impeach that party's own

prior sworn testimony). In his deposition, D'Alessio testified that (1) Defendants complied with the Management Agreement by asking the property owner for an extension of the ground lease (5 CT 1290:1-25), (2) Respondents had no agreement with Defendants as to what would happen to the property if MCWE won the unlawful detainer action (5 CT 1297:17-21, 1298:5-6), and (3) Plaintiffs' responsibility as property manager was to collect rent (5 CT 1341:2-17). D'Alessio's declaration, to the extent it contradicts that earlier deposition testimony, should be disregarded as a sham declaration. *D'Amico*, 11 Cal.3d at 22. These and other objections to Respondents' evidence were made in the trial and intermediate appellate court, and Appellants raise them again here. 4 CT 1141-1167.

F. Limiting plaintiffs' "right to sue" and "conduct discovery" is the very purpose of the anti-SLAPP statute.

Respondents argue that striking their claims "at the earliest stages of the case" would "limit Respondents' right to sue [and] conduct discovery". RAB at p. 21. Exactly right. These are the statute's best features, not defects. The anti-SLAPP statute expressly includes a discovery stay. Code Civ. Proc. §425.16(g). The purpose of the stay is to "limit Respondents' right to sue [and] conduct discovery". Respondents argue that without the anti-SLAPP statute, Appellants will still have "other means of limiting and disposing of claims" when the case is "closer to trial or even during trial based on the evidence that gets presented to the trier of fact". RAB at p. 21. That is certainly true – Appellants always have the ability to file a motion for nonsuit or a judgment notwithstanding the verdict. But the anti-SLAPP statute gives them the same remedy *now*. The availability of other remedies does not make the anti-SLAPP statute any less useful. The Legislature deemed those "other means" of terminating claims insufficient, which is why it enacted the anti-SLAPP statute. The "central purpose" of the anti-

SLAPP statute is "screening 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 (emphasis added). "The anti-SLAPP procedures are designed to shield a defendant's constitutionally protected conduct from the undue burden of frivolous litigation." *Id.* at 393. The statute is designed to spare *defendants* the expense of litigating. Any ancillary cost savings to the SLAPP plaintiff – who should not have filed the meritless claims to begin with – are beside the point. Respondents, however, are asking this Court repeal the anti-SLAPP statute by judicial fiat, based on their own belief that a defendant's "other means" of disposing of frivolous claims are good enough, and that the anti-SLAPP statute is "unfair" to plaintiffs. These are not valid reasons to void a statute.

G. Contrary to Respondents' representations, the Third Amended Complaint did not survive a motion for summary judgment.

Other parts of the Respondents' Merits Brief are simply factually inaccurate. They argue that the Third Amended Complaint has been "well vetted" and "proven [its] merit through a Motion for Summary Judgment" and by surviving "countless" other challenges. RAB at p. 14. This is false. The Third Amended Complaint has not survived a motion for summary judgment, as Respondents actually admit elsewhere in their brief:

> "Appellants filed their anti-Slapp motion only after their attempts to dispose of Respondents' **SAC** [second amended complaint] through a Motion for Judgment on the Pleadings and Motion for Summary Judgment failed". RAB at p. 13.

It was the *Second* Amended Complaint that survived a motion for summary judgment, not the *Third* Amended Complaint. The motion for summary judgment was filed two months *before* the Third Amended

Complaint was filed. 1 CT 28 (register of actions, entry #175). Eleven days after the motion for summary judgment, Respondents asked for leave to file their Third Amended Complaint. 1 CT 31 (register of actions, entry #186). Leave was granted, and they filed the Third Amended Complaint on June 24, 2015 – superseding the Second Amended Complaint and rendering the motion for summary judgment moot. 1 CT 43 (entry #273). The Third Amended Complaint was not challenged until July 23, 2015, a mere 28 days after it was filed, by an anti-SLAPP motion to strike and a demurrer. 1 CT 46 (entry #290), 47 (#299). A demurrer, unlike an anti-SLAPP motion or a motion for summary judgment, accepts the complaint at face value and ignores contradictory claims or facts pleaded in the alternative. Given such deference to the plaintiffs' allegations, a demurrer might be unsuccessful. An anti-SLAPP motion, however, requires the plaintiffs to produce admissible evidence to sustain each claim, and any claim inconsistent with the evidence should have been stricken. This burden – and yes, it is a burden – is at least as onerous as a motion for summary judgment where the plaintiffs have the burden of proof.

H. Vertical Media Group, Inc. is a non-existent corporation with no ability to file lawsuits, so its claims should be stricken.

While this appeal was pending, Appellants discovered that Vertical Media Group, Inc. is non-existent in its home state of Delaware. In California, it has been declared "suspended" and "forfeited" by the Secretary of State for nonpayment of taxes. See *Request for Judicial Notice, Exhibit A*. Under section 23301 of the Revenue and Taxation Code, "there is no escape from the conclusion that respondent corporation had no right to defend in the instant action, or even to participate therein during the time that its corporate rights were suspended. Therefore the trial court should have granted appellants' motion to strike the pleadings of

respondent". *Alhambra-Shumway Mines, Inc. v. Alhambra Gold Mine Corp.* (1957) 155 Cal.App.2d 46, 50–51.

The first cause of action for breach of written contract is brought solely by Vertical Media Group, Inc. 1 CT 128. The second cause of action for breach of the covenant of good faith and fair dealing is also brought solely by that non-existent corporation. 1 CT 129. Both causes of action should be stricken in their entirety because they are alleged by a corporation that does not exist.

In addition, they should be stricken because Vertical Media Group is not a party to the contract; although the contract was modified in 2011 to give Vertical Media Group a limited license to perform certain property management duties, it did not give Vertical Media Group the power to sue under the contract. 1 CT 148 (Modification to contract). Rather, Respondent Newport Harbor Ventures, LLC expressly "continue[s] to have all rights and obligations" under the contract, including the right to sue. *Id.* Vertical Media Group has no right to sue, so it cannot bring claims based in contract, even if it were an extant corporation.

The third and fourth causes of action for promissory estoppel and quantum meruit are brought by both plaintiffs: Newport Harbor Ventures, LLC and Vertical Media Group, Inc. 1 CT 130, 132. They should also be stricken insofar as they are brought by Vertical Media Group, a non-existent corporation with no power to file lawsuits.

As to Newport Harbor Ventures's quasi-contract claims under the third and fourth causes of action, they should be stricken because Newport Harbor Ventures did not perform or promise to perform any property management services – only Vertical Media Group promised to perform services, and Vertical Media does not exist. The "services" allegedly

performed here were the filing and prosecuting of the UD Action[7] and managing the property, and Newport Harbor Ventures expressly agreed **not** to seek compensation for such services, since the Management Agreement says Newport Harbor Ventures – not Appellants MCWE, Plaza, or Artz – are responsible for those costs. 1 CT 138:¶4 ("all costs associated with the duties set forth in Paragraph 1, above, shall be borne by NHV"). Newport Harbor Ventures expressly agreed not to perform such services because it did not have a real estate license, and it agreed to pay for those services itself. 1 CT 147-148.

In fact, as an unlicensed entity, Newport Harbor Ventures could not legally file the UD Action, collect rent from tenants, or perform any other property management services. A real estate broker's license is required of anyone who "does or negotiates to do" one or more specified acts, such as negotiating leases or rents (or offers to lease or rent), or places for rent, or negotiating the sale, purchase or exchanges of leases on property or on a "business opportunity," or collecting rents from real property or from improvements on real property, or collecting rents from business opportunities. Bus. & Prof. Code §10131(a)-(b). Performance of any of these acts requires a license, which neither of the Respondents had at the time the contract was signed. Respondents admitted that performance of the property management duties requires collecting rents and trying to enforce the terms of the Ground Lease, which are acts requiring a license. 3 CT 817:2-14 (Respondents' responsibility was to collect rent). "No

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[7] Technically, the act of filing the UD Action was performed by attorney Darryl Paul, not Plaintiff/Respondent VMG or Plaintiff/Respondent NHV. Since neither Respondent actually performed the services – they only paid for them – the person with standing to bring a quantum meruit claim would be Darryl Paul, not Plaintiffs/Respondents. Respondents do not have a law license, so they cannot recover for the costs of litigation.

person...acting in the capacity of a real estate broker...shall bring or maintain any action...for the collection of compensation for the performance of any of the acts mentioned in this article without alleging and proving that he was a duly licensed real estate broker or real estate salesman at the time the alleged cause of action arose." Bus. & Prof. Code §10136. Because Newport Harbor Ventures never had a license, it cannot recover any money for filing the UD Action – an act which it cannot legally perform, and for which it expressly agreed to bear the burden.

Vertical Media Group's contractual and quasi-contract claims should be stricken because it is a non-existent corporation. Newport Harbor Ventures' quasi-contract claims should be stricken because it did not perform services, and even if it had, it could not recover for those services because it never held a license.

II. CONCLUSION

That the anti-SLAPP statute gives an advantage to defendants is a feature, not a bug. The 60-day period to file a motion to strike is supposed to reopen whenever the plaintiff serves a new complaint, and a defendant may challenge any of the allegations in that new complaint.

This Court should reverse the Fourth District and clarify that a motion filed within 60 days of service of the most recently amended complaint is timely and may target any allegations in that complaint, regardless of when they first appeared in litigation.

The Court should also resolve the second issue in Respondents' favor. The principle allowing inconsistent counts to survive a demurrer does not allow them to survive an anti-SLAPP motion to strike, at least not when the causes of action are defeated by the evidence. The anti-SLAPP motion demands the plaintiff show a "probability" of success, and it is impossible to show a probability when the evidence defeats each claim.

To give effect to the Legislature's admonition that the anti-SLAPP statute be "broadly construed", this Court should reverse the Fourth District and hold that the anti-SLAPP motion should have been granted in its entirety.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.204(c)(1))

The text of this brief consists of 7,585 words as counted by the word-processing program used to generate the brief. This number accounts for the text, footnotes, and headings, but not the signature blocks, tables, or this certificate.

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I, Kirstin Largent , declare that I am not a party to the action, am over 18 years of age and my business address is: 631 S Olive Street, Suite 600, Los Angeles, California 90014.

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