S225090

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ROBERT C. BARAL,

Plaintiff and Respondent,

v.

DAVID SCHNITT,

Defendant and Appellant.

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

REPLY BRIEF ON THE MERITS OF DEFENDANT AND APPELLANT (The Petitioner in this Court)

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I. INTRODUCTION

Baral never responds to Schnitt's central argument, supported by more than 160 years of precedent, that a "cause of action" must be defined by a violation of a primary right. Instead, he spends most of his brief arguing an issue that is not in dispute: that anti-SLAPP motions should not be available to strike any allegation from a pleading, no matter how inconsequential, and irrespective of whether such allegations comprise a distinct "cause of action."

As a result of side-stepping the central question, Baral's Answering Brief provides no justification for adopting the *Mann* rule instead of a primary right analysis. His brief is conspicuously devoid of any explanation of why using a primary right analysis would be flawed as a matter of public policy. He likewise never justifies why this Court should depart from over a century and a half of settled jurisprudence and re-define "cause of action" to mean something other than the alleged violation of a primary right. And he never sufficiently counters Schnitt's central argument that doing so through adoption of the *Mann* rule would gut the substantive protections the anti-SLAPP statute was enacted to provide.

II. BARAL CONTINUES TO CONFUSE THE FUNDAMENTAL ISSUE OF WHAT CONSTITUTES A "CAUSE OF ACTION" BY NEVER DEFINING WHAT HE MEANS BY THAT TERM

Much like the *Mann* rule itself, Baral's brief perpetuates a fundamental confusion at the heart of this dispute as to what is meant by the

term "cause of action." As explained in the Opening Brief, courts and litigants use the term to mean two different things. (Opening Brief ["OB"], at pp. 16-17.) When using the term in its technical and correct sense, courts have long ruled that "cause of action" means the assertion of "a primary right" predicated on a primary injury suffered. (*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] (hereafter *Bay Cities Paving & Grading*).) On the other hand, the term is loosely used in a more "colloquial sense" to mean "the allegations a plaintiff has grouped together under the heading of 'cause of action,' usually according to a particular legal theory or remedy sought, and which is more accurately called a 'count.'" (*Wallace v. McCubbin* (2011) 196 Cal.App.4th 1169, 1181, fn. 5 [128 Cal.Rptr.3d 205] (*Wallace*).) The problem is that the two very different meanings "are often used imprecisely and indiscriminately" by courts and litigants alike, which results in confusion. (*Bay Cities Paving & Grading*, *supra*, 5 Cal.4th at p. 860, fn. 1.)

Baral's brief perpetuates this confusion by never explicitly defining what *he* means by this key term. Nevertheless, it is clear from his brief, its advocacy in favor of the *Mann* rule, and the fact that he attempts to avoid application of the "primary right" analysis here, that he simply assumes that a "cause of action" is synonymous with a "count" as organized by the Plaintiff in the complaint. (See, e.g., Answering Brief ["AB"], at pp. 35-45

[advocating for adoption of the *Mann* rule]; see also *id.* at p. 1 [contending that Schnitt's proposed rule allows the targeting of "allegations" rather than what Baral (ambiguously) refers to as "entire causes of action"].)[1]

Given the above confusion, it is important to make clear what each side is actually arguing. Baral argues the Court should adopt the *Mann* rule, which silently assumes a "cause of action" is synonymous with the term "count." Schnitt argues that "cause of action" in the anti-SLAPP statute should be interpreted to mean what it has universally meant throughout California jurisprudence since 1851: the alleged violation of a single primary right. The issue presented for review thus boils down to a fundamental dispute: the meaning of the term "cause of action" as utilized in the anti-SLAPP statute.

III. SCHNITT'S POSITION ON APPEAL IS NOT NEW AND IS PROPERLY BEFORE THIS COURT REGARDLESS

As discussed in detail below, nothing about Schnitt's argument concerning why this Court should reject the *Mann* rule is new and, even if

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[1] Baral points to a passage from the trial court's short opinion that demonstrates a similar confusion. (See AB, at pp. 11-12.) Although the trial court vaguely acknowledged case law, consistent with Schnitt's approach, holding that the anti-SLAPP statute cannot be pled around by merely combining discrete injuries into a single count, the trial court arbitrarily concluded that this was not such a case because Schnitt was seeking to strike "allegations per se." (See AA1116.) The trial court never explained how it came to that conclusion. In any event, the causes of action at issue here are distinct when properly analyzed. (See discussion below on pages 22-26.)

it were, any such argument could still be considered by this Court in the first instance because it involves a pure question of law.

First, Baral is wrong that Schnitt is making a new argument here. Schnitt has always argued that the *Mann* rule was unwise and should be abandoned as inconsistent with the text, history, and policy animating the anti-SLAPP statute. (AA653-654.) Indeed, he relied upon *Cho*, *City of Colton*, and *Wallace*, which are precisely the same cases on the side of the split of authorities he now seeks to have this Court adopt. (AA650 fn.2, 654, 1083-1084.)[2] He has likewise argued that Baral should not be allowed to resurrect the very same "claims" based on the Moss Adams Fraud Audit—which had already been stricken via a prior anti-SLAPP motion—by simply placing the same allegations under a different heading. (AA651-652, 654.) He has also always contended that courts should look beyond a complaint's arbitrary organization to analyze the true substance of the claims asserted. (AA651-652, 654.) Thus, none of Schnitt's arguments in

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[2] (See also *Cho v. Chang* (2013) 219 Cal.App.4th 521, 527 [161 Cal.Rptr.3d 846] (*Cho*), *City of Colton v. Singletary* (2012) 206 Cal.App.4th 751, 774 [142 Cal.Rptr.3d 74] (*City of Colton*); *Wallace v. McCubbin* (2011) 196 Cal.App.4th 1169, 1210 [128 Cal.Rptr.3d 205] (*Wallace*).)

this regard are new.[3]

To the extent Baral is arguing that a Petitioner cannot cite new *authority* for an issue that was raised at all levels below, he is wrong as a matter of settled law. (See *Giraldo v. California Dept. of Corrections and Rehabilitation* (2008) 168 Cal.App.4th 231, 251 [85 Cal.Rptr.3d 371] ["We are aware of no prohibition against citation of new authority in support of an issue that was in fact raised below . . . ."].)

Baral repeatedly notes in hyperbolic fashion that Schnitt advocated rejection of the *Mann* rule below without specifically justifying this rejection in terms of this Court's "primary right" jurisprudence. But Baral cites absolutely no authority for the proposition that every conceivable citation, policy argument, or other theoretical underpinning supporting a legal position has to be raised at the trial court in order to be considered on appeal. Indeed, this Court has repeatedly held that "a change in theory is permitted on appeal" when it involves "a question of law only" on undisputed facts "appearing in the record." (*Ward v. Taggart* (1959) 51 Cal.2d 736, 742 [336 P.2d 534] (*Ward*), citation omitted; see also *Frink v.*

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[3] The fact that Schnitt himself used the term "cause of action" in its colloquial sense at times below to mean "count" does not somehow make his discussion of primary rights new or suggest that any such prior colloquial usage was incorrect. If anything, it only further illustrates why this Court should adopt a bright-line rule that will end any ambiguity about the term's two meanings.

Prod (1982) 31 Cal.3d 166, 170 [181 Cal.Rptr. 893, 643 P.2d 476] (*Frink*); *People v. Yeoman* (2003) 31 Cal.4th 93, 118 [2 Cal.Rptr.3d 186, 72 P.3d 1166].) That is because the prohibition of new arguments on appeal exists to prevent the unfairness of forcing a party to litigate a disputed factual issue when the party was deprived of the ability to create a record on that issue. (*Ward, supra*, 51 Cal.2d at p. 742.) No such unfairness exists on pure questions of law.[4]

Further, allowing new argument and analysis on pure questions of law also makes sense because legal arguments necessarily become more thoughtful and refined through the appellate process, which is designed for such considered deliberation that trial courts rarely have time to engage in.[5] That is why, for example, courts can examine legislative history to interpret a statute, even where such history was not provided below. (*California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 699 [170 Cal.Rptr. 817, 621 P.2d 856].)

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[4] Nothing in the sole case Baral cites for the contrary position holds otherwise. In *Bank of America, N.A. v. Roberts* (2013), 217 Cal.App.4th 1386, 1398-1399 [159 Cal.Rptr.3d 345], the court of appeal merely held that a party could not introduce new *facts* on appeal trying to show that she was a third-party beneficiary of a supposed contract. The court explicitly held that *Roberts* did not involve pure questions of law because it was "based upon facts or documents that are outside of the record." (*Ibid.*)

[5] Indeed, the single-paragraph ruling issued by the trial court here illustrates the point well. (AA1116.)

In addition, "consideration of points not raised below also may be permitted when important issues of public policy are involved." (*Frink*, *supra*, 31 Cal.3d at p. 170 [new argument on appeal regarding the appropriate standard of trial court review of administrative proceedings was permissible]; *Ford v. Gouin* (1992) 3 Cal.4th 339, 346 fn. 2 [11 Cal.Rptr.2d 30, 834 P.2d 724] [issue "affecting all persons in the state engaged in waterskiing" sufficiently important to justify consideration of new arguments].) As explained in the Opening Brief, the anti-SLAPP statute advances numerous important public policies, affecting virtually every type of legal claim. (OB, at pp. 30-31.) And its role in disposing of meritless litigation aimed at free speech and petitioning rights will be substantially undermined if the *Mann* rule is allowed to stand. (*Id.*) Further, regardless of how the Court ultimately comes down on the issue of whether the *Mann* rule should survive, the lower courts are in complete disarray on this frequently arising question. (Petition for Review, at pp. 20-29.) Thus, important public policies are also served by having this Court end this widespread confusion.

In short, Schnitt squarely presented his argument seeking rejection of the *Mann* rule below. His position concerning application of this Court's "primary right" jurisprudence to achieve that goal merely offers the analytical framework that supports an argument he has made since the inception of this dispute. But even if the Court were to view the primary

right analysis as a new argument, it is a purely legal argument, affecting important public policy questions that this Court can and should resolve.

IV. THE *MANN* RULE SHOULD BE REJECTED

None of Baral's proffered reasons for adopting the *Mann* rule survive scrutiny. As explained in detail below, Baral never sufficiently counters Schnitt's argument that the rule is unsupported by the legislative history of the anti-SLAPP statute, reflects bad public policy, creates deep tension in California civil procedure generally, and is not required by this Court's prior anti-SLAPP decisions.

A. BARAL PROVIDES NO LEGISLATIVE HISTORY SUPPORTING THE *MANN* RULE

Baral's argument concerning the legislative history of the anti-SLAPP statute is deeply flawed. He contends that, simply because the anti-SLAPP statute has been amended several times in the past, and such amendments have not specifically addressed the issue that (with the benefit of 20/20 hindsight) happens to present itself in this case, the Legislature must have tacitly intended to adopt *Mann* as the settled rule. (AB, at pp. 35-40.) But that conclusion does not follow. "The Legislature's failure to act may indicate many things other than approval of a judicial construction of a statute: the sheer pressure of other and more important business, political considerations, or a tendency to trust to the courts to correct their own errors . . . ." (*People v. Whitmer* (2014) 59 Cal.4th 733, 741 [174

Cal.Rptr.3d 594, 329 P.3d 154], citation omitted.) Thus, "[i]n construing statutes, it is generally more fruitful to examine what the Legislature has done than what it has not done. [citation] '[L]egislative inaction is a weak reed upon which to lean....'" (*People v. King* (1993) 5 Cal.4th 59, 77 [19 Cal.Rptr.2d 233, 851 P.2d 27].)

Baral's argument presents a particularly poor example of where the Court should supposedly imply intent from legislative silence. He does not cite any instance when the issue of what constitutes a "cause of action" was ever discussed by the legislature, much less voted on. And it is not as if the courts have been in uniform agreement as to how to interpret this term. (See Petition for Review, at pp. 21-29.) Thus, it is not possible to infer that any legislative silence evinces an intent to adopt the *Mann* rule as settled law any more than that same silence after *Fox Searchlight*, *Taus*, or *City of Colton* could be read to signify the opposite conclusion.[6]

Indeed, if anything, the lack of legislative discussion over how to define "cause of action" for purposes of the anti-SLAPP statute suggests that the Legislature intended to adopt the universally understood definition of that concept that California has applied to all areas of civil procedure for

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[6] (See *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 308 [106 Cal.Rptr.2d 906] (*Fox Searchlight*); *Taus v. Loftus* (2007) 40 Cal.4th 683 [54 Cal.Rptr.3d 775, 151 P.3d 1185] (*Taus*); *City of Colton*, *supra*, 206 Cal.App.4th at p. 774.)

a century and a half. When the Legislature uses a term with a "commonly understood meaning" at the time of a statute's enactment, courts must construe the word in that statute according to its prior usage. (OB, at p. 18; *Watts v. Crawford* (1995) 10 Cal.4th 743, 755 [42 Cal.Rptr.2d 81, 896 P.2d 807].) Thus, because "cause of action" was a term universally understood at the time of the anti-SLAPP statute's enactment to mean the alleged violation of a primary right, this Court should construe it according to this deeply rooted understanding.

B. PUBLIC POLICY FIRMLY SUPPORTS REJECTION OF THE *MANN* RULE AND ADOPTION OF A PRIMARY RIGHT APPROACH

1. Baral is incorrect that rejection of the *Mann* rule will lead to greater abuse of the anti-SLAPP statute

Baral's Answering Brief sets up a false dichotomy. He suggests that the only options available to the Court are either adopting the *Mann* rule, or allowing anti-SLAPP motions directed towards any allegation in a complaint, no matter how insignificant. (AB, at p. 40.) But that is not the choice presented. Rather, as Schnitt has consistently argued, an anti-SLAPP motion should be available to attack a cause of action as defined by a "primary right analysis"—just as with motions for summary adjudication and demurrers. Using the primary right approach prevents precisely the sort of abuse Baral claims will occur in the absence of the *Mann* rule, while at the same time avoiding the negative repercussions of the *Mann* rule

itself.

Existing case law illustrates how this would play out in practice. For example, California law is clear that each alleged act of defamation gives rise to a separate cause of action. (*Martinelli v. International 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."].) Thus, under the primary right approach advocated by Schnitt, a defendant could not bring an anti-SLAPP motion as to just some portions of an allegedly libelous publication (for example, by arguing that certain individual sentences of the publication were not false). But, as is consistent with the ultimate holding of *Cho*, a defendant could independently move to strike one of two causes of action for defamation based on two separate publications, even if they were combined in a single count. (See *Cho*, *supra*, 219 Cal.App.4th at p. 525.) If the defendant could show that one of the two causes of action arose from protected activity and lacked minimal merit, that cause of action would be stricken. And that result would not change even if the other defamation cause of action could, in fact, survive anti-SLAPP scrutiny.

Similarly, under California law a claim for breach of contract gives rise to but one cause of action—irrespective of whether the plaintiff seeks multiple different forms of relief, such as specific performance or damages. (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 906 [123

Cal.Rptr.2d 432, 51 P.3d 297] (*Mycogen*).) Thus, an anti-SLAPP motion could not be brought where it targeted just one form of relief concerning the same fundamental breach of contract.

In short, as with motions for summary adjudication and demurrers, the fact that an anti-SLAPP motion would have to dispose of an entire "cause of action" prevents the statute from being used to focus on irrelevant minutiae, as Baral incorrectly claims would occur in the absence of the *Mann* rule. Therefore, it is not the case that a primary right analysis allows "use of anti-SLAPP motions to target minor, irrelevant portions of complaints." (Cf. AB, at p. 40.)

2. Any risk of delay inherent in the anti-SLAPP procedure provides no justification for arbitrarily construing the statute narrowly

Baral rails against anything but the most limited interpretation of the anti-SLAPP statute because he claims the statute is generally being abused in other contexts "in an effort to delay trial and stay discovery." (AB, at p. 40.) But such an approach, which essentially asks the Court to read the anti-SLAPP statute as narrowly as possible in all contexts to limit potential abuses, directly contravenes the statute's mandate that it "shall be construed broadly." (Code Civ. Proc., § 425.16, subd. (a).) This language mandating "broad[]" construction was specifically added to the statute years after its original enactment precisely in response to judicial decisions reading it narrowly, much as Baral asks this Court to do here. (*Briggs v. Eden*

Council for Hope & Opportunity (1999) 19 Cal.4th 1106, 1120 [81 Cal.Rptr.2d 471, 969 P.2d 564].)

Further, the concern that the anti-SLAPP statute may be abused in general provides absolutely no justification for arbitrarily restricting its scope in cases involving mixed counts. (OB, at pp. 37-38.) Moreover, even if the statute as a whole should arguably be amended on policy grounds to minimize delay resulting from its automatic-stay or immediate-appeal provisions, that is "a question for the Legislature, and the Legislature has already answered it" by leaving those provisions intact. (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 196 [25 Cal.Rptr.3d 298, 106 P.3d 958].)[7]

3. As Baral concedes, courts are well-equipped to determine what constitutes a "cause of action" under a primary right analysis

Baral parrots the statement from *Mann* that courts should not be forced to waste their "valuable resources" by engaging in the "time-consuming task of evaluating the merits of each and every allegation that

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[7] In fact, it is Baral who advocates, under a nonsensical reading of *Cho* and *City of Colton*, the wasteful expenditure of judicial resources. He claims that defendants must file anti-SLAPP motions asking for relief that even they do not believe they are entitled to—striking the whole count when only portions of it are SLAPPs—and simply hope that the Court will parse the complaint for them *sua sponte*. (AB, at pp. 14-19.) Nothing in those cases remotely suggests such a bizarre holding, nor does Baral ever explain how such a counter-intuitive rule would be consistent with the text, legislative history, or public policy animating the anti-SLAPP statute.

comprises a cause of action." (See *Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 106 [15 Cal.Rptr.3d 215].) But courts are quite capable of conducting the primary right analysis advocated by Schnitt. They do it all the time for purposes of demurrers and motions for summary adjudication. (See OB, at pp. 35-36.) Indeed, Baral himself recognizes this fact and even goes one step further to concede—somewhat oddly—that courts routinely do so even in the anti-SLAPP context. (AB, at p. 44 ["[t]here is no dispute that courts are capable of identifying causes of action under a primary right theory analysis - ***indeed, they have already done so in the context of anti-SLAPP motions***."], italics added.) Thus, it is difficult to understand how requiring trial courts to conduct a primary right analysis consistently in the anti-SLAPP context will in any way increase trial courts' workloads, much less impose any unmanageable burden.

Indeed, the opposite is true. As *Wallace* indicates, the *Mann* rule actually increases the burdens on courts by forcing them to slog through and analyze in detail evidentiary submissions concerning wholly unprotected activity simply because they happen to be included under the same "count" as activity arising from a person's petitioning or free speech rights. (See OB, at p. 33 [quoting *Wallace*, *supra*, 196 Cal.App.4th at p. 1206].) Thus, contrary to Baral's assertion, rejection of the *Mann* rule will, if anything, lessen the burdens on the trial courts.

4. The *Mann* rule encourages artful pleading around the anti-SLAPP statute, just as Baral has done here

Baral is incorrect that "artful pleading" simply is not a concern raised by the *Mann* rule. A review of Baral's three complaints in this very case readily illustrates why it is a concern.[8] His initial complaint alleged injury based on the allegedly defamatory findings in the Moss Adams Fraud Audit. He labeled that cause of action as two separate counts for defamation, and they were stricken via a successful anti-SLAPP motion. (AA276-77.) He then alleged the same harm resulting from the same allegedly defamatory Moss Adams Fraud Audit as part of counts that Schnitt breached his fiduciary duties in connection with the sale of IQB to LiveIt. (OB, at pp. 42-43.) Baral contends that *this* Moss Adams Claim[9] is somehow different in his Second Amended Complaint because he intentionally omitted any reference to injury to his "reputation," arbitrarily disclaimed recovery of damages just as to this particular portion of his

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[8] It is unclear what Baral means by the argument that "in the 11 years since *Mann*'s publication, not a single published decision has had cause to specifically address concerns of 'artful pleading' under the *Mann* rule." (AB, at p. 41.) Numerous decisions have expressed precisely this concern. (*Wallace*, *supra*, 196 Cal.App.4th at p. 1202; *City of Colton*, *supra*, 206 Cal.App.4th at p. 774; *Cho*, *supra*, 219 Cal.App.4th at p. 527; *Fox Searchlight Pictures*, *supra*, 89 Cal.App.4th at p. 308.)

[9] This brief uses the terms "Moss Adams Claim" and "LiveIt Claim" consistent with how these terms were defined in the Opening Brief. (See e.g., OB, at p. 9.)

count, and attempted to reformulate his legal theory as attacking "conduct" rather than "communications." But these purely strategic decisions smack of artifice—not any difference in the substantive claims alleged.

In any event, Baral's subjective intent in redrafting his claims, while certainly illustrative of the underlying problem, is ultimately immaterial to the rule this Court should adopt. It only matters that the *Mann* rule allows such artful pleading in general, and thus lends itself to abuse in all cases. (See OB, at pp. 30-33.)

5. "Garden variety" motions to strike do not provide sufficient protection against SLAPP suits, which include meritless causes of action falling short of entire complaints

Baral asserts that "garden-variety motions to strike" pursuant to Code of Civil Procedure section 436 are a sufficient check against SLAPP suits.[10] But the Legislature obviously did not think so, which is why it provided numerous, stronger remedies unavailable for standard motions to strike, such as the need to present admissible evidence, at the outset of the lawsuit, along with a discovery stay, and the right to recover attorneys'

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[10] Section 436 motions only apply to a narrowly defined set of defects, such as a pleading's irrelevant material or improper filing. (Code Civ. Proc., § 436.) They cannot be used to test whether a pleading sufficiently states a claim. (*Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509, 529 [75 Cal.Rptr.3d 19].) Nor can they consider admissible evidence. (Code Civ. Proc., § 437.) Given their limited nature, section 436 motions can hardly achieve the broad remedial ends of the anti-SLAPP statute.

fees. (OB, at pp. 36-37.)

Baral also repeatedly asserts that, in order to be a SLAPP, the entire lawsuit or "case" must be disposed of, and therefore if any part of the "case" will survive, an anti-SLAPP motion should not be granted. (AB, at pp. 28, 39.) But, as this Court has held, individual meritless causes of action can be just as burdensome in chilling one's free speech and petitioning rights as wholly baseless lawsuits. (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 687 [34 Cal.Rptr.2d 386, 881 P.2d 1083] (*Crowley*); see also *Wallace*, *supra*, 196 Cal.App.4th at p. 1203; OB, at p. 31.)[11] In any event, the Legislature clearly did not limit the anti-SLAPP statute to motions involving entire cases.

6. The *Mann* rule also harms those resisting SLAPP suits due to the anti-SLAPP statute's prohibition on amending around a successful motion

The harmful effects of the *Mann* rule are not limited to defendants seeking to use the anti-SLAPP statute's protections. Instead, the rule also harms those who try to counter such motions by forcing them to provide—at the outset of litigation and without the ability to conduct discovery—*admissible* evidence tending to show that their allegations of *un*protected conduct have merit. (OB, at pp. 33-34.) It likewise burdens courts by

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[11] The anti-SLAPP statute seeks to nip in the bud the burden imposed as a result of litigating individual claims—particularly the costs of associated discovery—irrespective of the outcome of the entire lawsuit.

forcing them to analyze in detail evidentiary submissions concerning wholly unprotected activity.

Baral responds to this argument by reciting an entirely incorrect proposition of law that the anti-SLAPP statute only prevents amendments "while the SLAPP motion is pending, not after the motion has been heard and resolved." (AB at p. 43, italics omitted). That is simply not true. (*Simmons v. Allstate Ins. Co.* (2001) 92 Cal.App.4th 1068, 1073 [112 Cal.Rptr.2d 397] [allowing such amendments "once the court finds the prima facie showing has been met would completely undermine the statute by providing the pleader a ready escape from section 425.16's quick dismissal remedy."]; *Navellier v. Sletten* (2003) 106 Cal.App.4th 763, 772-773 [131 Cal.Rptr.2d 201] [plaintiffs could not amend complaint to assert potentially valid malicious prosecution claims after they had already lost an anti-SLAPP motion on related fraud and breach-of-contract claims]; *Schaffer v. City and County of San Francisco* (2008) 168 Cal.App.4th 992, 1005 [85 Cal.Rptr.3d 880] [plaintiff who failed to make a prima facie showing on her state-law-based civil rights claims could not amend her complaint to assert federal theories of liability for the same conduct].)

Baral is likewise incorrect in his assertion that "not a single case has had cause to address this 'anomalous result' advanced by Schnitt." (AB, at p. 44.) It was expressly discussed at length in *Wallace.* (*Wallace, supra,* 196 Cal.App.4th at p. 1206.) Baral never substantively responds to the

concerns of *Wallace* and others that the *Mann* rule's formulistic way of reviewing "counts" rather than true "causes of action" improperly results in anti-SLAPP scrutiny of claims involving wholly unprotected activity, which impermissibly expands the reach of the anti-SLAPP motion and harms litigants in the process.

C. THE *MANN* RULE SEWS CONFUSION IN CALIFORNIA JURISPRUDENCE BEYOND THE ANTI-SLAPP STATUTE

Baral never answers the argument that adoption of the *Mann* rule will cause a broader rift in California jurisprudence beyond just the anti-SLAPP statute by redefining "cause of action" to mean "count." Such a rule could easily lead to similar imprecision in other areas of California civil procedure, and threaten to undermine settled law on the issue of what constitutes a "cause of action" that has been enshrined in this state since its founding. (See discussion OB, at pp. 17-18.)

D. NOTHING IN THIS COURT'S DECISION IN *OASIS WEST* COUNSELS IN FAVOR OF THE *MANN* RULE

Much ink has been spilled on the question of whether *Taus* implicitly rejected the *Mann* rule, and whether *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821 [124 Cal.Rptr.3d 256, 250 P.3d 1115] (*Oasis West*), truly adopted it as part of a valid holding. While Schnitt has the better arguments on these questions for all of the reasons stated in the Opening Brief (OB, at pp. 25-30), there is not much else to add on top of what was said before or in the numerous lower appellate decisions

discussing this issue.

In any event, the confusion created by these prior cases (as reflected in the deep and ever-growing split of authorities) is that this Court is not bound as a matter of stare decisis by its recitation of the *Mann* rule in *Oasis West*. Thus, this Court may definitively reject the *Mann* rule without undermining settled authority.

Baral still insists, however, that this Court should defer to its prior decision in *Oasis West* because its mention of the *Mann* rule was not dicta. Baral points to language from the opinion that "[t]he complaint identifies a number of acts of alleged misconduct and theories of recovery, but for purposes of reviewing the ruling on an anti-SLAPP motion, it is sufficient to focus on just one." (See *Oasis West*, *supra*, 51 Cal.4th at p. 821.) But, Baral never disputes that *Oasis West* did not, in fact, involve such "mixed counts," as numerous courts have observed. (See e.g., *Burrill v. Nair* (2013) 217 Cal.App.4th 357, 380 [158 Cal.Rptr.3d 332]; *Wallace*, *supra*, 196 Cal.App.4th at p. 1196.)[12] And the fact that the Court cited a legal

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[12] The various acts giving rise to liability for malpractice in *Oasis West* did not involve distinct primary rights. The case involved claims arising from an attorney's breach of his duties to his client while representing him on a single legal matter—a redevelopment project. (*Oasis West*, *supra*, 51 Cal.4th at p. 815.) This Court has been clear that such attorney-misconduct cases concerning a single representation give rise to a single primary right—irrespective of how many allegedly improper "acts" the attorney took in the course of that representation. (*Bay Cities Paving & Grading*,

proposition that was not actually necessary to its holding hardly makes that statement anything but dicta.

As such, *Oasis West*'s recitation of the *Mann* rule was classic dicta to which deference is not warranted. That is especially true given that none of the parties nor any of the amici breathed a word about *Mann* to the Court in *Oasis West*, much less briefed whether it was inconsistent with how this Court has defined a "cause of action" as a primary right in all other areas of jurisprudence. (OB, at pp. 28-30.)

In summary, Baral provides no valid reason as a matter of text, history, or public policy to explain why this Court should define a "cause of action" differently under the anti-SLAPP statute than in every other area of California jurisprudence. This Court should reject the *Mann* rule, which improperly focuses on how a complaint is organized rather than true "causes of action," and reverse the decision of the lower court holding otherwise.

V. CORRECT APPLICATION OF A PRIMARY RIGHT ANALYSIS DISPOSES OF THE MOSS ADAMS CLAIM

Baral next argues in the alternative that, even if the Court adopts a primary right approach, Schnitt's anti-SLAPP motion should still be

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supra, 5 Cal.4th at p. 860.) Thus, nothing in the actual holding of *Oasis West* is inconsistent with the rule Schnitt advocates here.

denied. Baral is again mistaken, as discussed below.[13]

A. THE MOSS ADAMS CLAIM IS A DISTINCT CAUSE OF ACTION AND THUS CAN BE INDEPENDENTLY STRICKEN

Baral is incorrect that the Moss Adams Claim does not allege the violation of a separate primary right from his LiveIt Claim. The primary right flows from the *injury* alleged. (*Crowley*, *supra*, 8 Cal.4th at p. 681.) Baral asserts two wholly distinct injuries relating to two separate events: The first event involved his exclusion from the negotiations regarding the sale of IQB that allegedly harmed Baral financially by allowing Schnitt to enrich himself at the expense of other IQB investors. The second event consisted of the investigation into Baral's son's embezzlement of corporate funds, which harmed Baral reputationally by concluding that Baral himself may have misappropriated corporate funds. The alleged injuries—as Baral himself admits—arise from "discrete acts of wrongdoing by Schnitt" (AB, at p. 34).[14] They thus allege the violation of distinct primary rights.[15]

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[13] This Court, of course, owes no deference to the decision of the lower court of appeal, or to legal conclusions of the trial court. Thus it is unclear why Baral repeatedly cites the legal conclusions of the courts in this case below as if they were binding authority.

[14] In four different trial court briefs, Baral separated the Moss Adams Claim from the LiveIt Claim when it served Baral's interests. (See, e.g., AA808 ("Baral can establish a probably [sic] of prevailing on the LiveIt Claims . . . ."); AA1097 ("Baral has established [a] probability of prevailing on the 'LiveIt Claims.'"); AA1167-1189 (the entirety of Baral's opposition Schnitt's Motion to Stay, which is based on segregating Baral's Second Amended Complaint into three separate claims, which Baral describes as

Baral argues that his core injury is somehow not the inaccurate report per se, but instead the infringement of his overall managerial rights to participate in its creation. But Baral ignores the fact that the Moss Adams Fraud Audit only caused him injury because it contained "various inaccurate conclusions" that were then "distributed . . . to various third parties" and thus damaged his reputation. (AA368-369, at ¶¶ 28-29.) That injury—which flows from what the report says, and not from any abstract right to participate in the process of writing it irrespective of its content—is fundamentally distinct from his claim that he was *also* injured because he was separately excluded from the negotiations concerning IQB's sale and, as a result, was unable to negotiate a better financial deal for himself.

Similarly, Baral's strategic (some might say "artful") decision to disclaim certain forms of *relief* only as to the Moss Adams Claim—and not

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the "Negligent Misrepresentation Claim," the "LiveIt Claims," and the "Moss Adams Claims."); AA1324 ("'Baral's Opposition to the Anti-SLAPP Motion recognized the distinction between the 'Moss Adams Claims' and the 'LiveIt Claims' . . . . .").)

[15] Indeed, this Moss Adams Claim asserts the same injury he alleged the first time around, when his defamation claims were properly stricken by the first anti-SLAPP motion (which Baral abandoned on his first appeal). Baral's artful attempt to reframe his Moss Adams Claim under a different *legal theory* as an invasion of his management rights, does not alter the fundamental nature of the injury asserted. (*Slater v. Blackwood* (1975) 15 Cal.3d 791, 795 [126 Cal.Rptr. 225, 543 P.2d 593]; *Rubin v. Green* (1993) 4 Cal.4th 1187, 1203 [17 Cal.Rptr.2d 828, 847 P.2d 1044] [plaintiff cannot avoid defamation defenses by relabeling defamation claims as different legal theories].)

as to any of the other alleged breaches of fiduciary duty—does not somehow give rise to a violation of a distinct primary right. "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." (*Crowley*, *supra*, 8 Cal.4th at p. 682, emphasis added, citation omitted; *Mycogen*, *supra*, 28 Cal.4th at p. 905.) Thus Baral cannot manufacture a new primary right violation by disclaiming all relief for past damages and simply attempt to "correct" the same past wrongs via injunction or declaratory relief.

This is also not a case where a violation of a single primary right can be predicated on multiple different acts. Examination of how courts treat similar breach of fiduciary duty claims in attorney malpractice cases is instructive. While multiple different acts in the course of a legal representation on a single legal matter can give rise to just one primary right (*Bay Cities Paving & Grading*, *supra*, 5 Cal.4th at p. 860), different primary rights are involved where the same attorney represents the same client in distinct legal matters (*Lilienthal & Fowler v. Superior Court* (1993) 12 Cal.App.4th 1848, 1854 [16 Cal.Rptr.2d 458] (*Lilienthal*)). Thus, any alleged breaches of an attorney's duty to a single client on two different matters can be adjudicated separately. (*Lilienthal*, *supra*, 12 Cal.App.4th at p. 1854 [involving summary adjudication].) Similarly here,

Baral's LiveIt and Moss Adams Claims involve two different alleged injuries (reputational damage to Baral versus financial harm to IQB) caused by two completely different things (the Moss Adams Fraud Audit versus the sale of IQB's assets to LiveIt). As such, they constitute distinct causes of action. And, as in *Lilienthal*, the fact that Baral's claims involve some (but not all) of the same persons, with similar fiduciary obligations to one another, does not alter this conclusion.

Thus, the Moss Adams Claim asserts the alleged violation of a distinct primary right and it can therefore be separately targeted by an anti-SLAPP motion as a discrete "cause of action."

B. THE MOSS ADAMS CLAIM ARISES FROM PROTECTED ACTIVITY, AND THUS SATISFIES PRONG ONE OF THE ANTI-SLAPP ANALYSIS

Baral is incorrect that, just because he has tried mightily to cast the Moss Adams Claim in the language of "conduct" rather than "communications," the claim somehow does not "arise from" protected petitioning or free speech activity under the first prong of the anti-SLAPP analysis. In order to satisfy this first prong, a "cause of action" must be one "arising from any act of that person in furtherance of the person's right of petition or free speech." (Code Civ. Proc. § 425.16, subd. (b)(1).) Such "acts" include not only communications themselves, but also "communicative conduct such as the filing, funding, and prosecution of a civil action." (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056 [39

Cal.Rptr.3d 516, 128 P.3d 713].)[16] "The merits of [a plaintiff's] claims should play no part in the first step of the anti-SLAPP analysis. [Citations.] The first step only determines whether section 425.16's procedural protection applies . . . ." (*City of Costa Mesa v. D'Alessio Investments, LLC* (2013) 214 Cal.App.4th 358, 371 [154 Cal.Rptr.3d 698].)

Here, the *entirety* of the Moss Adams Claim targets acts in furtherance of petitioning and free speech rights. The Moss Adams Fraud Audit was prepared specifically in anticipation of litigation, including litigation against Baral, his son Mitch, his company RC Baral & Co., and others, after it was discovered that Baral's son embezzled substantial amounts of money. (OB, at p. 8.)[17] Such pre-litigation investigations squarely constitute acts "arising from" petitioning rights for purposes of prong one. (*Miller v. City of Los Angeles* (2008) 169 Cal.App.4th 1373, 1383 [87 Cal.Rptr.3d 510]; *Gallanis-Politis v. Medina* (2007) 152

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[16] Much of this analysis regarding whether conduct "arises from" protected activity mirrors the analysis discussed below regarding whether the litigation privilege applies. That is because courts have routinely "looked to the litigation privilege as an aid in construing" the anti-SLAPP statute even though the analyses are distinct. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 323 [46 Cal.Rptr.3d 606, 139 P.3d 2].)

[17] Although Baral now claims that the facts concerning Mitch Baral's embezzlement are "unsubstantiated" (AB, at p. 5 fn. 1), his operative complaint expressly admits that his son embezzled money and Baral eventually repaid it (AA368-369.) This fact is far from "irrelevant." It explains the reason for the prelitigation investigation.

Cal.App.4th 600, 611 [61 Cal.Rptr.3d 701].)

In addition, as the appellate court properly held below, the decision as to *who* may participate in a pre-lawsuit investigation is, at the very least, an act "*in furtherance* of the person's right of petition." (See Code Civ. Proc. § 425.16, subd. (b)(1), emphasis added; see also *Tuszynska v. Cunningham* (2011) 199 Cal.App.4th 257, 268 [131 Cal.Rptr.3d 63] [selection of one's attorneys is an act "in furtherance of" the right to petition].) Similarly, the selection of who gets to contribute to a communication concerning a matter of free speech is an act "in furtherance" of such speech. (See *Hunter v. CBS Broadcasting, Inc.* (2013) 221 Cal.App.4th 1510, 1523 [165 Cal.Rptr.3d 123] [selection of weather news anchor arises from conduct in furtherance of free speech].) Thus, Schnitt's selection of Moss Adams, and the refusal to allow others (such as Baral, whose son's conduct triggered the investigation) to have input into that investigation process, is likewise an act "in furtherance of" such protected communications.

Further, to the extent the cause of action consisting of Schnitt's commissioning (or refusing to correct), the Moss Adams Fraud Audit constitutes a so-called "mixed" claim arising from both protected and unprotected conduct, prong one is still satisfied. That is because "[t]he *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; see *Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1287-1288 [74 Cal.Rptr.3d 873].) Here, as discussed above, the protected pre-litigation investigation and related communications are at the very core of the Moss Adams Claim and, as such, are far more than "merely incidental" to such claims.

Baral argues that it somehow matters for the first prong of the anti-SLAPP analysis that he is now seeking to alter the Moss Adams Fraud Audit after it was issued rather than trying to control its outcome in the first instance.[18] (AB, at pp. 24-25.) But Baral again confuses the relief requested with the underlying "cause of action" subject to anti-SLAPP scrutiny. (See *Crowley*, *supra*, 8 Cal.4th at p. 682.) *Both* types of suits—seeking prospective injunctive relief or retrospective damages relief—target conduct undertaken "in furtherance of" protected petitioning and free speech rights. Therefore, even claims such as Baral's seeking only prospective injunctive or declaratory relief are subject to the anti-SLAPP

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[18] Just as the litigation privilege precludes the Court from ruling that a report prepared in anticipation of litigation contains defamatory statements, it would similarly preclude the Court from ordering that the allegedly defamatory statements be removed from that privileged report.

statute under prong one.

Finally, Baral makes a number of arguments in his analysis of "prong one" concerning whether the litigation privilege actually applies. His framing of the litigation privilege as a "prong one" question betrays a fundamental misunderstanding of what this first part of the anti-SLAPP analysis entails. As discussed above, prong one only addresses the threshold issue of whether the anti-SLAPP statute applies because the violation of the primary right asserted "arises from" protected activity. Whether the cause of action lacks substantive merit—for example because it is barred by the litigation privilege—is a question properly analyzed under prong two. (*Seltzer v. Barnes* (2010) 182 Cal.App.4th 953, 969 [106 Cal.Rptr.3d 290].) Thus, this Brief will address all such merits-related arguments in its discussion of prong two below.

C. THE MOSS ADAMS CLAIM LACKS MINIMAL MERIT UNDER PRONG TWO

1. Whether a cause of action is defined by the primary right asserted is not solely a prong two question.

Baral's main arguments about prong two consist of little more than an argument in favor of the *Mann* rule. But the arguments why this Court should reject the *Mann* rule are not unique to prong two. Instead they go to the more fundamental question of what constitutes a "cause of action" for all purposes under the anti-SLAPP statute, which affects the scope of the analysis for purposes of *both* prongs. In any event, all of Baral's policy

arguments concerning the *Mann* rule are addressed above, and need not be repeated here.

2. It is entirely irrelevant whether the LiveIt Claim can survive anti-SLAPP scrutiny

Baral also tries to argue that, because he has presented facts supposedly showing he could prevail on his LiveIt Claim,[19] he therefore has satisfied prong two. But, because the Moss Adams and LiveIt Claims constitute separate "causes of action" (as defined by a primary right analysis), they are properly analyzed independently for all of the reasons stated above. As such, if the Court rejects the *Mann* rule—as it should—it is irrelevant for this appeal whether the LiveIt Claim can independently withstand anti-SLAPP scrutiny. The Moss Adams Claim should still be stricken.

3. Baral's claim lacks minimal merit because it is barred by the litigation privilege

The litigation privilege provides an absolute bar to the Moss Adams Claim and, as a result, Baral cannot show a probability of success under prong two, as discussed below.

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[19] Although the LiveIt Claim also lacks merit, Schnitt acknowledges that he has not attempted to demonstrate as much for purposes of the anti-SLAPP motion under review.

a) Excluding Baral from participation in drafting an investigative report is a communicative act, and thus subject to the litigation privilege

Baral first argues that the litigation privilege does not apply here because the operative Second Amended Complaint targets only "conduct" and not "communications." (AB, at pp. 22-25.) But he never responds to Schnitt's argument, made in detail in the Opening Brief, that "where 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.) Whether a cause of action is based on communicative or non-communicative conduct "hinges on the gravamen of the action." (*Id.* at p. 1058.) As explained before, the central injury Baral has suffered flows from the purportedly inaccurate statements contained in the Moss Adams Fraud Audit, which accused him and his son of misconduct. (See OB, at p. 46-47.) These "disputed conclusions" (AA374-375, at ¶ 47) are what Schnitt refuses to let Baral rewrite or otherwise "correct" through the submission of additional information to Moss Adams.

Baral argues that his core injury is somehow not the allegedly inaccurate report itself, but instead the infringement of his rights to participate in the report's creation in his role as a supposed manager. But, as discussed above (on page 23), the reason any infringement of his supposed managerial rights caused him injury is because of the *content* of

the report—not because of some abstract damage he suffered by being excluded from the process of the report's creation. Thus, the only possible reason Baral could have for needing to assert his managerial powers to "correct" the Moss Adams Fraud Audit would be to help repair his sullied reputation. The gravamen of his injury is thus communicative in nature.

In addition, even if the gravamen of Baral's claim was the supposedly improper *process* by which the audit report was created, it would still be protected by the litigation privilege as a communicative act. That is because "choices of what to say and what to leave unsaid" and the decision about who gets to participate in crafting a speaker's message are intimately bound up with the ultimate message conveyed. (*Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* (1995) 515 U.S. 557, 573 [115 S.Ct. 2338, 132 L.Ed.2d 487].) Thus, Schnitt's decision to bar Baral from participating in the creation of report prepared in anticipation of a lawsuit is a quintessentially communicative act done in anticipation of litigation, which is therefore subject to the litigation privilege.

The Court of Appeal chose to leave open the issue of whether the litigation privileged barred the Moss Adams Claim because it relied instead on the *Mann* rule to find the Moss Adams Claim was not subject to an anti-SLAPP motion. But there is little doubt that the Moss Adams Fraud Audit was prepared in anticipation of litigation (AA688-93), and both its contents

and the process of preparing it are therefore privileged.

b) Baral's "standing" argument fundamentally misconceives the litigation privilege

Baral makes a meritless argument (first raised at oral argument on appeal) that Schnitt lacks "standing" to assert the litigation privilege because it would have been *the Company* IQB and not Schnitt himself who would have been a plaintiff in any possible lawsuit flowing from the investigation. (AB, at pp. 25-27.) But case law is clear that one does not have to be a party to a lawsuit (or a potential party to a potential lawsuit) in order to claim the benefits of the litigation privilege. (*Adams v. Superior Court* (1992) 2 Cal.App.4th 521, 529 [3 Cal.Rptr.2d 49] ["We see no reason why mere lack of standing should have the effect of necessarily vitiating the privilege."].) Otherwise, *every* third party witness or anyone else who was not literally a party in litigation would *always* be subject to "derivative tort actions" for anything they said in court, which is exactly what the litigation privilege was meant to prevent. (See *Rusheen v. Cohen*, *supra*, 37 Cal.4th at p. 1063.)

Indeed, Baral himself admits that the litigation privilege applies to "litigants *or other participants*" in litigation. (AB, at p. 25 [citing *Rusheen v. Cohen*, *supra*, 37 Cal.4th at p. 1057, italics added].) Schnitt was certainly a "participant" in potential litigation by directing the pre-litigation investigation on behalf of his company, even if the company was likely to

be the primary party to litigation.[20] Therefore, Baral is mistaken that Schnitt somehow lacks standing to assert the litigation privilege here.

VI. CONCLUSION

This Court should reject the confusion created by *Mann*, and perpetuated by Baral in this action, over what constitutes a "cause of action" subject to an anti-SLAPP motion. It should hold that what constitutes a "cause of action" for purposes of the statute is the same as it has always been in California—the alleged violation of a single primary right. The lower court erred when it applied a contrary rule, and denied Schnitt's anti-SLAPP motion. As such, the decision of the trial court should be reversed, with instructions to grant the anti-SLAPP motion in full and award Schnitt costs and attorneys' fees both below and on appeal.

Dated: November 6, 2015

KERR & WAGSTAFFE LLP
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By _____
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DAVID SCHNITT

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[20] Furthermore, the premise that Schnitt was not a potential party to litigation is wrong. Just as Baral is suing Schnitt for allegedly breaching his duties as manager, an IQB investor could have sued Schnitt, alleging that he failed to supervise Mitch Baral properly.

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 8,390 words.

Dated: November 6, 2015

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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 November 6, 2015, I served the following document(s):

REPLY BRIEF ON THE MERITS
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 November 6, 2015, at San Francisco, California.

GINIE U. PHAN