Case No. S235735

SUPREME COURT OF CALIFORNIA

RAND RESOURCES, LLC et al.,

Plaintiffs, Appellants, and Respondents

v.

LEONARD BLOOM, et al.,

Defendants, Respondents, and Petitioners.

ANSWER BRIEF ON THE MERITS

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

JOSEPH YBARRA (State Bar No. 218130)
AARON M. MAY (State Bar No. 207751)
KEVIN H SCOTT (State Bar No. 274605)
HUANG YBARRA SINGER & MAY LLP
550 South Hope Street, Suite 1850
Los Angeles, CA 90071-1560
Telephone: (213) 884-4900
Facsimile: (213) 884-4910

Attorneys for Plaintiffs, Appellants, and Respondents
RAND RESOURCES, LLC AND
CARSON EL CAMINO, LLC

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Telephone: (213) 884-4900
Facsimile: (213) 884-4910

Attorneys for Plaintiffs, Appellants, and Respondents
RAND RESOURCES, LLC AND
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I. INTRODUCTION AND SUMMARY OF ARGUMENT

In 2012, Richard Rand—the sole owner of plaintiffs Rand Resources, LLC and Carson El Camino, LLC (collectively, "Rand" or "Plaintiffs")—entered into a written contract with the City of Carson to serve as its exclusive agent with respect to soliciting an NFL franchise to relocate to Carson. Whereas Rand honored that contract—meeting with NFL officials, team owners, and City officials—the City did not, covertly engaging defendant Leonard Bloom and his company, U.S. Capital LLC (collectively, the "Bloom Defendants") to act as the City's agent, in plain breach of the City's contract with Rand.

As in every case, Defendants communicated among themselves in the course of breaching and interfering with the contract at issue. Based on these communications, and the facts that a municipality was party to the contract and the contract concerned soliciting the NFL, Petitioners ask the Court to find that the claims arise from protected activity triggering the anti-SLAPP statute.

The Court of Appeals unanimously held otherwise, ruling that the claims involved conduct, not speech, and even if one assumed otherwise (*arguendo* only), the purported "speech" did not concern a matter of public interest or a matter under consideration by a legislative body. The Court of Appeals was correct on each count.

First, Plaintiffs' claims were based on Defendants' conduct, not any protected speech. Under an exclusive agency agreement between Plaintiffs and the City of Carson that was in place from 2012 to 2014, Plaintiffs were supposed to be the only party soliciting the NFL on behalf of the City. Unbeknownst to Plaintiffs, Defendants undermined that contract at every turn, displacing Plaintiffs with another agent and actively hiding that fact from Plaintiffs. Plaintiffs' claims turn on that *conduct* by Defendants; the references to speech in the operative complaint are provided for context or as evidentiary support for Plaintiffs' claims, not as the basis for liability as required to trigger the anti-SLAPP statute. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78) [anti-SLAPP statute applies only where "plaintiff's cause of action itself *was based on* an act in furtherance of the defendant's right of petition or free speech."]; *Graffiti Protective Coatings, Inc. v. City of Pico Rivera* (2010) 181 Cal.App.4th 1207, 1214-1215 [anti-SLAPP statute is not triggered where the speech referenced in the complaint is evidence in support of liability rather than the alleged basis for liability]; *Martinez v. Metabolife Intern., Inc.* (2003) 113 Cal.App.4th 181, 188 ["[A] defendant in an ordinary private dispute cannot take advantage of the anti-SLAPP statute simply because the complaint contains some references to speech or petitioning activity by the defendant."].)

Second, even assuming Plaintiffs' claims did somehow involve protected speech (*arguendo* only), that speech was not on a matter of public interest. The

communications relate only to *who* was the City's agent for soliciting the NFL, not the merits of NFL relocation or the substance of a proposed stadium deal or any other issue of public importance. (*See Commonwealth Energy Corp. v. Investor Data Exchange, Inc.* (2003) 110 Cal.App.4th 26, 34 [explaining that, to satisfy the "public interest" test, the particular communications forming the basis for liability must go "beyond the parochial particulars of the given parties" and be of broader social significance].) Defendants failed to submit *any evidence* to the trial court indicating that the identity of the City's agent was a matter of public importance.

Third, and finally, Plaintiffs' claims did not arise from speech in connection with a matter under consideration by a legislative body. The activities for which Plaintiffs seek to hold Defendants accountable occurred almost entirely while the agency agreement was in place and did not concern the later potential renewal of the agreement. (*E.g. People ex rel. 20th Century Ins. Co. v. Building Permit Consultants, Inc.* (2000) 86 Cal.App.4th 280) [An official proceeding must be imminent or pending to trigger anti-SLAPP protection].) Evidencing this, Defendants point to no statement or act regarding an issue under consideration by a legislative body whatsoever, but rather rely entirely on the fact that the City Council approved the agency agreement in 2012 and, two years later, decided not to renew it. But any contract with a municipality must be approved by its City Council. (*Authority for California Cities Excess Liability v. City of Los Altos* (2006) 136

Cal.App.4th 1207, 1212.) That requirement does not transmute an ordinary commercial dispute into an anti-SLAPP case.

In short, this case is not, as Petitioners contend, about public or private debate over the merits of having an NFL franchise in Carson or what the stadium complex should look like. Nor is it even a case about who *should* serve as the City of Carson's agent in soliciting the NFL, which was settled when the City signed the contract at issue and selected Plaintiffs as its exclusive agent. Rather, this case is about whether Defendants breached and/or interfered with a valid and enforceable contract. As such, the Court of Appeal's unanimous decision should be affirmed. To decide otherwise would vastly expand the scope of the anti-SLAPP statute and potentially suck into its orbit every case involving any contract between a municipality and a private party.

II. BACKGROUND AND OPINION BELOW

A. Rand And The City Of Carson Enter Into An Exclusive Agency Agreement.

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

In 2012, the City of Carson (the "City") entered into an exclusive agency agreement (the "EAA") with Rand whereby it appointed Rand "the sole person" responsible for "coordinating and negotiating with the NFL for the designation and

development of an NFL football stadium . . . in the City."[1] (AA:1:2:29-30)[2] Although the EAA was for a two-year period, it had a renewal provision stating that, upon a showing that Rand had exercised reasonable efforts under the agreement, the City "shall grant" two one-year renewal requests. (AA:1:2:30)

B. The City Breaches the EAA By Using Bloom As Its *De Facto* Agent.

While the EAA was in place, Rand worked diligently on convincing an NFL franchise to re-locate to Carson: meeting with NFL executives at the league's New York City headquarters; meeting with various team owners; hiring architects to draft plans for a stadium; creating promotional materials; making pitches to investors around the globe; and meeting and communicating with City officials to discuss those efforts. (AA:II:13:565-66 at ¶¶ 11-13) All in all, Rand spent hundreds of thousands of dollars and a significant amount of time in efforts to bring the NFL to the City. (*Ibid.*)

Unbeknownst to Rand, however, the City undercut him and breached the parties' agreement by allowing defendants Leonard Bloom and U.S. Capital LLC (collectively, the "Bloom Defendants") to act as the City's *de facto* agent in the same negotiations that Rand was supposed to be conducting. Specifically, during

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[1] Rand Resources, LLC, entered into the EAA with the City and subsequently assigned its rights under the EAA to Carson El Camino, LLC. Richard Rand is the owner of both entities.

[2] All citations to evidence herein are to Appellants' Appendix ("AA") and take the format (AA:Volume Number:Tab Number:Page Number).

the time the EAA was in effect, the Bloom Defendants, City, and the then-serving Mayor of Carson, James Dear ("Mayor Dear," and, together with the City, the "City Defendants") engaged in at least four types of prohibited conduct. First, the Bloom Defendants, with the knowledge and support of the City Defendants, "were contacting NFL representatives and purporting to be agents of the City with respect to bringing an NFL franchise to Carson," in which meetings the Bloom Defendants used promotional materials that were derivative of materials developed by Rand. (AA:1:2:31) Second, the City Defendants and Bloom Defendants would send each other confidential and private correspondence to facilitate Bloom's efforts with respect to the NFL. (*Ibid.*) Third, the Bloom Defendants "ghostwrote letters for Mayor Dear that Mayor Dear put on his official letterhead and sent to third parties as part of their efforts to undermine the EAA." (*Ibid.*) Fourth, when questioned by Mr. Rand about the Bloom Defendant's efforts, Mayor Dear lied to Rand, saying that "he did not know Mr. Bloom and was not aware of what, if anything, Mr. Bloom was doing with respect to the City and the NFL." (AA:1:2:32)

Not surprisingly given the City's secret conduct with Bloom, when the EAA was up for extension in late 2014, the City did not renew it, violating the City's obligation to do so upon a showing of reasonable progress by Rand (which showing Rand had made). (*Ibid.*)

C. Rand Files Suit, and the Trial Court Grants Defendants' SLAPP Motions.

In February 2015, Rand filed suit against the City, Mayor Dear, and the Bloom Defendants. Rand's First Amended Complaint ("FAC")—the operative pleading—states causes of action for: (1) breach of contract against the City; (2) tortious breach of contract against the City; (3) promissory fraud against the City; (4) fraud against all Defendants; (5) intentional interference with contract against the Bloom Defendants; and (6) intentional interference with prospective economic advantage against the Bloom Defendants. (AA:1:2:34-40)

Defendants brought anti-SLAPP motions to strike only causes of action two through six. (AA:1:4:54-77; AA:2:7:430-54) The City did not move to strike Rand's breach of contract claim, and thus that claim is not at issue here.

Shortly after Defendants filed their anti-SLAPP motions, Rand moved, *ex parte*, to conduct certain specified discovery aimed at responding to Defendants' arguments as to the merits of Rand's claims. (AA:2:9:513-24) The trial court, without explanation, denied Rand's ex parte application. (AA:2:11:533) A few weeks later, at the hearing on Defendants' Motion, the trial court sustained Defendants' objections to each piece of evidence offered by Rand and presented the parties with a written tentative granting Defendants' motions in their entirety.

With respect to Prong 1, the trial court ruled that both sets of Defendants had met their burden because "communications involving the proposed development of

such commercial property fall into the 'matter of public interest' portion of the statute and, as such, they need not be made in connection with an issue under consideration or review by a legislative, executive or judicial body." (AA:IV:21:1095-1097 at §§ II-A, III-A) The trial court did not identify which specific communications or proposed development it was referring to.

In addition, the trial court found that the Bloom Defendants had established that the statements constituting the fraud claim against them were made "'in connection with a legislative proceeding,' as used in the anti-SLAPP context because their actions impacted the City's decision to decline to extend the Exclusive Agency Agreement." (AA:IV:21:1096 at § II-A-2) Again, the trial court did not identify the statements at issue.

Although the trial court ultimately reconsidered its blanket evidentiary ruling and admitted some of Plaintiffs' proffered evidence (AA:IV:24:1141-1158), it adopted its written tentative without change, failing to address any of Rand's now-admitted evidence or whether such evidence changed the outcome with respect to Prong 2—Plaintiffs' probability of success on the merits. (AA:IV:24:1116-1126.)

D. The Court of Appeal Unanimously Overturns the Trial Court.

The Court of Appeal unanimously reversed, holding that each of the five causes of action at issue was based on conduct and *not* on protected speech, making the anti-SLAPP statute inapplicable. (Op. at 13 [Second Cause of Action "is not

premised upon protected free speech or the right to petition for redress of grievances, but upon the City's conduct in carrying out (or not) its contract with Rand Resources."]; *id.* at 16 ["[T]he gravamen of the [third] cause of action is the manner in which the City conducted itself in relation to the business transaction between it and Rand Resources, not the City's exercise of free speech or petitioning activity."]; *id.* at 16 ["The gravamen of the fourth cause of action with respect to the City is ... the City's violation of the terms of the EAA by allowing someone other than Rand Resources to act as its agent ... not the City's exercise of free speech or petitioning activity."]; *id.* at 17 ["The alleged wrongful conduct at the heart of [the fifth and sixth causes of action] is again the Bloom defendants' efforts to usurp Rand Resources's rights and role under the EAA."].) In so doing, the Court of Appeal relied on a line of California cases holding that the court must "distinguish between (1) speech or petitioning activity that is mere evidence related to liability and (2) liability that is based on speech or petitioning activity." (*Id.* at 10 [quoting *Graffiti Protective Coatings, Inc. v. City of Pico Rivera* (2010) 181 Cal.App.4th 1207, 1214–1215].)

Next, the Court of Appeal held that, even if Rand's claims were based on petitioning speech (and they were not), that speech was not of public importance because it concerned the *identity* of the agent that would represent the City in its solicitation of the NFL. (*Id.* at 13) In so holding, the Opinion recognized that the

question is not whether an overall project or development is of public importance, but rather whether the specific matter giving rise to liability is of public importance. In drawing this distinction, the Court of Appeal was informed by *Commonwealth Energy Corp. v. Investor Data Exchange, Inc.* (2003) 110 Cal.App.4th 26, which explained that, "[j]ust because you are selling something that is intrinsically important does not mean that the public is interested in the fact that you are selling it." (*Id.* at 14 [quoting *Commonwealth*, *supra*, 110 Cal.App.4th at 34].) Following *Commonwealth*, the Opinion held as follows:

> While having an NFL team, stadium, and associated developments in Carson is no doubt a matter of substantial public interest, plaintiffs' complaint does not concern speech or conduct regarding a large scale real estate development or bringing an NFL team to Carson and building it a stadium. It instead concerns the identity of the person(s) reaching out to the NFL and its teams' owners to curry interest in relocating to Carson. The identity of the City's representative is not a matter of public interest. In this regard, it is noteworthy that the City was not paying Rand Resources for its services or even reimbursing Rand Resources for its expenses. Furthermore, the particular communications alleged in the cause of action, i.e., the false representation that the EAA would be renewed, Dear's false denial about knowing Bloom, and communications entailed in meetings between the defendants, are also not matters of public interest.

(*Id.* at 14.)

The Opinion considered and distinguished *Tuchscher*, the principal case relied upon by Petitioners and the trial court, on the grounds that (i) unlike this case,

Tuchscher involved communications about the specifics of an actual planned development; and (ii) the parties there actually conceded that the development in interest was an issue of public interest. (*Id.* at 14-15)

The Opinion also held that subdivision (e)(2) was inapplicable. It reasoned that, to the extent that Plaintiffs' claims alleged speech at all, "the communications and conduct alleged in the cause of action were made solely in connection with the breach of the EAA, and not in connection with the issue of its renewal or any other issue under consideration or review by the City." (Op. at p. 15) It continued that "the particular communications alleged in the cause of action, i.e., the false representation that the EAA would be renewed, Dear's false denial about knowing Bloom, and communications entailed in meetings between the defendants were not made in connection with whether the EAA would be renewed or replaced with some agreement with the Bloom defendants," which was the only subject of later legislative review. (*Ibid.*)

Because Petitioners had not satisfied the first prong of an anti-SLAPP analysis, the Court of Appeal did not address Prong Two, Plaintiff's probability of success on their claims. (*Id.* at 18)

III. PLAINTIFFS' CLAIMS FOR BREACH OF AND INTERFERENCE WITH AN EXCLUSIVE AGENCY AGREEMENT DO NOT ARISE FROM PETITIONING OR FREE SPEECH ACTIVITY IN CONNECTION WITH A PUBLIC ISSUE OR AN ISSUE OF PUBLIC INTEREST WITHIN THE MEANING OF THE ANTI-SLAPP STATUTE.[3]

California's anti-SLAPP statute states that "[a] cause of action against a person *arising from* any act of that person *in furtherance of the person's right of petition or free speech* under the United States or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (C.C.P. § 425.16, subd. (b)(1) [emphasis added].) Although the statute is to be broadly construed when required to effectuate its purpose, its application is still limited to cases where the defendant establishes that the "conduct by which plaintiff claims to have been injured falls within one of the four categories described in subdivision (e)" of Section 425.16. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 66) Two such categories are relevant to this appeal, subdivision (e)(4), which is addressed in this Section, and subdivision (e)(2), which is addressed in the next Section.

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[3] Although the Court has asked the parties to address whether Plaintiffs' breach of contract claim arises from protected speech in connection with a public issue, the City—the sole defendant on that cause of action—did not move to strike the breach of contract claim. As such, that claim is not at issue here. As discussed below, Plaintiffs' *tortious* breach of contract claim neither arises from protected speech activity nor does any implicated speech concern a public issue.

To qualify for protection under subdivision (e)(4) of the anti-SLAPP statute, defendants were required to establish that the conduct for which Plaintiffs seek to hold them liable was conducted "in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (C.C.P. § 425.16(e)(4).) In other words, Defendants must establish two independent criteria, first showing that the activity forming the basis for their claimed liability was conducted in furtherance of protected speech activity,[4] and then showing that the speech activity occurred in connection with some issue of public significance.

Defendants fail on both counts. First, Plaintiffs seek to hold petitioners liable for conduct (not speech) that occurred in furtherance of their commercial interests, not their Constitutional rights of free speech and petition. Second, even if protected speech or conduct in furtherance of protected speech did form the basis for some of Plaintiffs' causes of action (*arguendo* only), the "issue" involved concerns only the identity of the City's agent for soliciting the NFL and the breach of a contract related thereto. Although the parties to this case may care a great deal about this issue, it is

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[4] As it did before the trial court and the Court of Appeals, the City's brief entirely ignores the "in furtherance of [protected speech]" requirement, going so far as to elide the statute and misleadingly claim that the SLAPP statute protects all "conduct . . . in connection with a public issue or an issue of public interest." (City Br. at 28.) The City fails to cite any authority for this proposition, which is flatly inconsistent with the express terms of California's anti-SLAPP statute.

not one of public significance, and Defendants failed to introduce any evidence indicating that it was.

A. Plaintiffs' Tortious Breach of Contract and Tortious Interference Causes of Action "Arise From" Commercial Conduct, Not Speech, and Therefore the Anti-SLAPP Statute is Not Implicated.

"[T]he statutory phrase 'cause of action . . . arising from' means simply that the defendant's act underlying the plaintiff's cause of action must itself have been an act in furtherance of the right of petition or free speech." (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.) "In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was based on an act in furtherance of the defendant's right of petition or free speech." (*Ibid* [emphasis in original].) "[A] defendant in an ordinary private dispute cannot take advantage of the anti-SLAPP statute simply because the complaint contains some references to speech or petitioning activity by the defendant." (*Martinez v. Metabolife Intern., Inc.* (2003) 113 Cal.App.4th 181, 188.) Rather, California has long recognized a distinction between cases where protected speech activity is of relevant evidentiary value to the cause of action and cases where the conduct furthering protected speech activity forms the gravamen of the complaint; only the latter cases are subject to anti-SLAPP motions.

As this Court has recognized, "the arising from requirement is not always easily met." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53,

66.) For instance, in *In re Episcopal Church Cases* (2009) 45 Cal.4th 467, the Court considered a dispute between the national Episcopal Church and its Los Angeles Diocese, on one side, and a specific parish in Los Angeles (St. James) on the other side. Following a dispute over the ordination of gay ministers, St. James elected to disaffiliate from the national Church, triggering a lawsuit over the ownership of the physical property on which St. James was located. (*Id.* at 475-76.) Plaintiffs, the national church and Los Angeles Diocese, sued, claiming that they owned the property. (*Id.* at 476.) St. James moved to strike, claiming that the "action arose from their protected activity in first expressing disagreement with the higher church authorities regarding church governance and then disaffiliating from the general church." (*Id.* at 477.)

This Court held otherwise. Notwithstanding that protected activity "may lurk in the background—and may explain why the rift between the parties arose in the first place," the complaint was not subject to an anti-SLAPP motion because it was based on a property dispute, not the underlying cause of the rift. As this Court stated, "[t]he property dispute is based on the fact that both sides claim ownership of the same property. This dispute, and not any protected activity, is 'the gravamen or principal thrust' of the action." (*Id.* at 477-78.)

Likewise, the Court of Appeals has repeatedly held that where, as here, a complaint is based on defendants' conduct in carrying out or interfering with a

contract, the mere fact that the complaint references communications does not trigger the anti-SLAPP statute.

Wang v. Wal-Mart Real Estate Business Trust (2007) 153 Cal.App.4th 790, is instructive. The plaintiffs there alleged that Wal-Mart induced them to sell their property subject to certain limitations on its future use. Then, when Wal-Mart needed the plaintiffs to extend escrow, it induced them to comply without telling them that it had filed updated permit applications for the property that, if granted, would negatively impact the plaintiffs. (*Id.* at pp. 795-98.)

The plaintiffs sued for breach of contract and fraud, and Wal-Mart argued that its conduct was protected because it occurred in connection with the permit applications. In holding that the fraud and breach of contract actions were not subject to the anti-SLAPP statute, the Court of Appeal explained that the alleged wrongdoing did not arise from petitioning activities in pursuing permits for the development, but rather Defendants' conduct in "carrying out...contractual duties, seeking to extend escrow [based on false promises], requesting the execution of documents, and other practices within the scope of the parties' contractual relationship." (*Wang*, 153 Cal.App.4th at 808.)

Similarly, in *Graffiti Protective Coatings, Inc. v. City of Pico Rivera* (2010) 181 Cal.App.4th 1207, the Court of Appeals held that the anti-SLAPP statute was not triggered by a complaint challenging the City of Pico Rivera's alleged *conduct* in

entering into a contract without engaging in the statutorily required competitive bidding process. The Court of Appeals recognized that, although the city's officials may have deliberated on the public issue of whether to enter a contract, the actual complaint was based on the City's conduct in entering into the contract rather than the speech that may have precipitated it. (*Id.* at 1224.) As the Court of Appeal recognized, "[a]lthough the City's communications may be of evidentiary value in establishing that it violated the law, liability is not based on the communications themselves." (*Ibid.*)

The same is true here; Defendants' liability is premised on commercial activity—namely, breaching a contractual agreement and interfering with Plaintiffs' contractual rights. The mere fact that Defendants also communicated in the course of committing these actions does not transform them into protected activity. (*See ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999-1001 [the plaintiff's interference with contract claim did not trigger the anti-SLAPP statute because the claim "did not attempt to rely on the speech or petition activity as a basis for claiming interference. Rather, it simply alleged a direct contact between defendants and Cal Tech."]; *USA Waste of California, Inc. v. City of Irwindale* (2010) 184 Cal.App.4th 53, 63-65 [breach of reclamation plan, and not city's speech in issuing a notice of violation, formed the gravamen of plaintiff's cause of action.]; *United States Fire Ins. Co. v. Sheppard, Mullin, Richter & Hampton* (2009) 171

Cal.App.4th 1617, 1628-30 [in an action based on alleged violation of lawyers' ethical duty to provide conflict-free counsel, allegations about the firm's protected communications are relevant to establish the conflict but do not form the gravamen of the cause of action]; *Scott v. Metabolife Internat., Inc.* (2004) 115 Cal.App.4th 404, 414–417 [in products liability case, liability was based not on advertising speech but on the product's failure to conform to the defendant's statements in the advertising]; *World Financial Group, Inc. v. HBW Ins. & Financial Services, Inc.* (2009) 172 Cal.App.4th 1561, 1569 [anti-SLAPP statute did not apply because "[a]ll of the allegedly wrongful conduct and speech that plaintiffs attribute to defendants was committed in a business capacity, and was directed at a competitor's associates and customers for the sole purpose of promoting the competing business as a superior employer and provider of products and services."]; *Gotterba v. Travolta* (2014) 228 Cal.App.4th 35, 42 [in dispute about whether his termination contract permitted John Travolta's former pilot to publish a book about the actor, the gravamen of the complaint was the contract, not letters sent threatening legal sanctions for revealing details of his time with Mr. Travolta.].)

The distinction between activity giving rise to a lawsuit and speech that is incidental to or evidence of that conduct serves as a necessary limit on the anti-SLAPP statute's reach. Hundreds of thousands of government contracts are executed or carried out each year; many more private contracts are of sufficient size

or import that some aspect of them could be said to be of "public interest." And all will involve some aspect of speech, whether it be negotiations regarding the scope of the contract, discussions about whether to enter or breach it, or the like. The reading urged by Petitioners and adopted by the trial court would bring all such contracts within the ambit of the anti-SLAPP statute. And, bizarrely, the larger and more important the contract, the more difficult it will be to enforce, as speech about such contracts is more likely to concern a "public issue."

Moreover, this is not, as Defendants contend, a case about public or private debate over whether an NFL franchise should relocate to Carson, or where the proposed stadium should be located, or what the environmental footprint of the stadium would be, or whether the hot dog vendors should be unionized, or any other issue of public import. It is not even a case about who *should* represent the City in its negotiations with the NFL, as that issue was settled when the City signed the EAA and selected Rand as its agent. (AA:1:2:29-30 [conferring upon Rand the "exclusive agen[cy]" to negotiate on behalf of the City].) Rather, it is a case about whether the City breached the EAA and whether the Bloom Defendants interfered with that agreement. That Petitioners spoke in the process of doing so is no more relevant than that they breathed or drove a car to the meetings.

B. Plaintiffs' Fraud and Promissory Fraud Causes of Action Also Arise From Conduct, Not Speech, and Are Therefore Outside the Scope of the Anti-SLAPP Statute.

Plaintiffs' Third and Fourth Causes of Action are for promissory fraud and fraud. They allege that, in 2012, the City, by and through the City Attorney Bill Wynder, falsely told Rand that the EAA would be renewed upon a showing of substantial progress (AA:1:2:36-37 [Third Cause of Action]), and that the City Defendants and Bloom Defendants conspired with each other and lied to Rand regarding their earlier breaches of the EAA, as a result of which Rand continued to expend funds and effort in a pointless attempt to solicit the NFL (AA:1:2:37-38 [Fourth Cause of Action].)

Admittedly, these claims allege false statements, and therefore involve communications. However, as the Court of Appeals has explained, there is a distinction between speech "in its colloquial sense"—which is present in every fraud claim—and conduct in furtherance of petition or free speech that warrants anti-SLAPP protection. (*Martinez v. Metabolife Intern., Inc.* (2003) 113 Cal.App.4th 181, 190, and n.5 [discussing "necessity of distinguishing claims involving injuries caused by words from claims involving injuries caused by protected speech"].) As the Court of Appeal found here, the false statements at issue arose in the context of the business relationship between the City and Rand and did not express any protected opinion. The gravamen of the fraud causes of action is therefore "the

manner in which the City conducted itself in relation to the business transaction between it and Rand, not the City's exercise of free speech or petitioning activity." (Op. at p. 16.)

This considered decision is in line with prior authority and should not be overturned. (*E.g.*, *Wang v. Wal-Mart Real Estate Business Trust*, *supra*, 153 Cal.App.4th at pp. 807-808 [holding that, because the allegedly fraudulent representations at issue occurred in the context of a business transaction, the gravamen of the plaintiff's fraud cause of action was business conduct, not free speech activity]; *Blackburn v. Brady* (2004) 116 Cal.App.4th 670, 676–77 ["Plainly, even construing the gravamen of Blackburn's third cause of action, as Brady does, as fraud committed in his bidding at the sheriff's auction, it is a purely business type event or transaction and is not the type of protected activity contemplated under section 425.16, subdivision (e)."]; *Kajima Engineering and Const., Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 929 [holding that a fraud cause of action alleging misrepresentations involved in bidding for a city contract arises from commercial conduct, not speech warranting protection under the anti-SLAPP statute]; *Midland Pacific Bldg. Corp. v. King* (2007) 157 Cal.App.4th 264, 275 [holding that a fraud cause of action "is not based on any protected activity" because it involved private commercial speech].)

C. To the Extent Plaintiffs' Claims Arise From Speech At All, They Do Not Arise from Speech Concerning a Public Issue or an Issue of Public Interest.

As discussed above, speech has little to do with Plaintiffs' claim, and it certainly does not provide the basis for Defendants' liability. But to the extent speech is involved, it is not speech made "in connection with a public issue or an issue of public interest" as required to trigger the anti-SLAPP statute.

1. In performing the anti-SLAPP analysis, both established case law and practical considerations require the courts to focus solely on the specific speech forming the basis for liability.

In determining whether speech involved an issue of public interest, California courts have consistently rejected the "synecdoche theory of public issue in the anti-SLAPP statute. The part is not synonymous with the greater whole." (*Commonwealth Energy Corp. v. Investor Data Exchange, Inc.* (2003) 110 Cal.App.4th 26, 34.) As the *Commonwealth Energy* Court poetically explained, "[s]elling an herbal breast enlargement product is not a disquisition on alternative medicine." (*Ibid* [summarizing the facts and holding of *Consumer Justice Center v. Trimedica International, Inc.* (2003) 107 Cal.App.4th 595].) "Lying about the supervisor of eight union workers is not singing one of those old Pete Seeger union songs (e.g., 'There Once Was a Union Maid')." (*Ibid* [summarizing the facts and holding of *Rivero v. American Federation of State, County and Municipal Employees, AFL–CIO* (2003) 105 Cal.App.4th 913].) And "hawking an

investigatory service is not an economics lecture on the importance of information for efficient markets." (*Ibid.*)

Wilson v. Cable News Network (Cal. Ct. App., Dec. 13, 2016, No. B264944) 2016 WL 7217201, decided just a week before this brief is submitted, reinforces the point. That case involved, among other issues, a claim by a former CNN news producer that CNN had defamed him by falsely claiming that he had plagiarized a story about former Los Angeles Sheriff Lee Baca. (*Id.* at *2.) CNN argued that news gathering, plagiarism in news, and Sherriff Baca were all topics of widespread public interest. (*Id.* at *7-9) The Court of Appeal so stipulated, but held these arguments irrelevant because the particular communication underlying the complaint was the statement that the producer had plagiarized a story. And absent any evidence that the story was widely read, that the plagiarism incident was widely publicized and a topic of interest, or that the producer himself was a public figure, the statement was a purely private matter. (*Id.* at *9 ["The focus of defendants' statement was a private controversy, not the public interest.].)

As these decisions make clear, rather than accept Defendants' word that the public issue test is satisfied in every case involving something large or important, the courts must look to the *particular speech forming the basis for a cause of action and determine whether that speech was on a matter of public concern.* (*Commonwealth*, *supra*, 110 Cal.App.4th at 34 [reviewing court must examine the "*specific nature of*

the speech rather than the generalities that might be abstracted from it."].) This distinction too is grounded in sound public policy. Without it every fraud and tortious interference complaint – which complaints almost by definition involve communication – would be the potential victim of an anti-SLAPP motion, so long as it was connected, however tangentially, to something the public might care about. And, perversely, the larger and more important the fraud, the more likely the complaint would fall within the ambit of the anti-SLAPP statute.

Kurwa v. Harrington, Foxx, Dubrow & Canter, LLP (2007) 146 Cal.App.4th 841, illustrates the point. *Kurwa* involved the breakup of a two-member medical practice that had done significant business with a local health maintenance organization (HMO). The departing doctor, Dr. Kislinger, retained an attorney, Goldfarb, to write a letter to the HMO requesting that the HMO transfer its business from the old practice to a new practice owned solely by Dr. Kislinger. (*Id.* at 844.) The jilted partner, Dr. Kurwa, sued Goldfarb and his firm for, among other things, tortious interference with contract. (*Ibid.*) Goldfarb and his firm filed an anti-SLAPP motion, arguing that, because the letter addressed Kurwa's qualifications to practice medicine and which entity should be the provider of medical care to thousands of patients, the letter concerned a public issue. (*Id.* at 845.)

The Court of Appeal saw through this ruse, holding that:

> [T]he statements at issue in this case are not, as Harrington Foxx would have us believe, the undisputed fact of Dr. Kurwa's suspension

> or the disputed alleged deficiencies in the corporate status of Trans Valley. Rather, the gist of Dr. Kurwa's lawsuit against Dr. Kislinger is that the latter, in breach of his fiduciary duties, misappropriated an asset of Trans Valley to his own use and benefit. The means by which Dr. Kislinger allegedly achieved this objective was through the Goldfarb Letter, which requested the HMO to terminate the Capitation Agreement with Trans Valley and to enter into a new agreement with Dr. Kislinger alone. It is this "speech" which forms the basis of Dr. Kurwa's complaint against Harrington Foxx.
>
> Unlike [other cases], there was no upcoming referendum pursuant to which members of the HMO would decide whether Dr. Kurwa should remain an authorized provider under the HMO's health plan. Thus, in the terms of [citation], there was no "ongoing controversy, debate or discussion," participation in which the anti-SLAPP statute was meant to encourage. Rather, *this was a private matter between the principals of Trans Valley and the HMO* which was ultimately concerned solely with the issue of who would be the signatory of the Capitation Agreement and thereby reap the substantial benefits of that agreement.
>
> (*Id.* at p. 848.)

The issue here is the same. Even conceding, *arguendo* only, that the speech referenced in the FAC forms the basis of either the City Defendants' or the Bloom Defendants' liability, that speech does not concern issues of public interest, such as whether the NFL should come to Carson, where the stadium should be located, or who should build it. Rather, the "speech" at issue involved only which of two individuals should reap the benefits of a contract with the City. Such speech is plainly of the "parochial" variety that does not implicate the anti-SLAPP statute.

Petitioners entirely ignore this distinction, claiming instead that a public issue is implicated because the complaint concerns the "real estate development alleged in

the FAC" (City Br. at p. 28; Bloom Br. at p. 14) or, in the City's case, that the identity of the City's agent is "just as much a matter of public interest as the 'what' of those actual negotiations with the NFL" (City Br. at 31.) In so doing, Petitioners entirely ignore *Kurwa*, *Commonwealth* and the many other cases[5] recognizing the difference between the important whole and the mundane execution and argue that,

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[5] In addition to the cases discussed in the main text, s*ee, e.g.*, *Rivero v. American Federation of State, County and Municipal Employees, AFL–CIO*, *supra*, 105 Cal.App.4th at 924 [holding that, while union issues generally are a topic of public concern, fliers defaming a particular janitorial supervisor are not]; *Consumer Justice Center v. Trimedica International, Inc.*, *supra*, 107 Cal.App.4th at 600-603 [holding that advertisements for herbal breast enlargement did not relate to a public issue]; *World Financial Group, Inc. v. HBW Ins. & Financial Services, Inc.* (2009) 172 Cal.App.4th 1561, 1570 ["By focusing on society's general interest in the subject matter of the dispute instead of the specific speech or conduct upon which the complaint is based, defendants resort to the oft-rejected, so-called 'synecdoche theory of public issue in the anti-SLAPP statute,'"] [quoting *Commonwealth*, *supra*]; *Jewett v. Capital One Bank* (2003) 113 Cal.App.4th 805, 815 [holding that credit card "solicitations were designed solely for the purpose of commercial activity, and that to allow such solicitations the protection of section 425.16 by virtue of the fact that they touch upon matters of general public interest would eviscerate the unfair business practices laws."]; *Nagel v. Twin Laboratories, Inc.* (2003) 109 Cal.App.4th 39, 47–48 [holding that an ingredient list on diet supplement did not warrant anti-SLAPP protection because it was "not participation in the public dialogue on weight management issues" but rather in furtherance of the "private interest of increasing sales for its products"]; *Albanese v. Menounos* (2013) 218 Cal.App.4th 923, 936 ["Even if Albanese is rather well known in some circles for her work as a celebrity stylist and fashion expert, there is no evidence that the public is interested in this private dispute concerning her alleged theft of unknown items from [defendants]."].

because an NFL stadium is a large undertaking, all communications relating to such a proposal fall within the anti-SLAPP statute. (City Br. 28-30)

In addition, Petitioners' claim proves too much. Under Petitioners' proposed approach, discussions about topics as mundane as how many pixels should be in the scoreboard, or whether the contract should be signed in blue or black pen, or what brand shampoo should be in the locker room, would be entitled to anti-SLAPP protection, as they relate, however tangentially, to the proposed development. But whereas the pen vendor or team stylist may have a strong opinion on these topics, the public at large does not, and thus they do not trigger the anti-SLAPP statute. (*E.g.*, *Dyer v. Childress* (2007) 147 Cal.App.4th 1273, 1280 [holding that while the film Reality Bites, in toto, "may address topics of widespread public interest," the public had no particular interest in Ethan Hawke's portrayal of the plaintiff, and thus the anti-SLAPP statute did not apply to his defamation and false light claims].)

2. Petitioners failed to introduce any evidence, or otherwise establish, that the communications alleged to form the basis of liability concerned a public issue.

Focusing, as the law requires, on the actual "speech" giving rise to liability, Petitioners entirely failed to put forth any evidence that such speech concerned a matter of public interest. As such, Petitioners failed to meet their burden. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 ["The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff

complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute. (§ 425.16, subd. (b)(1))."].)

The sole evidence submitted by Petitioners in the trial court on the public interest requirement was a declaration by Saied Nasseh, planning manager for the City of Carson. (AA:1:5:79-80.) Mr. Nasseh stated that Carson was a small city (*Id.* at p. 79), that Carson was being considered for an NFL stadium (*Ibid.*), that the proposed stadium would be a substantial undertaking with a large economic impact (*Id.* at pp. 79-80), that the proposal enjoys community support (*Id.* at p. 80), and that "[a]n NFL stadium would transform the culture and character of not only Carson but the entire region." (*Ibid.*) That is the sum total of evidence introduced by Petitioners, all of which supports the notion that bringing the NFL to Carson is a significant issue, but none of which addresses the relevant question— namely, whether the individual selected to represent Carson in soliciting the NFL was a matter of public interest. As to this issue, Petitioners submitted no evidence whatsoever.

Neither do Plaintiffs' allegations demonstrate that the speech at issue involved a matter of public interest. The FAC references three principal types of communications. In the first, described in paragraph 36 of the FAC, the City acquiesced in the Bloom Defendants' attempts to negotiate a deal with the NFL and

their false representations to the NFL that the Bloom Defendants were authorized to act as the City's agent. (AA:1:2:31.) These actions damaged Rand by undercutting its role as the City's agent, but they are plainly not the type of publicly significant communications that implicate the anti-SLAPP statute. They are virtually indistinguishable from the attorney's letter in *Kurwa*. Like that case, the Bloom Defendants' representations to the NFL were tangentially related to an important issue (NFL relocation, while important, pales by comparison to medical care for thousands), but themselves relate only to the quotidian issue of which among two competing businesspeople gets the contract. (*Kurwa v. Harrington, Foxx, Dubrow & Canter, LLP*, *supra*, 146 Cal.App.4th at p. 848.) Nor do the statements contribute to any public debate, as there is no evidence that the proper party to solicit the NFL on behalf of Carson was a topic of public debate circa 2013. (*Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 898 ["[I]t is not enough that the statement refer to a subject of widespread public interest; the statement must in some manner itself contribute to the public debate."]; *see also Du Charme v. International Broth. of Elec. Workers, Local 45* (2003) 110 Cal.App.4th 107, 119 ["[I]n order to satisfy the public issue/issue of public interest requirement of section 425.16, subdivision (e)(3) and (4) of the anti-SLAPP statute, in cases where the issue is not of interest to the public at large, but rather to a limited, but definable portion of the public (a private group, organization, or community), the constitutionally protected activity must, at a

minimum, occur in the context of an ongoing controversy, dispute or discussion, such that it warrants protection by a statute that embodies the public policy of encouraging participation in matters of public significance."].)

The second type of communication referenced in the FAC—the Bloom Defendants ghostwriting letters on behalf of Mayor Dear and engaging in secret correspondence and meetings regarding how they would undercut Rand (AA:1:2:31)—is even farther afield from a matter of public concern. Many of those letters and emails were put into evidence by Plaintiffs (not Defendants) (AA:3:15:681-84), and they consisted of private emails and letters, many of which were marked as confidential.[6] There is no evidence that these communications were known to anyone other than Defendants, and, as such, do not concern public issues and do not warrant SLAPP protection. (*Bikkina v. Mahadevan* (2015) 241 Cal. App. 4th 70, 80–85 [holding that defendants' statements made to a "small, specific audience," not made in a place open to the public or a public forum, not reported in

[6] For instance, in a November 15, 2013 email marked as "high importance" and "confidential," Linda Paul of U.S. Capital provided Mayor Dear with a draft letter (on City letterhead) that was to be sent by Mayor Dear to the Los Angeles County Counsel's office regarding the proposed NFL site. (AA:3:15:890-93, at 890.) Similarly, in a July 16, 2014 email sent by Mr. Bloom with the subject line "Carson NFL," Mr. Bloom writes, *inter alia*, that "[a]ll meetings with the City, the County, the Carson City Attorney and the Los Angeles County Attorney are under strict CONFIDENTIALITY and no outsiders are to be involved." (AA:4:15:909-11, at 910.)

the media, and not posted on a website consequently did not trigger protection under the public interest prongs of the anti-SLAPP statute].)

The third type of communication referenced in the FAC concerns a purely private issue not warranting SLAPP protection: fraud. First, in 2012 and in order to induce Rand to enter into the EAA, Carson's City Attorney Bill Wynder told Mr. Rand that, even though the EAA only initially provided for a term of two years, the City would extend the EAA for the two years beyond that period upon showings of reasonable progress by Rand. (AA:1:2:30.) This statement was false when made, and induced Rand to enter into the EAA and expend funds for its two-year duration. Second, the defendants concealed evidence of their wrongful conduct with the Bloom Defendants, most notably by the Mayor informing Mr. Rand that he did not know Mr. Bloom and was unsure what, if anything, Mr. Bloom was doing with regards to bringing the NFL to Carson. (AA:1:2:31-32.) Although false and fraudulent, these are garden-variety misrepresentations, made privately, that relate solely to the identity of the City's negotiating agent. As with the communications discussed above, no evidence was submitted by defendants to establish either that the public *did* care about this issue (e.g., no contemporaneous news articles or the like were submitted) or that the public *should* care about this issue (no evidence to suggest that statements by the City about who its agent is or what Rand' prospects of renewal were might have a substantial impact upon a significant portion of the

public). (*Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 111 [holding that fraudulent statements regarding competitor's alleged polluting were not subject to the anti-SLAPP statement because, "[a]lthough pollution can affect large numbers of people and is a matter of general public interest," the defendants had "submitted no argument or evidence that [the specific competitor] is an entity in the public eye."], *overturned on other grounds by Baral v. Schnitt* (2016) 205 Cal.Rptr.3d 475.)

D. ***Tuchscher*, Upon Which Defendants Rely Almost Exclusively, is Distinguishable, Has Been Limited to its Facts, and, to the Extent it is Applicable Here, Should be Overruled.**

Both Petitioners' briefs and the trial court's Order rely almost exclusively on *Tuchscher Dev. Ent., Inc. v. San Diego Unified Port Distr.*, (2003) 106 Cal.App.4th 1219, which they read as standing for the blanket proposition that "an action for breach of an exclusive commercial development contract with a public entity . . . is subject to anti-SLAPP... ." (AA:IV:24:1122-1123 at § II-A.) But *Tuchscher* is distinguishable, and even if it were not, Petitioners' reading of it is wrong.

First, *Tuchscher* involved markedly distinct facts. Critically, and as the Court below noted, *Tuchscher* involved an actual, planned development. (106 Cal.App.4th at p. 1227.) Here, by contrast, the communications at issue do not pertain to the actual development of real estate, but to who represented the City in negotiating preparatory matters that might ultimately lead to an NFL franchise moving to Carson

and then might lead to a new stadium in the City, many years down the line. Further, *Tuchscher* involved an exclusive negotiating agreement that purported to limit the parties with whom the city of Chula Vista could negotiate, (*Ibid.*) and an allegation that San Diego's port commissioner had facilitated the breach of that agreement by promoting a rival developer (*Id.* at 1228-30.) The exclusive *agency* agreement in this case is fundamentally different in that, rather than purport to limit who could speak to NFL or the City, it restricted only who could speak *with the voice* of the City. Thus, *Tuchscher* has no bearing on this case.

Moreover, even assuming (*arguendo* only) that *Tuchscher* could apply here, Petitioners' reading of the case is flawed. Contrary to Petitioners' argument, there is no blanket rule that *any* communication relating to an exclusive development agreement is a matter of public interest. *Tuchscher* did not so hold, and if it had it was wrong and would warrant reversal. As the Opinion below recognized, *Tuchscher* involved an actual planned development of a mixed-use project in Chula Vista, California. (106 Cal.App.4th at p. 1227.) Plaintiff Tuchscher Development Enterprises ("TDE") had a 1.5-year exclusive right to negotiate a development agreement for the project before the project opened up to other developers. (*Ibid.*) During that exclusive period, the respondents allegedly had a number of conversations and communications with the city and another developer regarding the substance of the project, including whether TDE was capable of completing the

project and how the project might look.[7] (*Id.* at p. 1229-30.) These topics included matters that were indisputably the subject of public debate and interest, such as which specific roadways would be constructed, which parcels demolished, and which parcels developed, if the project were given to another developer. (*Ibid.*) TDE sued, alleging that *those particular communications* interfered with its exclusive negotiating right. (*Id.* at p. 1227-28.)

Perhaps not surprisingly given the facts, neither any party nor the Court of Appeal drew any distinction between the overall importance of the project and the importance of the particular issues under discussion: there was no distinction to be drawn on those facts. Here, by contrast, and as discussed at length above, the particular communications at issue have nothing to do with the merits or substance of the proposed development.

In subsequent cases where, as here, a distinction does exist between the importance of a development and the importance of a particular communication, courts have distinguished *Tuchscher* and focused on the particular facts of the case. (*E.g. Wang v. Wal-Mart Real Estate Business Trust* (2007) 153 Cal.App.4th 790,

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[7] Notably, the motion to strike in *Tuchscher* was filed only by the port district and commissioner whose purported liability was based on statements supporting the rival developer. The city and rival developer do not appear to have moved to strike under the anti-SLAPP statute. (*Id.* at p. 1228 ["Respondents [only the port district and commissioner] moved to strike TDE's complaint"].) This decision makes sense because, as discussed in Section III.A above, engaging in commercial negotiations (as opposed to, as the port commissioner allegedly did, offering an opinion on the merits of a project) is not protected conduct that implicates the anti-SLAPP statute.

803-804 [distinguishing *Tuchscher* and holding that applying for environmental permits associated with a development was not a matter of public importance triggering the anti-SLAPP statute].) That is exactly what the Opinion below did, consonant with both *Tuchsher* and subsequent cases limiting it to its particular facts. (*Graffiti Protective Coatings, Inc. v. City of Pico Rivera* (2010) 181 Cal.App.4th 1207, 1224 [explaining that the Court of Appeal has "essentially limited *Tuchscher* to its facts – the development of scenic Bayfront property."].)[8]

IV. PLAINTIFFS' CLAIMS DO NOT ARISE OUT OF COMMUNICATIONS MADE IN CONNECTION WITH AN ISSUE UNDER CONSIDERATION BY A LEGISLATIVE BODY.

The EAA was approved in 2012 and came up for renewal in 2014, each time following a city council vote. Petitioners argue that, solely by virtue of those votes, Rand's claims necessarily concern a "written or oral statement or writing made in connection with an issue under consideration or review by a legislative . . . body" (C.C.P. § 425.16(e)(2)), thus triggering the anti-SLAPP statute. Not so, for two independent reasons.

First, Plaintiffs' claims are based on *conduct*, not speech, and thus are wholly outside the ambit of the anti-SLAPP statute. Indeed, if Petitioners are correct, any

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[8] *Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, also cited by Petitioners, is also not applicable. That case, like this one, involved a proposed development. Unlike here, the challenged activity included speech that directly related to the merits of the proposed development and litigation and petitioning activity designed to prevent the development. No such speech or activity is alleged here.

claim that a municipality breached a contract would necessarily involve protected speech, as all municipal contracts must be approved in advance by the municipality's legislative body (here, the Carson City Council). The case law refutes any such contention.

Second, even if, for the sake of argument, Petitioners' liability arose out of speech, the overwhelming majority of the speech at issue occurred *after* the EAA was adopted and had nothing to do with whether the EAA should be renewed – the only issues that were ever considered by the City Council.

A. Plaintiffs' Claims Are Based on Petitioners' Conduct, Not Speech, and Therefore the Anti-SLAPP Statute is Inapplicable.

First, as discussed extensively above in Sections III.A and III.B, the gravamen of Plaintiffs' causes of action is commercial conduct, not protected speech or petitioning activity.[9] As such, the anti-SLAPP statute does not apply. (C.C.P. § 425.16(b)(1) [anti-SLAPP statute applies only to "a cause of action *arising from* any act of that person in furtherance of [petitioning activity]"].)

The distinction between claims arising from commercial conduct and those arising from protected speech is especially important in cases that, like this one, involve commercial contracts with local government. In California, all city

[9] Indeed, the arguments in Section III.A and III.B apply with even greater force here, as subsection (e)(2) by its express terms covers only statements and writings, not also "conduct" in furtherance of protected activity. (*Compare* C.C.P. § 425.16 subd. (e)(2) *with* subd. (e)(4).)

contracts must be approved by the city council in order to be effective. (*Authority for California Cities Excess Liability v. City of Los Altos* (2006) 136 Cal.App.4th 1207, 1212.) Following Petitioners' argument, every statement made relating to or touching on any municipal contract (and the contracts themselves, which are "writings") would therefore qualify as a statement made "in connection" with a legislative proceeding, creating a significant hurdle to bringing suit against a municipality for breach of contract. This cannot be the rule. The Legislature well knows how to erect procedural bars to suing government entities; if it wanted the anti-SLAPP statute to apply to any and all breach of contract claims against a municipality, it would have done so in the Government Code, not elliptically through a sub-sub-section in the anti-SLAPP law.

B. To the Extent Plaintiffs' Challenged Claims Involve Speech At All, Such Speech Overwhelmingly Occurred After The EAA Was Adopted And Not In Connection With Any Legislative Consideration of Its Renewal.

To qualify for potential protection under Section 425.16(e)(2), the cause of action must arise out of a statement made "in connection with an issue under consideration or review by a legislative . . . body." (C.C.P. § 425.16(e)(2).) This section, however, "does not accord anti-SLAPP protection to suits arising from any act having any connection, however remote, with an official proceeding." (*Blackburn v. Brady* (2004) 116 Cal.App.4th 670, 677.) Rather, courts must

evaluate the alleged speech to determine whether that particular speech occurred in connection with such an official proceeding. (*Ibid.*)

Paul v. Friedman (2002) 95 Cal.App.4th 853 and *People ex rel. 20th Century Ins. Co. v. Building Permit Consultants, Inc.* (2000) 86 Cal.App.4th 280 illustrate this point. In *Paul*, an investigator was retained to investigate the plaintiff in a securities arbitration. Though the arbitration had to do with stock recommendations, the investigator went far deeper, looking into the plaintiff's personal life and making harmful statements about the plaintiff and his family to the plaintiff's business partners. Notwithstanding the fact that an official proceeding (the arbitration) was ongoing, the investigator was not entitled to sanctuary in the anti-SLAPP law because his tortious speech had no nexus to the subject matter of the arbitration. (*Paul v. Friedman*, *supra*, 95 Cal.App.4th at pp. 865-68.)

20th Century Insurance Co. involved fraudulent damage reports submitted to an insurance company following the 1994 Northridge earthquake. The fraudsters sought protection under the anti-SLAPP statute, claiming that the reports were prepared in anticipation of litigation and might ultimately be used to sue the insurance company if it denied the claims. The Court of Appeal rejected the argument, holding that, although litigation was a possibility, no lawsuits had yet been filed or specifically considered, and thus "[a]t the time defendants created and submitted their reports and claims, there was no 'issue under consideration' pending

before any official proceeding." (*People ex rel. 20th Century Ins. Co. v. Building Permit Consultants, Inc.*, *supra*, 86 Cal.App.4th at 285.) The Court of Appeal reasoned that, "[i]f we protect the reports and claims under section 425.16 because they eventually could be used in connection with an official proceeding, we would effectively be providing immunity for any kind of criminal fraud so long as the defrauding party was willing to take its cause to court." (*Ibid.*)

Together, the decisions in *Paul* and *20th Century Insurance* demonstrate what is required to trigger the anti-SLAPP statute under Code of Civil Procedure section 425.16(e)(2). In *20th Century Insurance,* there was no pending official proceeding, and a plausible connection to a possible but not immediate future proceeding was held insufficient. In *Paul,* there was an official proceeding, but no nexus between the challenged speech and the issues under review in that proceeding. Both elements are required—a pending official proceeding and a nexus between the challenged speech and the "issue under consideration" in that proceeding.

Here, neither is present. First, the conduct giving rise to Defendants' liability (namely, Bloom's covert displacement of Rand as the City's exclusive agent) occurred *while the EAA was in place*, when no legislative proceeding was pending whatsoever.[10] (*See A.F. Brown Elec. Contractor, Inc. v. Rhino Elec. Supply, Inc.* (2006) 137 Cal. App. 4th 1118, 1129 [holding that submitting stop notices and debt

[10] The sole communications alleged in the FAC that occurred at a time when the EAA was not in place are discussed in more detail in Section IV.C, below.

collection efforts to a public entity did not satisfy the "official proceeding" requirement because "there was no 'official proceeding' in progress or requested by defendants when they submitted their stop notices."].) Second, the "speech" at issue (assuming, *arguendo* only, it was speech at all, rather than commercial conduct), did not involve renewal of the EAA, which is the sole issue later considered by the City Council in 2014. Attempting to avoid this dispositive fact, the City argues that the Mayor's meetings with Bloom related to "whether [the Bloom Defendants] could take over as agents once the EAA expired . . . ." (City Br. at p. 41.) But the City's assertion is pure argument, as neither the City nor the Bloom Defendants offered any evidence supporting such this claim in the trial court, thus entirely failing to meet their burden to do so. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 ["The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute. (§ 425.16, subd. (b)(1)."].)

C. Mr. Wynder's 2012 Statement Regarding Renewal Does Not Qualify For Protection Because the Gravamen of Causes of Action Two and Three Is Commercial Activity, Not Protected Speech.

As discussed above, the overwhelming majority of the speech referenced in the FAC took place after the EAA was adopted and before it came up for renewal, meaning that (i) there was no pending legislative proceeding, and (ii) the speech did

not involve the potential extension of the EAA, which was the only issue under legislative consideration in 2014.

There are three exceptions to this otherwise generally applicable statement. In 2012, Mr. Wynder fraudulently told Mr. Rand that the EAA would be renewed for another term upon a showing of reasonable progress by Rand (AA:1:2:30.) Then, in 2014, Messrs. Dear and Bloom scheduled a meeting where they "discuss[ed] and conspire[d] about how to breach the EAA and not extend it." (AA:1:2:32.) Then, a few days before the EAA was up for renewal, Mr. Wynder told Mr. Rand that the EAA would not be renewed and that "the City had been 'walking on eggshells' with Leonard Bloom and 'did not need' Rand anymore." (AA:1:2:32-33)

The two conversations in 2014 are included in the FAC for context and as evidence of the Defendants' bad intent, but they do not form the basis for any asserted liability and thus cannot trigger the anti-SLAPP statute. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78 [explaining that the anti-SLAPP law applies only where "plaintiff's cause of action itself was based on an act in furtherance of the defendant's right of petition or free speech."].)

Mr. Wynder's statement to Mr. Rand in 2012 that the EAA would be renewed upon a showing of reasonable progress is mentioned in Cause of Action Two (Tortious Breach of Contract against the City), Cause of Action Three (Promissory Fraud against the City), and Cause of Action Six (Intentional Interference With

Prospective Economic Advantage against the Bloom Defendants). Although the City now argues that this statement was made in connection with the initial approval of the EAA (City Br. at p. 45), it did not make this argument below and has therefore waived it.

In any event, the statement would not qualify for anti-SLAPP protection. With respect to Rand's Second Cause of Action for tortious breach of contract against the city, the gravamen of Plaintiff's allegation is that the City breached its contract by permitting the Bloom Defendants to act as its agent and by choosing in 2014 not to extend the EAA. (AA:1:2:34-35) Mr. Wynder's statement in 2012 is relevant evidence to establish the existence of the contract, but the gravamen of the allegation is the City's conduct breaching the contract, not Mr. Wynder's statement. Likewise, and as discussed at length above in Section III.B, the gravamen of Cause of Action Three is Defendants' commercial fraud, not any protected petitioning activity.[11] And with respect to Cause of Action Six, the statement is relevant (though far from necessary, given the other evidence) to prove that Rand had a reasonable expectation that the EAA would be renewed. But it does not form the

[11] In the event the Court elects to consider the City's new argument and holds that Causes of Action Two or Three arise from statements made in connection with the initial adoption of the EAA, it should remand to determine whether Cause of Action Two is a "mixed" cause of action under *Baral v. Schnitt*, (2016) 1 Cal.5th 376 (that argument is outside the scope of the issues upon which the Court granted review) as well as whether Plaintiffs have satisfied the "probability of success" portion of the anti-SLAPP test with regard to the statement by Mr. Wynder.

gravamen of the Bloom Defendants' liability, which is based on their own tortious conduct in interfering with Rand's prospective economic advantage. (*See Graffiti Protective Coatings, Inc. v. City of Pico Rivera* (2010) 181 Cal.App.4th 1207, 1224 [although "communications may be of evidentiary value in establishing that [defendants] violated the law, liability is not based on the communications themselves."].)

V. CONCLUSION

For the reasons stated above, the Opinion of the Court of Appeal should be affirmed.

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DATED: December 20, 2016

Respectfully submitted,

HUANG YBARRA SINGER & MAY LLP
JOSEPH J. YBARRA
AARON M. MAY
KEVIN H. SCOTT

By: _____
JOSEPH J. YBARRA

Attorneys for Plaintiffs, Appellants, and Respondents
RAND RESOURCES, LLC AND
CARSON EL CAMINO, LLC

CERTIFICATE OF WORD COUNT

(Cal. Rule of Court 8.520(c)(1))

The text of this brief consists of 10,757 words, as counted by the Microsoft Word program used to generate this brief.

DATED: December 20, 2016

Respectfully submitted,
HUANG YBARRA SINGER & MAY LLP
JOSEPH J. YBARRA
AARON M. MAY
KEVIN H. SCOTT

By: _____
JOSEPH J. YBARRA

Attorneys for Plaintiffs and Appellants
RAND RESOURCES, LLC AND
CARSON EL CAMINO, LLC

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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

On December 20, 2016, I served the foregoing document(s) described as:
ANSWER BRIEF ON THE MERITS
on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

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

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

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

Executed on December 20, 2016, at Los Angeles, California.

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

Yvonne Godson

SERVICE LIST

RAND RESOURCES, LLC and CARSON EL CAMINO, LLC
v. LEONARD BLOOM, ET AL.
LASC CASE NO. BC564093
APPELLATE CASE NO. B264493

Sunny Soltani
Anthony Taylor
Christine Burrows
ALESHIRE & WYNDER LLP
18881 Von Karman Avenue, Suite 1700
Irvine, CA 92612
Email: ataylor@awattorneys.com

Counsel for Defendants/Respondents
City of Carson and James Dear

John V. Tamborelli
TAMBORELLI LAW GROUP
21700 Oxnard Street, Suite 1590
Woodland Hills, CA 91367
Email: Jtamborelli@lawtlg.com

Counsel for Defendants/Respondents
Leonard Bloom and US Capital LLC

Clerk of the Court
COURT OF APPEAL
Second Appellate District – Division 1
Ronal Reagan State Building
300 S. Spring Street, 2nd Floor, North Tower
Los Angeles, CA 90013

(1 copy)

LOS ANGELES SUPERIOR COURT
Hon. Michael Stern
Department 62
111 N. Hill Street
Los Angeles, CA 90012

(1 copy)

SUPREME COURT OF CALIFORNIA
350 McAllister Street, Room 1295
San Francisco, CA 94102

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