S181781

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

OASIS WEST REALTY, LLC,
Plaintiff and Respondent

vs.

KENNETH A. GOLDMAN, et al.,
Defendants and Appellants

ANSWER TO PETITION FOR REVIEW

After a Published Opinion by the Court of Appeal,
Second Appellate District, Division Five
Case No. B217141

From an Order Denying a Special Motion to Strike
of the Los Angeles Superior Court, Case No. SC101564
Hon. Norman P. Tarle

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TABLE OF CONTENTS

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES (continued)

Statutes

Rules

I.

WHY REVIEW SHOULD BE DENIED

Respondent Oasis West Realty, LLC ("Oasis") has petitioned for review from the published opinion of the Second District Court of Appeal, Division Five (Armstrong, J., with Turner, P.J. and Kriegler, J., conc.), which reversed an order by the Los Angeles Superior Court (Hon. Norman P. Tarle) denying a special motion to strike brought pursuant to Code of Civil Procedure section 425.16.

From January 2004 to April 2006, defendant Ken Goldman was one of several attorneys representing Oasis in connection with its proposed redevelopment of the Beverly Hills Hilton property. Two years after he ended that representation, in April 2008, the City Council approved the Hilton project, prompting a citizens' group to circulate a petition requiring a public vote on whether the project should go forward. Thereafter, in May 2008, Goldman supported this effort by collecting a few signatures and distributing a homemade note to neighbors on his street. In November 2008, the voters approved the development. In this lawsuit, Oasis is claiming that Goldman's modest personal petitioning activities breached his fiduciary duty of loyalty, thereby compelling him to pay for the $4 million it spent to defeat the petition and gain voter approval.

Goldman attempted to stop Oasis's lawsuit by filing a special motion to strike under section 425.16. His petitioning activities indisputably are an exercise of his free-speech rights—precisely the sort of conduct the anti-SLAPP statute is intended to protect. The trial court found otherwise, likening Goldman's exercise of his free-speech rights to a lawyer "switching sides" in litigation. The court then equated this "conflict of interest" with a breach of fiduciary duty and held, therefore, that Goldman's conduct did not implicate section 425.16.

The Court of Appeal unanimously reversed. It first concluded that there was "no doubt" that Goldman's petitioning effort related to the Hilton project was protected activity, likening it to a "*typical*" SLAPP suit involving "citizens opposed to a particular real estate development." Next, the court held that Oasis could not show a probability of prevailing at trial because Goldman's conduct violated no duty of loyalty under the Rules of Professional Conduct or California common law. In particular, both the Rules of Professional Conduct and the "side switching" cases on which Oasis and the trial court relied all turn on the existence of a second adverse representation or engagement—a fact conspicuously absent from this case. Alternatively, the court found that Oasis had "presented no evidence" that Goldman's canvassing of his neighborhood caused the $4 million it demanded in damages.

Oasis now claims that the Court of Appeal's thoughtful and balanced opinion is a prelude to unhinging the duty of loyalty under California law and posits a parade of horribles that inevitably will follow from its reasoning. But Oasis arrives at its conclusions by overreaching regarding (1) the facts actually involved in this controversy and (2) the limits actually apparent in the existing case law.

Indeed, when the actual facts of this case are fairly considered, there is no parade and there are no horribles. To set the record straight, Goldman did not undertake a second adverse engagement with those who launched the ballot measure. Nor was there any disclosure of client confidences here—actual or threatened—when Goldman stopped at a few homes on his street before the voting took place.

Because of these unique facts, the Court of Appeal's opinion creates no conflict with existing case law. Nor, given the Court of Appeal's careful and clear reasoning, is there a possibility of confusion related to existing cases involving the duty of loyalty or section 425.16. Facts similar to this

case are not likely to arise again any time soon, and if attempts are made to extend the narrow holding to fact patterns where it does not apply, the trial and appellate courts will be well-equipped to reject them—particularly given the clarity of the Court of Appeal's analysis and the well-established parameters of the controlling law.

When the actual record is fairly considered, it is equally apparent that the Court of Appeal's reasoning and holding aligns with the avowed purpose of section 425.16 and the First Amendment values it furthers. While the First Amendment goes unmentioned in the petition, it remains at the heart of this controversy. Goldman's petitioning activities reflect core First Amendment values, undertaken in connection with an issue of public importance—precisely the conduct that section 425.16 exists to protect. Further, as the court also found, there is "no evidence" to support Oasis's claim that Goldman's petitioning activities caused it to sustain $4 million in damages related to the ballot measure. The efforts of the Citizens' Committee (of which Goldman was neither a leader nor a member) that initiated and backed the measure, not Goldman's brief walk through his neighborhood, caused Oasis's expenditure of resources.

In short, the Court of Appeal's published opinion fits within the confines of existing authority and properly balances an attorney's recognized duty of loyalty with the personal exercise of First Amendment rights. In striking that balance, the opinion creates no conflict and, unless badly misinterpreted (as with the petition here), threatens no mischief. Accordingly, there is no need for this Court to grant review.

II.

FACTUAL AND PROCEDURAL BACKGROUND

Goldman adopts the Court of Appeal's factual and procedural recitation. Goldman supplies some additional detail here to provide a complete description of the underlying facts.

A. January 2004-April 2006: Goldman's legal work for Oasis related to the Hilton project.

Plaintiff Oasis is a limited liability company that owns a property currently occupied by the Beverly Hilton Hotel. (Court of Appeal Opinion, page 2 ("Opn., p. 2").) Defendant Goldman is a partner in defendant Reed Smith LLP and a 30-year resident of Beverly Hills. (Petition for Review, page 6 ("Petn., p. 6").)

In January 2004, Oasis retained Goldman to render legal services in connection with the redevelopment of the Beverly Hilton Hotel property (referred to by the Court of Appeal as the "Hilton project"). (Opn., p. 3.) As alleged by Oasis, Goldman was hired "to render advice, strategic planning and assistance in the formulation of the Project ... and to interface with the City officials from whom Oasis sought support for the project." (Opn., p. 3.) Goldman provided those services until April 2006, when he ended his representation. (Opn., p. 3.)

B. April 2008: Oasis secures approval of its Hilton project from the Beverly Hills City Council.

In June 2006—two months after Goldman's representation concluded—Oasis introduced a proposal to the Beverly Hills City Council regarding the Hilton project. (Opn., p. 3.) For the next two years, the Council and the City's Planning Commission reviewed and held hearings related to the project. (Opn., p. 3.) During this time, Goldman "took no part in any of the public hearings and discussions concerning the project."

(Opn., p. 4.) In April 2008, "the Council certified the EIR and introduced an ordinance approving a development agreement between the City and Oasis." (Opn., p. 3.)

C. April-November 2008: The citizens' campaign to overturn the City Council approval (Measure H).

On April 30, 2008, a group of Beverly Hills residents led by Larry Larson formed a political-action committee—the Citizens' Right to Decide Committee ("Citizens' Committee")—"with the goal of putting a referendum on the ballot which would leave approval of the project up to the voters." (Opn., pp. 4, 6.) The Citizens' Committee then actively campaigned against the passage of Measure H up until the general election in November 2008. (Volume I, Joint Appendix, pages 64-65 ("I JA 64-65").)

Goldman took no part in forming the Citizens' Committee, serving on the committee, overseeing its operation, contributing funds for its activities, or attending community rallies or other committee-sponsored events. (I JA 64-65.) Likewise, he was not employed or retained by the Citizens' Committee (or anyone else) to provide legal or any other services associated with Measure H. (I JA 60.)

D. May 2008: Goldman's limited conduct related to Measure H.

Goldman's personal activity related to Measure H was limited to two separate acts in May 2008, (Opn., p. 4), both undertaken as a private citizen.[1]

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[1] Although Oasis claims that "Goldman *immediately* participated in efforts of the Citizens' Committee," (Petn., p. 8, emphasis added), this characterization finds no support in the Court of Appeal's recitation of the facts or the evidence presented to the trial court. In

First, on May 6, 2008, Goldman spoke at a City Council meeting on his own behalf and urged the Council to relieve the referendum petitioners (many of them senior citizens) of the requirement that they carry around the entire 2,200-page Resolution—a document that weighed more than 15 pounds—while they collected signatures. (Opn., p. 4.) "Goldman's statement was that the requirement was unnecessary and unfair 'whether you're for the Hilton or for the Referendum.'" (Opn., pp. 4-5.) He was unsuccessful.

Second, on May 12, 2008, Goldman and his wife walked their street in Beverly Hills for "about 90 minutes," soliciting petition signatures from their neighbors. (Opn., p. 5.) At "4 or 5 houses," they left a homemade note that expressed their concerns about the Hilton project and urged their neighbors to sign the petition. (Opn., p. 5.)

Two days later, on May 14, 2008, Oasis contacted Reed Smith and "demanded that Goldman and Reed Smith withdraw from all activities 'that may in any manner be construed as adverse to the Project.'" (Opn., p. 5.) The next day, Oasis further demanded that Goldman's wife "remain silent," (Opn., p. 6; I JA 90), and "take no action at this point concerning the referendum." (I JA 90.) In response, except for voting in the general election, Goldman took no other actions with respect to the Measure H campaign or the Hilton project. (I JA 62.)

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fact, the head of the Citizens' Committee, Larry Larson, provided unrebutted testimony that Goldman took no part in preparing the initial petition, organizing or participating in the Steering Committee, raising funds, organizing or participating in the kickoff meeting, organizing or participating in the telephone campaign, or creating or distributing yard signs and advertisements. (I JA 97-98.) Nor was Goldman among the first group of people who volunteered to collect signatures. (I JA 98.)

The petition, for its part, vastly overstates—without any record support—the extent and nature of Goldman's activities. What the record shows is just the two modest steps described above. Thus, the petition's assertion that Goldman personally solicited "dozens" of his neighbors on May 8, (Petn., p. 8), is unsupported and ill-considered hyperbole.

Oasis also cites to what it describes as "several emails and correspondence on his firm letterhead ... in which Goldman expressed his leadership role in the opposition movement." (Petn., p. 8.) This is also misdirection. First, the record cited by Oasis includes two email strings and no other correspondence. Second, the emails involve no "leadership role" by Goldman related to the Hilton project. As described by the Court of Appeal, the communications include "two emails from Goldman to the City Council stating his opposition to a *different* project," (Opn., p. 6, emphasis added), two emails *from Larson to Goldman* soliciting the Southwest Homeowner's Association's opposition to the Hilton project, (Opn., pp. 6-7), and a short statement by Goldman to Larson related to two different projects, one of which was the Hilton project. (Opn., p. 7.) The Court of Appeal specifically considered and rejected Oasis's argument that these emails suggested a disclosure of confidences and, plainly, they do not. (Opn., p. 15, fn. 5.)[2]

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[2] In a background section entitled, "Goldman Takes Action In Direct Conflict With His Representation of Oasis," the petition also identifies a newspaper ad from March 2009 in which residents of Beverly Hills voice their support for Goldman in the present litigation. (Petn., p. 8.) Oasis presents no argument or evidence connecting the ad with any act by Goldman, let alone one that was in conflict with his prior representation of Oasis. The Court of Appeal thus rejected the notion that this ad evidenced any representation by Goldman in connection with the Hilton project. (Opn., p. 9.)

E. January 2009: Oasis sues Goldman and Reed Smith over Goldman's modest campaign activities, and Defendants move to strike the complaint pursuant to section 425.16.

Measure H passed by a narrow margin in November 2008, allowing the Hilton project to go forward. (Opn., p. 6.) Two months later, on January 30, 2009, Oasis filed the underlying lawsuit, alleging that "but for the conduct of Mr. Goldman and Reed Smith, Oasis would not have had to spend in excess of $4 million to oppose the Petition and then to actively campaign for the approval of Measure H." (Opn., p. 6.)

Defendants filed a special motion to strike under section 425.16 contending that (a) Goldman's personal campaigning activities were protected by the First Amendment; and (b) Oasis could not demonstrate a "probability" that it would "prevail" on its claims because there is no authority holding that a lawyer's personal conduct may breach the duty of loyalty owed to a former client, absent an actual disclosure of confidences. (I JA 24-54.)

Oasis's response to the motion was most noteworthy for what it did *not* do, as opposed to what it did. To begin with, Oasis did not dispute that Goldman's representation had concluded more than two years before the Measure H campaign had begun. (I JA 107-125.) Nor did it provide any evidence disputing that Goldman had nothing to do with launching the ballot measure *or* that he was not employed or retained by the Citizens' Committee *or* that he had not disclosed any confidences while engaging in his protected activity. (I JA 107-125.)

F. May 2009: The trial court extends the case law involving the breach of the duty of loyalty and denies the special motion to strike.

On May 20, 2009, the trial court entered its ruling denying the special motion to strike. (II JA 263-270.) According to the trial court, Goldman's campaigning activities represented a conflict of interest with Oasis's Hilton project sufficient to support a breach of the duty of loyalty reflected in rule 3-310(E) of the California Rules of Professional Conduct. (II JA 268-269.) Although the rule is limited by its terms to adverse employment, the court held that it could apply to any activity engaged in by a lawyer that conceivably could be described as adverse to the interests of a former client. (II JA 268-269.) The court cited no California case directly on point to extend the rule's proscription and applied the rule even though the lawyer acted in a non-representative capacity and no client confidences were actually disclosed. (II JA 268-269.)

As far as Goldman's protected speech and petitioning conduct was concerned, the trial court dismissed it without an extended analysis of the case law applying section 425.16. (II JA 263-270.) In the court's view, the "gravamen" of Oasis's causes of action was the alleged breach of Goldman's fiduciary duty, which did not implicate any First Amendment concerns. (II JA 268-269.)

Defendants' timely appeal followed on June 22, 2009. (II JA 271.)

G. March 2010: The Court of Appeal unanimously reverses, concluding that all of Oasis's claims arose from acts in furtherance of protected activity and that Oasis could not show a probability of prevailing at trial.

The Court of Appeal unanimously reversed the trial court in a published opinion. The court first concluded that "[t]here is no doubt on

the evidence presented here, Goldman's activities were protected activities." (Opn., p. 8.) Both Goldman's conduct—a citizen "distributing flyers" and "speaking at ... city council meetings"—and the subject thereof—a "real estate development"—were indicia of a "*typical* SLAPP suit." (Opn., p. 8, emphasis in original.)

In its Respondent brief, Oasis argued that "section 425.16 does not apply to litigation which is actually about an attorney's breach of the duty of loyalty," citing *Benasra v. Mitchell Silberberg & Knupp LLP* (2004) 123 Cal.App.4th 1179, *Freeman v. Schack* (2007) 154 Cal.App.4th 719, *U.S. Fire Ins. Co. v. Sheppard, Mullin, Richter & Hampton* (2009) 171 Cal.App.4th 1617, and *PrediWave Corp. v. Simpson Thacher & Bartlett LLP* (2009) 179 Cal.App.4th 1204. (Opn., p. 8.) In response, the Court of Appeal noted that each of these cases involved a claim by a former client alleging "concurrent or subsequent representation of an adverse party under circumstances which made that second representation a violation of Rules of Professional Conduct Rule 3-310(C), on concurrent representations, or Rule 3-310(E), on subsequent representations." (Opn., pp. 8-9.) The common thread running through each case was the court's holding "that the case arose from the lawyer's act in accepting the second representation, rather than the litigation activities the attorney undertook on behalf of the second client." (Opn., p. 9.) The Court of Appeal therefore distinguished the present action because "there was no second representation" by Goldman, (Opn., p. 9), and, "[w]ithout a second relationship, there is no violation of Rule 3-310(E)." (Opn., p. 11.)

Next, the Court of Appeal noted that Goldman had a separate obligation to maintain the confidences of his former client under Business and Professions Code section 6068. (Opn., pp. 11-12.) After reviewing the record, the Court of Appeal found "no evidence that Goldman revealed any confidential information or hinted that he had such information, or created

circumstances which would encourage others to think that he did and that he was basing his opposition on that information." (Opn., p. 12.)

The Court of Appeal also evaluated "the general principles of fiduciary relationships" under the common law to determine whether Goldman was prohibited from opposing the Hilton project in his "private capacity." (Opn., p. 12.) Finding that "all the cases" discussing an attorney's obligation to a former client "do so in the context of subsequent representation or employment," (Opn., p. 14), the court saw "no authority for a rule which would bar an attorney from doing what Goldman did here." (Opn., p. 16.) Nor was the court interested in accepting Oasis's invitation to extend the rule, concluding: "We cannot find that by representing a client, a lawyer forever after forfeits the constitutional right to speak on matters of public interest." (Opn., p. 17.)

Finally, the Court of Appeal concluded that Oasis had failed to satisfy its burden to establish a probability of prevailing on the merits for two separate reasons. First, "because there was no breach of duty, Oasis did not show a legally sufficient claim." (Opn., p. 17.) Second, Oasis had "presented no evidence" that Goldman caused the $4 million in damages alleged in the complaint. (Opn., p. 17.)

III.
ARGUMENT

A. Review is not warranted because the Court of Appeal's construction of the duty of loyalty adheres to settled law and creates no conflict.

Oasis does not argue, because it cannot, that this Court's review is necessary to "secure uniformity of decision" regarding an attorney's duty of loyalty under the facts of this case. Rather, Oasis claims that review will settle "an important question of law" because the Court of Appeal's

decision will erode trust critical to the attorney-client relationship. (Petn., pp. 28, 12.) As Oasis sees it, "clients will be reluctant to tell the lawyer everything needed for the representation because of fear that information may later be used against them." (Petn., p. 3.)

This argument ignores a crucial part of the Court of Appeal's analysis, which addressed an attorney's independent obligation to maintain the confidences of his or her former client. (Opn., p. 11.) The Court of Appeal was unequivocal that "[i]f, in opposing the Hilton project, Goldman had even hinted, or had by his conduct implied, that his opposition to the project was based on information obtained while he represented Oasis, he would have violated Business and Profession Code section 6068." (Opn., p. 11.)

In this case, Oasis has made no allegation, offered no evidence, and makes no argument that Goldman actually disclosed its confidences to anyone at any time. (Petn., pp. 25-27.) Nor could it. The Court of Appeal searched for and found "*no evidence* that Goldman revealed any confidential information, or hinted that he had such information, or created circumstances which would encourage others to think that he did and that he was basing his opposition on that information." (Opn., p. 12, emphasis added.) In short, Goldman "did not trade on his former representation of Oasis to lend credence to his opposition." (Opn., p. 12.) There is no reason to conclude, therefore, that the holding of this case will give birth to the "fearful client" repeatedly referenced by the petition.

When the actual record is considered, moreover, there is nothing inherent in the Court of Appeal's analysis of the duty of loyalty that warrants this Court's review. Although its case citations date back to 1893, Oasis offers no other California appellate decision—and we have found none—addressing an attorney's personal conduct adverse to a former client.

Whether similar circumstances to the facts of this case will recur is, at best, an open question.

The petition nevertheless suggests that the Court of Appeal's opinion "crafted an artificial rule," (Petn., p. 11)—what it describes as the "self-interest-exception to the duty of loyalty," (Petn., p. 12)—when it concluded that Goldman's private, non-representational conduct adverse to his former client did not violate the duty of loyalty. The opposite is true. Indeed, Oasis's argument that any adverse personal conduct by an attorney is actionable would be a novel and unwise extension of the duty of loyalty at the expense of a private citizen's exercise of his or her First Amendment rights.

The cornerstone of Oasis's argument—and its fundamental flaw—is that "Goldman unquestionably switched sides in an ongoing legal matter," (Petn., p. 21), and, therefore, "breach of loyalty is presumed." (Petn., p. 14.) As the petition's extensive list of authorities makes clear, however, the very essence of alleged "side-switching" involves a second representation or engagement adverse to an existing or former client. (See *City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 846, emphasis added ["an attorney may not switch sides during pending litigation *representing first one side and then the other*"]; *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1147 [disqualification was warranted where of counsel, and the law firm to which he was of counsel, *represented adversaries in the same litigation*]; *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 290 [law firm would breach its duty to first client if it *advised second client* regarding the statue of limitations in a potential action against first client]; *In re Zamer G.* (2007) 153 Cal.App.4th 1253, 1262, fn. 7, emphasis added ["A lawyer who *represents clients with adverse interests in same litigation* automatically will be disqualified, as will a lawyer who switches sides

during pending litigation, because both situations present an unacceptable risk that the lawyer's duties of loyalty and confidentiality will be compromised"]; *Knight v. Ferguson* (2007) 149 Cal.App.4th 1207, 1215, emphasis added, internal citation and quotations omitted ["[T]he pertinent issue is the propriety of an attorney's *representation adverse to a former client*"]; *Pound v. DeMera DeMera Cameron* (2005) 135 Cal.App.4th 70, 76, emphasis added [disqualification proper where attorney "entered into *representation adverse to his former clients*"]; *City Nat. Bank v. Adams* (2002) 96 Cal.App.4th 315, 329, emphasis added ["Where the lawyer *switches sides and represents the former client's adversary in the same matter*, everything the lawyer does for the new client necessarily will injuriously affect the former client"]; *Henriksen v. Great American Savings & Loan* (1992) 11 Cal.App.4th 109, 117 [disqualification from *representing client* proper where attorney "formerly represented and therefore possesses confidential information regarding the adverse party in the current litigation"]; *Dill v. Superior Court* (1984) 158 Cal.App.3d 301, 306, emphasis added ["the compelling reason for disqualification from *representation* is [attorney's] former personal involvement on petitioner's behalf in the identical action"]; *Dettamanti v. Lompoc Union School Dist. of Santa Barbara County* (1956) 143 Cal.App.2d 715, 723, emphasis added ["Where there is a duty of loyalty to *different clients* it is impossible for an attorney to advise either one as to a disputed claim against the other"].)

Even the *Wutchumna Water* decision repeatedly quoted by Oasis involved an attorney's representation of a second client adverse to the interests of a first client in the same matter. (See *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564, 570 ["Respondent, within a few months after his discharge, set about bringing ... two actions ... and raised on behalf of the adverse claimants on the stream the identical issues which lay at the foundation of his discharge by appellant"].) Here, there is no second

representation and, in the words of the Court of Appeal, "Oasis's arguments to the contrary strain the facts." (Opn., p. 9.)

Moreover, the absence of a second adverse representation or engagement clearly places the facts of this case beyond the scope of any fiduciary duty defined by California law.[3] Rule 3-310(E) of the Rules of Professional Conduct prohibits an attorney from "accept[ing] employment adverse to the ... former client" in a substantially-related matter. (Rules Prof. Conduct, rule 3-310(E).) Common law requires a subsequent representation or engagement to support a breach of duty as well. Four

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[3] The absence of any adverse representation also distinguishes Oasis's argument addressing the presumed disclosure of confidences. (Petn., pp. 25-27.) As an initial matter, the petition incorrectly frames the "presumed disclosure" issue by arguing that the law presumes that Oasis disclosed confidences to Goldman during the time he was representing it. (Petn., p. 25.) Disclosure of confidences by Oasis to Goldman has never been in dispute. The relevant issue would be whether the law presumes Goldman's disclosure of Oasis's confidences *to a third party*—an argument that Oasis made before the Court of Appeal. (Respondent Brief, pages 16-18 ("RB 16-18").) The presumed disclosure of confidences, however, is a concept based entirely on the existence of a subsequent adverse representation. The concept applies when the former lawyer is shown to have two conflicting fiduciary duties—one to keep the confidences of his former client, and the second, to disclose all he knows to a second, existing client. (See, e.g., *Wutchumna Water Co.*, 216 Cal. at 570 [attorney brought action "raised on behalf of the adverse claimants" to prior client, regarding same subject matter and "the identical issues"]; *U.S. Fire Ins. Co. v. Sheppard, Mullin, Richter & Hampton* (2009) 171 Cal.App.4th 1617, 1627 [addressing circumstance where "the attorney accepts a representation in which confidences disclosed by a former client may benefit the new client"]; *City Nat. Bank v. Adams* (2002) 96 Cal.App.4th 315, 330 ["prior and current representations ... in exactly the same matter"].) Like Oasis's "side-switching" analysis, the presumed disclosure of confidences does not apply because Goldman did not undertake a second representation.

recent cases considering the application of section 425.16 to duty-of-loyalty claims involving attorneys illustrate as much:

- In *Benasra*, 123 Cal.App.4th 1179, former clients brought a claim against the defendant law firm for accepting representation of clients with adverse interests in a subsequent action. In rejecting the protected-activity prong of the anti-SLAPP motion analysis, the Court of Appeal held that the conduct at issue was not "what occur[red] in the courtroom during the second representation, but *the very acceptance of that adverse engagement*." (*U.S. Fire*, 171 Cal.App.4th at 1627, emphasis added [explaining *Benasra*].)

- In *Freeman*, 154 Cal.App.4th 719, an attorney was sued by former clients after he abandoned their representation to assume representation for other parties in the same case. In rejecting the protected-activity prong of the anti-SLAPP motion analysis, the Court of Appeal held that the conduct at issue was not "filing or settlement of litigation," but "his *undertaking to represent a party* with interests adverse to plaintiffs." (*Id.* at 732, emphasis added.)

- In *U.S. Fire Ins. Co.*, 171 Cal.App.4th 1617, a former client sued to enjoin its former counsel from representing an adverse party in the same litigation. In rejecting the firm's anti-SLAPP motion under the protected-activity prong, the Court of Appeal emphasized that "the principal thrust of the misconduct averred in the underlying complaint is the *acceptance by Sheppard Mullin of representation adverse to U.S. Fire*." (*Id.* at 1628, emphasis added.)

- In *PrediWave Corp.*, 179 Cal.App.4th 1204, the Court of Appeal held that the defendant attorney had failed the first prong analysis under section 425.16 because the conduct at issue was *simultaneous representation.* (*PrediWave*, 179 Cal.App.4th at 1228.) The court first noted that "the principal thrust of Prediwave's cause of action is that defendants simultaneously represented both PrediWave and Qu in matters in which they had an irreconcilable conflict of interest," (*id.* at 1226-1227),

> and then concluded that this conduct was "not statements or writings within the meaning of section 425.16, subdivision (e)." (*Id.* at 1227.)

As with all the other cases cited in the petition, the outcome in each of these cases resulted from a lawyer adopting a potentially conflicting position by virtue of a subsequent adverse representation or engagement. Because that key element is absent here, the Court of Appeal's decision finding no breach of the duty of loyalty creates no conflict with existing case law and does not threaten the efficacy of that duty as set forth in existing law. The court's narrow holding creates no reason for review.

B. Review is not warranted because the Court of Appeal's application of section 425.16 involves settled law and creates no conflict.

Oasis also seeks review of how the Court of Appeal carried out the two-step analysis under section 425.16, (Petn., p. 4), arguing that "in determining that the first prong of the anti-SLAPP analysis was satisfied, the Court skipped to the second step." (Petn., p. 30.) Although the petition is difficult to follow on this point, Oasis apparently believes that the Court of Appeal misapplied section 425.16 and, in doing so, has created an issue in need of this Court's attention. There is nothing in this aspect of the Court of Appeal's reasoning that warrants review either.

To begin with, if Oasis thought that the Court of Appeal's approach in applying section 425.16 was in error for the step-skipping reason it now advances, it should have raised that issue in a petition for rehearing and not for the first time on review. This Court need not consider the issue for that reason alone. (Cal. Rules of Court, rule 8.500(c)(2).)

In any event, there is no need for this Court to expend its limited resources and explicate the proper approach. As Oasis concedes, the two-step approach is "settled," (Petn., p. 31), by a "solid line of cases." (Petn.,

p. 4.) This Court already has provided guidance on the two-step analysis under section 425.16 on multiple occasions. (See, e.g., *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 278-279; *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192; *Zamos v. Stroud* (2004) 32 Cal.4th 958, 965; *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733; *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89; *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78; *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.)

Nor is there any error in the Court of Appeal's analysis or the result it reached under section 425.16. Rather, the court acknowledged and followed *Navellier*, 29 Cal.4th 82, (Opn., p. 8), and correctly found that section 425.16 could and should be brought to bear to protect Goldman's First Amendment petitioning activities in keeping with the legislative intent behind its enactment. Nothing on the face of the opinion thus threatens the existing case law on section 425.16 or the policies that underlie the statute.

In that regard, the petition for review studiously ignores—there is not a single mention of the First Amendment in its 37 pages—that section 425.16's stated goal is to protect "the right of petition or free speech ... in connection with a public issue." (Code Civ. Proc., § 425.16, subd. (b)(1).) At no point in the briefing has Oasis ever disputed that the Hilton project is a public issue, nor does it dispute that the type of conduct engaged in by Goldman—distributing a flyer or collecting signatures or speaking at a city council meeting—is core free-speech activity. The right to petition the government, along with the closely related freedoms of speech and press, are among "the indispensable democratic freedoms secured by the First Amendment." (*Thomas v. Collins* (1945) 323 U.S. 516, 530 [65 S.Ct. 315, 322, 89 L.Ed. 430]; *Sierra Club v. Butz* (N.D.Cal. 1972) 349 F.Supp. 934, 936.) These fundamental rights are guaranteed to all free citizens, *including* attorneys. (See *Johnston v. Koppes* (9th Cir. 1988) 850 F.2d 594,

596.) In applying section 425.16, the Court of Appeal simply acted to avoid the unwarranted infringement of Goldman's First Amendment rights—just as the Legislature contemplated would be the case.

Finally, there is no apparent error in the Court of Appeal's resolution of the second step in the anti-SLAPP analysis either. There, the burden shifts to the plaintiff to establish that there is a probability that he will prevail on the claim. (Code Civ. Proc. § 425.16, subd. (b)(1).) Here, the Court of Appeal held that Oasis failed to satisfy this burden for two independent reasons: First, because there was no breach of duty by Goldman, (Opn., p. 17), and second, because "while Oasis alleged that Goldman's activities caused it $4 million in damages, the total amount it spent as a result of the petition and referendum, it presented no evidence that Goldman caused those damages." (Opn., p. 17.) With regard to the second reason, the petition argues that "the Court of Appeal overstepped its bounds—it weighed evidence, it drew inferences against plaintiff, and instead of analyzing the issues as if it were evaluating a motion for nonsuit, it acted as a trier of fact." (Petn., p. 35.)

Oasis's *only* example of allegedly improper evidence-weighing or inference-drawing is the Court of Appeal's discussion of Goldman's appearance at and statement to the City Council. (Petn., p. 35.) This argument conflates the Court of Appeal's analysis of Goldman's duty of loyalty with its separate finding that Oasis had failed to provide evidence regarding causation of the $4 million damage claim. Regarding Goldman's City Council statement, the Court of Appeal concluded that "a finding that Goldman's statements to the City Council breached a duty of loyalty to Oasis would stretch that duty to cartoonish proportions." (Opn., p. 12.)

The position that Goldman's City Council statement is evidence that he caused Oasis's $4 million damage claim is not alleged in the complaint, (I JA 1-23), nor was it argued before either the trial court, (I JA 107-125),

or the Court of Appeal. (RB 1-28.) More importantly, under the facts of this case, the argument makes no sense. The undisputed evidence is that the procedural suggestion made by Goldman was *rejected* and never implemented in any way. (I JA 60-61.)

As noted by the Court of Appeal, the uncontroverted evidence from the head of the Citizens' Committee, Larry Larson, was that "the modest number of signatures Goldman and his wife collected made no difference to the success of the petition." (Opn., p. 6.) Oasis does not dispute this conclusion because it cannot. Its claim for $4 million in damages is not sustainable and the dismissal of Oasis's lawsuit was warranted for this reason also.

IV.
CONCLUSION

The Court of Appeal's opinion carefully and thoughtfully follows the existing case law and creates no conflict or issue that warrants this Court's review. The petition for review should be denied.

DATED: April 30, 2010

FAIRBANK & VINCENT

By: _____
Dirk L. Vincent

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.504(d)(1))

This brief consists of 6,646 words as counted by the Microsoft Word program used to generate the brief.

DATED: April 30, 2010 FAIRBANK & VINCENT

By: _____
Dirk L. Vincent

PROOF OF SERVICE

I, the undersigned, declare that I am a resident of Los Angeles County; I am over the age of eighteen years and not a party to the within entitled action; my business address is 444 South Flower Street, Suite 3860, Los Angeles, CA 90071.

On April 30, 2010, I served the following documents:

- **Answer to Petition for Review**

BY MAIL OR PERSONAL SERVICE

[X] By placing a true copy thereof enclosed in sealed envelopes addressed as follows: **[Please see attached service list]**

[X] **BY MAIL** -- I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party serviced, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing affidavit.

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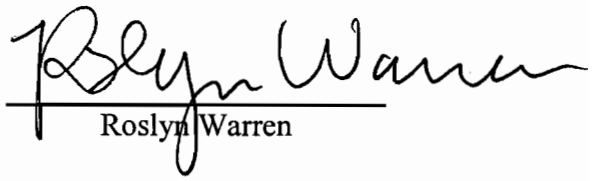
Executed on April 30, 2010, at Los Angeles, California.

[ ] (Federal) I declare under penalty of perjury that the above is true and correct.

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



Roslyn Warren

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164-0901
Oasis West Realty, LLC v. Kenneth Goldman, et al..
Los Angeles Superior Court, Case No. SC101564

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