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SUPREME COURT COPY

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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.

AFTER A DECISION BY THE COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION 5, CASE NO. B217141
SUPERIOR CASE NO. SC101564

OPENING BRIEF ON THE MERITS

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ISSUES PRESENTED

1. Whether a lawyer retained to represent a client to obtain approval of a project could perform services for the client, receive payment for those services, and then, after severing his relationship with the client, affirmatively work against the very project he was retained to support so long as the lawyer is acting for his own self interest and is not then representing another client, or does this conduct violate the lawyer's duty of loyalty to his client?

2. In analyzing whether the "gist of an action" as pleaded concerns activity protected by the anti-SLAPP statute (the first step of the anti-SLAPP test), is it improper to consider "irrelevant" merits-based arguments, particularly when that analysis requires the Court to weigh evidence?

INTRODUCTION

The first issue under review concerns the fundamental duty of loyalty lawyers owe to their clients. The opinion of the Court of Appeal significantly erodes that duty by holding that a lawyer retained to represent a client with respect to a very specific matter (here the approval of a real estate project) could perform services for the client, receive payment for those services and then, after severing his relationship with the client, affirmatively work against the very project he was retained to support so long as the lawyer is acting on his own behalf and is not then representing another client.

It would be startling to most (if not all) clients that the very lawyer hired to champion their cause is able to work with impunity against that very cause. This truly is the very antithesis of "loyalty."

The Court of Appeal attempted to justify this conclusion because (1) the lawyer did not agree to represent a second client but instead acted on his own behalf when he affirmatively opposed the ongoing project he had been retained to support; (2) the lawyer's conduct supposedly concerned a matter of public interest; and (3) there was no affirmative evidence that the lawyer disclosed confidential information. None of these reasons justifies the Court's decision.

First, from the client's perspective it does not matter whether the attorney who is now taking actions to stop the client's project is acting on his own behalf or on behalf of a

second client. Either way the very same lawyer the client retained to gain approval for his project is now attempting to stop it. Indeed, if anything it is an even greater betrayal if the lawyer acts on his or her own behalf rather than for a new client, since the lawyer would be personally and not just professionally opposed to the client.

Second, as explained below, a lawyer may never switch sides in an ongoing legal matter. It is no excuse that the lawyer attempts to justify his disloyal conduct on public policy grounds.

And third, it is conclusively presumed that a lawyer obtains confidential information while representing a client. Once that lawyer switches sides, the client need not produce affirmative evidence that the lawyer used that confidential information. The very fact that a lawyer who was retained to publicly support a project switched sides to publicly oppose that very project by itself implies that the lawyer is being motivated by what he learned during his representation.

Under the Court of Appeal's analysis, clients will no longer know whether their lawyer will later affirmatively work against them in the very same matter. In view of this uncertainty, clients will be reluctant to tell their lawyer everything needed for the representation because of fear that information may later be used against them. The trust which is so critical to the lawyer-client relationship will be subverted.

The second issue under review concerns the manner in which a court rules on an anti-SLAPP motion. As this Court is well aware, such a motion involves a two-step

analysis. Under the first step, the moving defendant is obligated to show that the gist of the plaintiff's action involves matters that fall within the anti-SLAPP statute. If and only if that first prong is satisfied, the burden shifts to the plaintiff to demonstrate the merits of its claim. Here, however, the Court of Appeal conflated the two prongs, improperly weighed the evidence, and ruled contrary to a solid line of cases holding that claims of ethical misconduct by lawyers, such as what is pleaded here, is not within the anti-SLAPP statute.

As the Court of Appeal acknowledged, the great weight of those decisions considering the issue have concluded that a client's claim that a lawyer violated his duty of loyalty involves conduct that does not fall within the anti-SLAPP statute – even though the manner in which the disloyalty became manifest usually involves activity that would fall within the statute (such as the filing and prosecution of a lawsuit).

However, after acknowledging this rule and recognizing that the gist of plaintiff's action involved its attorney's conduct adverse to his client, the Court of Appeal proceeded to determine that the anti-SLAPP statute nevertheless applied because, according to the Court, plaintiff could not establish that there was a breach of the duty of loyalty and therefore plaintiff was wrong on the merits. In other words, as part of its determination whether the first prong of the anti-SLAPP analysis was satisfied, the Court skipped to the second prong (the merits of the action). Perhaps as troubling, in doing this the Court evaluated the evidence and drew inferences against the plaintiff in evaluating the merits

of its claim.

The reason this approach is so problematic is that it causes the court to go to step two (the merits of the plaintiff's claim) even though on its face the gist of the plaintiff's claim does not fall with the ambit of the anti-SLAPP statute. If this approach is approved then the scope of the anti-SLAPP statute is expanded tremendously. A procedure which is already subject to abuse will be even more abused.

In sum, for two independent but related reasons, the Court of Appeal's reversal of the order denying the anti-SLAPP motion was in error. That opinion should therefore be reversed and the trial court's order should be reinstated.

BACKGROUND

A. Oasis West Seeks Beverly Hills Approval For Its Redevelopment Project

Plaintiff Oasis West Realty, LLC ("Oasis") is a limited liability company that owns a 9-acre parcel of land in Beverly Hills. (JA2.) In January 2004, Oasis began efforts to develop the property, contemplating demolishing existing structures and constructing new improvements including a five-star hotel and luxury condominium units. (JA2.) This required the approval of the Beverly Hills City Council and the support of the citizens of the City of Beverly Hills. (JA2.)

B. Oasis Retains Attorney Ken Goldman, A Respected And Influential Beverly Hills Civic Leader, To Help Secure City Approvals

In January 2004, Oasis retained Defendant Ken Goldman, a partner in defendant Reed Smith LLP and a 30-year resident of Beverly Hills (JA60), 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." (JA2.) Oasis selected Goldman as counsel for the project, because "Goldman was an expert in civic matters and "a well-respected, influential leader who was extremely active in Beverly Hills politics." (*Ibid.*) As Goldman was President of the Southwest Homeowners Association and had appeared before the City Council many times to address other major redevelopment projects in the City, his "statements and opinions on City development matters bore significant influence on City Council members and the local citizenry," particularly members of the Southwest Homeowners Association. (*Ibid.*)[1]

Goldman provided his services to Oasis for over two years, during which time Oasis paid approximately $60,000 in fees. (JA60.) During his representation of Oasis, Goldman "was intimately involved in the formulation of the plan for Oasis' development

[1]In March 2009, in response to Oasis' claim that Goldman's efforts to defeat the project were disloyal, a full-page testimonial in a Beverly Hills newspaper contained the signatures of over 200 residents boasting of Mr. Goldman's leadership and community service. (JA234.)

of the Property, its overall strategy to secure all necessary approvals and entitlements from the City and its efforts to obtain public support for the Project. Throughout the representation, Oasis revealed confidences to Mr. Goldman, which it reasonably believed would remain forever inviolate." (JA3.)

Goldman's legal services to Oasis included many meetings with Oasis officers to plan project strategy vis-a-vis the City, the City Council, the School Board president and superintendent, City residents and homeowners associations; communications and meetings with City officials (including the Mayor and City Manager), planning staff, other City employees, and local residents concerning the project; conducting surveys, polls and community outreach, and identifying potential project opposition. (JA139,146,158,162-163,167,174,181,183,186,191-192,195.)

C. As The Project Moves Forward Toward Obtaining City Council Approval, Goldman Terminates His Representation Of Oasis; Opposition To The Project Forms

In the spring of 2006, Goldman advised Oasis that he and Reed Smith would no longer represent Oasis in connection with the project. (JA3.) Immediately after the City Council approved the project on April 29, 2008, a group of Beverly Hills residents formed a political action committee – the Citizens' Right to Decide Committee (the

"Citizens' Committee") – for the purpose of putting the City Council's approval of the project to a public vote by referendum. (JA64.)

D. Goldman Takes Action In Direct Conflict With His Representation Of Oasis

Goldman immediately participated in efforts of the Citizens' Committee to abrogate the City's approval of the very project he had been retained to support. (JA3.)

- Goldman authored and distributed a letter disparaging the Project, containing misleading information about its size, traffic impact and parking, and exhorting residents to join the opposition to the Project and to support the referendum. (JA227.)

- Goldman appeared before the members of the Beverly Hills City Council, all of whom he personally knew ("I know every single one of you"), to seek procedural changes to make it easier for the anti-project forces to solicit signatures authorizing the referendum. (Opn. p. 5, JA77.)

- Goldman personally solicited dozens of his neighbors to oppose the Project. (JA61.)

- Goldman, President of the Southwest Homeowners Association, sent several emails and correspondence on his firm letterhead to one of the leaders of the Committee, Mr. Larson, in which Goldman expressed his leadership role in the opposition

movement. (JA202-207, 62.)

E. Oasis Demands Goldman Cease His Actions In Opposition To The Project

On May 14, 2008, Oasis demanded that Goldman and Reed Smith withdraw from all activities "that may in any manner be construed as adverse to the Project" and that they retract their opposition. (JA84.) Goldman and Reed Smith agreed that neither would take any additional acts opposing the project. (JA62.) The referendum succeeded in placing the City Council's approval of the project on the ballot. (JA64-65.)

Oasis was billed and paid well in excess of $3,000 in legal fees solely to address Goldman's duplicity and to attempt to restrict further misconduct. (JA209,213.) Millions more dollars were spent by Oasis to defeat the referendum and to address Goldman's opposition to the Project, monies that Oasis would not have had to spend if Goldman not opposed the Project and there had been no referendum. (JA613-614.)

The Redevelopment Project was approved by voters in the November 2008 election by a very slim margin. (JA64.)

F. Oasis' Lawsuit

In January 2009, Oasis filed an action for breach of fiduciary duty, negligence, and breach of contract against Goldman and Reed Smith 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.'" (JA4.)

G. The Anti-SLAPP Motion

Defendants moved to strike the action as a SLAPP pursuant to Code of Civil Procedures, section 425.16, primarily contending that Goldman's personal campaigning activities were protected by the First Amendment. (JA24.)

In opposing Goldman's anti-SLAPP motion, Oasis primarily contended that Goldman's switching sides to oppose the very project for which Oasis had retained him as its lawyer constituted a breach of the duty of loyalty, and that Goldman could not hide behind the First Amendment to justify his affirmative acts in opposition to that pending project. (JA107.)

The Superior Court denied the anti-SLAPP motion, ruling that (a) Goldman breached his duty of loyalty to his client Oasis, in "campaigning against approval of the

project after representing Oasis in efforts to secure that very same approval" and (b) Goldman breached his ethical duties to Oasis when he accepted representation of Oasis without disclosing his potentially adverse personal interest in opposition to the project. (JA266.) In part, the trial court ruled:

"This action is not grounded in any 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' by Goldman (i.e. what he said at the April 28, 2008 City Council meeting or his act of soliciting signatures – though these evidence the ethical violations), but on the ethical violations discussed above – by failing to make a written disclosure of his personal interest in Oasis' project before accepting representation, and secondly in involving himself in 'whatever capacity' he may have acted in opposition to the subject project, after concluding representation. Here, without the prior attorney-client relationship giving rise to these duties, there would be nothing left of the complaint. The alleged breaches of the duties arising out of the prior attorney-client relationship are the principal thrust of this action." (JA261.)

Goldman and Reed Smith appealed (JA271).

H. The Court Of Appeal's Decision

On March 3, 2010, the Court of Appeal reversed the Superior Court's decision in a published opinion which is described in the Legal Discussion portion of this brief.

LEGAL DISCUSSION

I. Contrary to the Court of Appeal's opinion, the duty of loyalty prevents a lawyer from affirmatively working against the very project the lawyer was retained by a former client to support, regardless whether the lawyer is acting for his or her self interest or is representing a new client

A. An attorney's duty of loyalty to the client: "a distinct fundamental value of our legal system"

The first issue under review goes to the very essence of the loyalty lawyers owe their clients. The Court of Appeal crafted an artificial rule under which a lawyer may affirmatively act against the very matter he or she was retained and paid by the client to support so long as (1) the lawyer severs his or her relationship with the client and (2) the lawyer takes those actions for his or her own self interest rather than on behalf of a new

client. As explained, in view of this self-interest-exception to the duty of loyalty, clients will no longer be able to fully trust their lawyers. Clients will not know whether a lawyer will elect to terminate his or her relationship with the client and affirmatively work against the client as to the very pending matter that was the subject of the representation. In view of this uncertainty, clients will justifiably be reluctant to fully and candidly disclose the information necessary for the lawyers' representation. The trust which is so crucial to the lawyer-client relationship will be seriously eroded.

The United States Supreme Court has characterized the "duty of loyalty" as "perhaps the most basic of counsel's duties." (*Strickland v. Washington* (1984) 104 S. Ct. 2052, 2067.) This Court agrees, characterizing the relation between attorney and client as being "a fiduciary relation of the very highest character, and binds the attorney to most conscientious fidelity -- uberrima fides." (*Cox v. Delmas* (1893) 99 Cal. 104, 123; see also *Rader v. Thrasher* (1962) 57 Cal.2d 244, 250; *SpeeDee Oil Change Systems* (1999) 20 Cal.4th 1135, 1146 [a "distinct fundamental value of our legal system is the attorney's obligation of loyalty"].)

In *Anderson v. Eaton* (1930) 211 Cal. 113, 116, this Court stressed that "[i]t is . . . an attorney's duty to protect his client in every possible way, and it is a violation of that duty for him to assume a position adverse or antagonistic to his client without the latter's free and intelligent consent given after full knowledge of all the facts and circumstances. (*In re Boone*, 83 Fed. 944, 954-955.) By virtue of this rule an attorney is precluded from

assuming any relation which would prevent him from devoting his entire energies to his client's interests."

And this duty of loyalty does not stop once the attorney-client relationship ends. This Court has made clear that "an attorney is forbidden to do either of two things *after severing his relationship* with a former client. He may not do anything which will injuriously affect his former client in any manner in which he formerly represented him nor may he at any time use against his former client knowledge or information acquired by virtue of the previous relationship." (*Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564, 573-574, italics added.)

In *SpeeDee Oil Change Systems*, *supra*, 20 Cal.4th at p. 1147, this Court recognized that when a lawyer switches sides in the same matter (which happened here) "[t]he most egregious conflict of interest" occurs. The Court explained that "[s]uch patently improper dual representation suggests to the clients – and to the public at large – that the attorney is completely indifferent to the duty of loyalty and the duty to preserve confidences. However, the attorney's actual intention and motives are immaterial, and the rule of automatic disqualification applies. 'The rule is designed not alone to prevent the dishonest practitioner from fraudulent conduct,' but also to keep honest attorneys from having to choose between conflicting duties, or being tempted to reconcile conflicting interests, rather than fully pursuing their clients' rights. (*Anderson v. Eaton* (1930) 211 Cal. 113, 116 [293 P. 788].)" (*Ibid.*)

Thus, a legion of cases in this Court and the Courts of Appeal reflects the rule that an attorney's breach of loyalty is presumed when he switches sides in an ongoing matter:

- *City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839, 846 ["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 [partners and of counsel in same firm breached duty by representing adverse parties in the same litigation, because the duty to preserve client confidences (Bus. & Prof. Code, § 6068, subd. (e)) survives the termination of the attorney's representation];
- *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 290 [firm would breach duty to client if it advised second client regarding the statute of limitations in a potential action against first client];
- *In re Zamer G.* (2007) 153 Cal.App.4th 1253, 1262 ["A lawyer who represents clients with adverse interests in the 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, 1215-1216 [attorney breached duty of loyalty by switching sides from client who had consulted attorney

previously about forming a partnership and entering into a commercial lease to establish a new restaurant, over to representing party in a lawsuit against the client concerning that same business venture];

- *Pound v. DeMera DeMera Cameron* (2005)135 Cal.App.4th 70, 76-77 [attorney breached duty of loyalty when he "switched sides in the same action" – the "most egregious conflict of interest"];
- *City National Bank v. Adams* (2002) 96 Cal.App.4th 315, 329 ["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 [attorney "switching sides" and representing parties adverse to client in the same litigation presumed to possess confidential information];
- *Dill v. Superior Court* (1984) 158 Cal.App.3d 301, 306 ["the compelling reason for disqualification from representation is Hale's former personal involvement on petitioner's behalf in the identical action"];
- *Dettamanti v. Lompoc Union School Dist.* (1956) 143 Cal.App.2d 715, 723 ["the law regards the shifting of loyalty and allegiance from one of two adverse interests to the other as impossible, and will have none of it"].

This duty of loyalty is so important that the Court has tried to remove even the

temptation that lawyers will act contrary to their client's interests. (See *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23, 37-38.)

The issue here is whether, even though a former lawyer unquestionably owes the client a continued duty of loyalty with respect to the subject matter of the former representation, can the lawyer nevertheless affirmatively take efforts against the very matter he was retained by his client to support? In its published opinion the Court of Appeal gave lawyers the right to do so, so long as the lawyer was acting in his or her own self interest.

As now explained, this holding subverts the trust that is at the very core of the attorney-client relationship and is not supported by the Court of Appeal's analysis.

B. The focus of an inquiry into whether the attorney has breached the duty of loyalty to his client must be from the perspective of that client

Here, the Court of Appeal recognized that "unquestionably [Goldman] acted against the interest of his former client, on the issue on which he was retained." (Opinion, p. 13.)[2] The Court further recognized that Goldman's actions did "injuriously

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[2]As explained later in this brief, the Court improperly weighed the evidence to conclude that aspects of Goldman's conduct were not in breach of his duty of loyalty. However, for purposes of this issue, the fact that the Court acknowledged that at least some of Goldman's conduct was adverse to Oasis with respect to the very subject of his representation, is sufficient to demonstrate why the Court's opinion subverts the duty of

affect his former client in [a] manner in which he formerly represented him" and therefore violated the literal terms of *Wutchumna Water Co., v. Bailey*, *supra*, 216 Cal. at pp. 573-574.

But the Court of Appeal concluded that this Court could not possibly have meant what it said in *Wutchumna Water Co.* because it would "bar Goldman not only from circulating the petition, but from signing it, indeed, from voting against the measure. However, all the cases which recite this rule do so in the context of subsequent representations or employment. None involve the acts an attorney takes on his or her own behalf." (Opinion, p. 14.)

However, to limit the time-honored, bed-rock rule of absolute lawyer loyalty only to circumstances where the lawyer is acting in a representative capacity defeats the very purpose of the duty -- to foster absolute client trust and confidence in counsel and the legal system. (*Wutchumna Water Co.* v. *Bailey, supra,* 216 Cal. 564.)

"The effective functioning of the fiduciary relationship between attorney and client depends on the client's trust and confidence in counsel. (*Flatt*, *supra*, 9 Cal. 4th at pp. 282, 285.) The courts will protect clients' legitimate expectations of loyalty to preserve this essential basis for trust and security in the attorney-client relationship. (Ibid.)" (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.*, *supra*, 20 Cal.4th 1135, 1146-1147 (Cal. 1999); see *General Dynamics Corp. v. Superior Court*

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loyalty Goldman and his firm owed to Oasis.

(1994) 7 Cal.4th 1164, 1174 ["no client should be forced to suffer representation by an attorney in whom that confidence and trust lying at the heart of a fiduciary relationship has been lost"].)

The Court of Appeal failed to appreciate that the duty of loyalty precludes an attorney from "assum[ing] a position adverse or antagonistic to his client without the latter's free and intelligent consent given after full knowledge of all the facts and circumstances." (*Anderson, supra,* 211 Cal. at p. 116.) While "[t]he typical case falling within the rule arises in the context of legal representation of a client whose interests are adverse to another client or former client of the attorney. [Citation] . . . 'adverse' also connotes being 'opposed to one's interest' or 'unfavorable.'" (*David Welch Co. v. Erskine & Tulley* (1988) 203 Cal.App.3d 884, 891-892.)

The focus therefore must be from the perspective of that former client to whom the duty of loyalty is owed. And from that perspective, it matters not in the least whether counsel's disloyalty by taking adverse actions against the client was on behalf of another client or in his "personal," non-representative capacity – the damage to the former client is the same. If anything, it is an even greater betrayal if a lawyer opposes the very matter he or she was retained to support, for personal rather than professional reasons. A lawyer who publicly acts adversely and exhorts others to join his cause will likely cause even more damage to the client than the lawyer who just represents a single, second client. Therefore, no client would ever knowingly engage nor allow himself to continue to be

represented by a lawyer that publicly opposes and encourages others to join in opposing the client's still-pending interests, regardless whether the lawyer was doing so for a new client or on his own account.

How could a client trust his lawyer enough to disclose confidential and potentially harmful information necessary for the lawyer to be able to competently represent the client? The answer to this inquiry is that, under the Court of Appeal's analysis, clients could no longer so trust their lawyers.

It is not the case that unless the lawyer is retained by a second client, the lawyer remains neutral with respect to the subject matter of the earlier representation. Clearly, a lawyer who affirmatively works against the subject of the earlier representation – such as occurred here – is anything but neutral. It is equally clear that the former client's interests are harmed every bit as much whether the lawyer is acting on his or her own behalf or is representing a second client.

The "professional" versus "personal" distinction which the Court seeks to draw, is illusory. A lawyer's "personal" conduct – for example, whether he engages in drug use, moral turpitude, alcoholism or lack of contrition or failure to cooperate with investigators, to name but a few – is routinely considered in determining whether a candidate will be issued a license to practice law and whether a license should be suspended or revoked. (See *In re Kreamer* (1975) 14 Cal.3d 524 [drug offense]; *In re Calaway* (1977) 20 Cal.3d 165 [gambling offense]; *In re Chira* (1986) 42 Cal.3d 904, 909 [income tax offense]; *In*

re Safran (1976) 18 Cal.3d 134, 135 [sex offense].)[3]

A lawyer's duty to hold confidences inviolate likewise extends to him in both his "professional" and "personal" capacities. If a lawyer revealed the confidences of a former client to his friends even while acting in his "personal" capacity, there could be no possible persuasive argument that he should be immune from liability because his confidence-revealing conduct was not undertaken on a subsequent client's behalf.

The plain fact of the matter is Mr. Goldman is one person. Regardless whether he is wearing a lawyer's suit and tie and appears as an advocate for another, or he is wearing his civilian clothes and advocating for himself, his conduct, to the extent it serves to undermine exactly what he was previously engaged to advocate, must be actionable if the duty of loyalty is to have any meaning whatsoever.

And just because the cases which discuss the duty of loyalty happen to primarily

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[3]Indeed, this Court has recognized that it has the power to discipline lawyers based on conduct that is unrelated to the practice of law and does not involve moral turpitude. (*In re Rohan* (1978) 21 Cal. 3d 195, 202 ["This Court possesses inherent powers to discipline a wayward attorney whether or not his misconduct involves moral turpitude. Our inherent powers are not limited by our interpretation of statutory provisions to the effect that criminal conduct unrelated to an attorney's professional responsibilities does not constitute grounds for discipline unless it involves moral turpitude, dishonesty or corruption within the meaning of section 6106. (See also §§ 6106.1.) The Legislature has provided that nothing contained in the State Bar Act (§§ 6000-6172) "shall be construed as limiting or altering the powers of the Supreme Court of this State to disbar or discipline members of the bar as this power existed prior to the enactment of" the 1927 State Bar Act. (§ 6087.) Moreover, the 'statutory grounds for discipline are not exclusive. [Citations.]' (*Stratmore v. State Bar* (1975) 14 Cal.3d 887, 889-890 [123 Cal.Rptr. 101, 538 P.2d 229].)"])

arise in the context of a lawyer representing a second client, does not mean that subsequent representation must be a necessary element to state a legally cognizable claim for breach of the duty of loyalty claim.[4]

Not one of the cases cited above (ante at pp. 15-16) which holds that an attorney's breach of loyalty is presumed when he switches sides in an ongoing matter, predicates its holding on the fact that there happened to be a representation of a second client. Rather, each of these cases is premised on the fact that the former lawyer abandoned the former client's interest to instead work against the subject of his or her earlier representation.[5]

This Court should therefore reaffirm its straightforward edict in *Wutchumna Water Co. v. Bailey*, *supra*, 216 Cal 564 that lawyers should not "injuriously affect his former client in any manner in which he formerly represented him. . . ."[6] As now explained, this

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[4] "'Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.' [Citation.]" (*Canales v. City of Alviso* (1970) 3 Cal.3d 118, 128, fn 2; see *People v. Myers* (1987) 43 Cal.3d 250, 273-274 [even though the court in an earlier opinion retroactively applied a new principle of law, that case did not stand for the proposition that such retroactive application was appropriate since that was not an issue raised or resolved]; *McAdory v. Rogers* (1989) 215 Cal.App.3d 1273, 1277 [manner in which the Court of Appeal earlier calculated maximum recovery under MICRA was not controlling since in that case there was no consideration of whether the method of calculation was proper.])

[5]Of note, these cases primarily interpret the cannons of ethics and do not concern a common law claim for breach of fiduciary duty such as involved here.

[6]Finally, before ending this discussion, it bears mention that in reaching its conclusion the Court of Appeal parsed the words of Rule of Professional Conduct 3-310(E) which prohibits members from accepting "employment" adverse to the former client. But that does not mean "non-employed" conduct is immune from rules of ethical

remains true even of the lawyer is able to fashion a supposed "public policy" justification for his disloyalty.

C. An attorney cannot, consistent with his duty of loyalty, switch sides and oppose his client's ongoing legal matter, whether or not that opposition is under the guise of "the public interest"

"Absent the former client's informed written consent, an attorney may never switch sides in an ongoing legal matter." (*City National Bank v. Adams* (2002) 96 Cal.App.4th 315, 330, emphasis added.) Consistent with this principle, the trial court ruled that defendants' "ethical violation was complete when Goldman accepted representation of Oasis without providing the necessary written disclosure of his potentially adverse interest." (JA 261.)

Here, Goldman unquestionably switched sides in an ongoing legal matter. However, in concluding that Goldman nevertheless did not violate his duty of loyalty, the

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conduct. As the Court itself recognized (Opinion, pp. 8-11), "'An attorney's duty to a client is defined not just by the rules and statutes, but by the general principles of fiduciary relationships. The Rules of Professional Conduct do not supersede common law obligations.' (*Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 548 [28 Cal.Rptr.2d 617, 869 P.2d 1142] [abrogated by statute on other grounds].)" Thus, regardless whether Goldman's conduct violated the precise terms of the Rules of Professional Conduct, it was directly antagonistic to Oasis's interests with respect to the very subject of his representation and therefore violated his duty of loyalty.

Court reasoned: "We cannot find that by representing a client, a lawyer forever after forfeits the constitutional right to speak on matters of public interest." (Opinion, p. 17.)

The Court's analysis is flawed. As Justice Potter opined over 50 years ago:

> "If . . . a lawyer can invoke the constitutional right of free speech to immunize himself from even-handed discipline for proven unethical conduct, [that] is an intimation in which I do not join. A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards.
>
> Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech."

(Supreme Court Justice Potter Stewart in his concurring opinion in *In re Sawyer* (1959) 360 U.S. 622, 646-647.)[7]

Here, Goldman did not simply decide to speak generally about a matter of public concern. Rather, he engaged in activity that was targeted to *only* the still pending legal matter that was *the very subject of his representation.*

As summarized above, Goldman was retained to support that real estate project

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[7]Consistent with this precept, this Court has recognized that a lawyer's First Amendment rights must be viewed through the prism of his or her ethical obligations. (See *Kitsis v. The State Bar* (1979) 23 Cal. 3d 857, 863 [State Bar can constitutionally restrict lawyer's in person solicitation of clients].)

because he was "a well-respected, influential leader who was extremely active in Beverly Hills politics." (Ante at pp. 6-7.) Goldman and his firm willingly accepted this work and were well paid for it. (Ante at pp. 6-7.) Then, after the lawyer-client relationship ended, Goldman turned around and publicly worked against that very project which was then still pending. If Goldman was willing to accept representation and be paid for his work because of his influence as to a matter of public concern, then he should not be able to claim he had some inalienable right to use that same influence to work against that project once the representation ceased.

None of the authorities referenced by the Court of Appeal supports a lawyer engaging in such conduct targeted to the still pending subject of his representation. For example, in *Johnston v. Koppes* (9th Cir. Cal. 1988) 850 F.2d 594, a government lawyer, using her vacation time, merely attended a public hearing concerning a controversial issue without saying a word. Thus, the lawyer in *Johnston* did not affirmatively work against a still pending matter that was the subject of her representation.

Likewise in *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 549, this Court considered whether lawyers working for a public entity could file an action seeking to enforce rights under a statutorily authorized collective bargaining agreement. That action did "not, in general, present a conflict with the client on matters in which the Attorneys represent the County." (*Id.* at p. 546.)

In such an extremely narrow setting, this Court concluded that "attorneys employed in the public sector, who exercise their statutory right to sue to enforce rights given them . . . do not in such capacity violate their ethical obligations to their employer/client. In so holding, we emphasize that attorneys in such circumstances are held to the highest ethical obligations to continue to represent the client in the matters they have undertaken, ..." (*Id.* at p. 553.)

Far from supporting the Court of Appeal's conclusion, *Woodside* illustrates why Goldman's conduct in fact violated his duty of loyalty owed to plaintiff. The Court's ruling in *Woodside* that the duty of loyalty was not breached in that case was based on (1) the existence of a statutory collective bargaining scheme under which the employee-attorneys were entitled to file their lawsuit and (2) the fact that the lawsuit was unrelated to any matter on which the employee-attorneys were representing their client.

Both of these factors are missing here. Goldman had no separate agreement with Oasis allowing him to engage in his conduct attacking the real estate development and there is certainly no statute that specifically states he was entitled to engage in that conduct with respect to Oasis. Further, Goldman's conduct was directly related to the very matter on which Goldman represented Oasis. The careful manner in which this Court crafted the narrow exception to the duty of loyalty in *Woodside*, serves to illustrate why the Court of Appeal in this case was wrong when it created such a broad exception to that sacrosanct duty.

Moreover, if the Court of Appeal's analysis were accepted, then the duty of loyalty would be converted into a case-by-case standard dependent upon whether, in hindsight, a Court concludes that the lawyer's disloyal conduct was undertaken for public policy reasons. In *Beck v. Wecht* (2002) 28 Cal.4th 289, 297, this Court counseled against such an approach. There the issue presented was whether co-counsel owed fiduciary duties to each other in a contingency fee case. The Court concluded that the recognition of such a duty would diminish the undivided duty of loyalty each attorney owed to the client. (*Id.* at p. 296-297.) The Court then rejected the plaintiff's effort to carve out an exception to this rule based upon the limited facts of that case, explaining:

> "[The plaintiff's] effort to distinguish his case on the facts raises a fundamental question. Should this issue – whether co-counsel owe one another a fiduciary duty to conduct their joint representation in a manner that does not diminish or eliminate the fees each expects to collect – be decided on a case-by-case basis? We think not. The better approach, we conclude, is a bright-line rule refusing to recognize such a fiduciary duty. . . ."

(*Ibid.*)

So too, the better approach here would be to *not* determine whether a duty of loyalty is owed as to the very pending matter for which the lawyer was retained, based on the case-by-case determination whether the lawyer's conduct in a particular case was or was not in furtherance of some "public policy." Such an analysis would be unworkable to

both clients and lawyers. Clients will not know whether their lawyer will remain loyal once the representation ceases or whether their lawyer will decide that switching sides would be in furtherance of a "public policy" which is perceived by the lawyer. And lawyers will not know whether a court will agree that their decision to switch sides was sufficiently linked to public policy to be justified. The standard employed by the Court will therefore foster uncertainty that will necessitate litigation to resolve making this ethical restriction on a lawyer's conduct punitive and not prophylactic, as it should be. (See *Hetos Investments, Ltd. v. Kurtin* (2003) 110 Cal.App.4th 36, 48 [disqualification is prophylactic not punitive].) A bright line, prophylactic rules is clearly appropriate.

Simply put, there is no public policy justification for a lawyer switching sides as to the very subject of his representation, especially when the matter is still pending.

D. There is a "conclusive presumption" that a client discloses confidences to its attorney; the actual use or misuse of confidential information is not determinative

As additional support for its conclusion, the Court of Appeal reasoned that "as long as confidentiality is not compromised" (Opinion, p. 16) Goldman was entitled to act as he did. But it does not matter whether Oasis, the client, is able to affirmatively demonstrate that Goldman was using confidential information in his post-termination

work against the project. An "'attorney-client relationship raises an irrefutable presumption that confidences were disclosed.'" (*People ex rel. Deukmejian v. Brown* (1981) 29 Cal.3d 150, 156-157.)

This "conclusive presumption of knowledge of confidential information has been justified as a rule of necessity, 'for it is not within the power of the former client to prove what is in the mind of the attorney. Nor should the attorney have to 'engage in a subtle evaluation of the extent to which he acquired relevant information in the first representation and of the actual use of that knowledge and information in the subsequent representation.'" (*Global Van Lines, Inc. v. Superior Court* (1980) 144 Cal.App.3d 487, 489.)

"The conclusive presumption also avoids the ironic result of disclosing the former client's confidences and secrets through an inquiry into the actual state of the lawyer's knowledge and it makes clear the legal profession's intent to preserve the public's trust over its own self-interest. [Citation.]" (*H. F. Ahmanson & Co. v. Salomon Bros.* (1991) 229 Cal.App.3d 1445, 1453; see also *City National Bank v. Adams, supra,* 96 Cal.App.4th at p. 330 ["When the prior and current representations are in exactly the same matter. . . there is no exception to the conclusive presumption of the exchange of confidential information."]; *David Welch Co. v. Erskine & Tulley* (1988) 203 Cal.App.3d 884, 891 ["The primary purpose of that rule is to protect the confidential relationship which exists between attorney and client. [Citation.] It has been said that an attorney may not 'at any

time use against his former client knowledge or information acquired by virtue of the previous relationship. . . .' (*Wutchumna Water Co. v. Bailey* (1932) 216 Cal 564, 573-574 [15 P.2d 505]; *Quaglino v. Quaglino*, *supra*, at p. 549.) The actual use or misuse of confidential information is not determinative; it is the possibility of the breach of confidence which controls. [Citation.] ['This duty to protect confidential information continues even after the formal relationship ends.'" Emphasis added.].)

The Court of Appeal's focus on whether there was affirmative evidence that Goldman actually used confidential information in his opposition to the Oasis project, has a series of flaws:

First, this focus loses site of the very reason there is a conclusive presumption of disclosure to begin with – because "it is not within the power of the former client to prove what is in the mind of the attorney." (*Global Van Lines, supra,* 144 Cal.App.3d at p. 489.) How could Oasis possibly prove whether Goldman was being motivated to oppose the project based upon confidential information that had been disclosed to him while he was representing Oasis?

For the same reason, it is not the case as defendants argued in their Answer to the Petition for Review, that the mere existence of a duty owed by lawyers to maintain confidential information is sufficient to fully protect clients against improper conduct by a lawyer who switches sides. (Answer p. 12.) It will be the rare case that the former client will be privy to what the lawyer is doing outside the public view or will know what

motivated the lawyer to suddenly switch sides and affirmatively work against a project he had been retained to support. Certainly, the client could not expect the attorney to voluntarily admit he has used confidential information. Thus, the mere existence of the duty to maintain confidential information will not ensure that a lawyer who switches sides as to an on going matter, will not use confidential information against his former client.

Second, the Court ignores that the conclusive presumption is designed to protect against "the possibility of the breach of confidence. . . ." (*Woods v. Superior Court* (1983) 149 Cal.App.3d 931, 934.) So long as the former lawyer is taking affirmative steps antagonistic to the very project he had been retained to further, this "possibility" certainly exists.

Third, the Court's focus ignores the reality that if lawyers are able to affirmatively work against projects they were retained to support, then the lawyer-client relationship will be subverted. If a client knows that (1) its lawyer could affirmatively work against the very project as to which he was retained to represent the client so long as that lawyer is acting on his or her own behalf and (2) the only protection the client has is if it is able to introduce affirmative evidence that the lawyer actually used confidential information, then the client may very well be reluctant to disclose all of the confidential information that is necessary for the lawyer to fully represent the client.

Fourth, in focusing on whether there is direct evidence that confidential information was disclosed, the Court fails to appreciate that, from the outsider's

perspective, the very fact that the client's former lawyer is now opposing the project he was retained to support carries with it the implication that the lawyer must be opposing the project because of what he learned during that representation. No matter how hard Goldman struggles to do so, he could not purge himself from his role as Oasis's former lawyer. Nor does it matter whether Oasis could point to evidence that Goldman *affirmatively* "trade[d] on his former representation of Oasis to lend credence to his opposition" (opinion, p.12) as noted by the Court of Appeal. He didn't have to. The mere fact that he was Oasis's former lawyer did it for him. The Court's focus on whether there was direct evidence that confidential information was actually used therefore misses the point.

Simply put, a client is not required to affirmatively demonstrate that its former layer used confidential information in order to establish that lawyer breached the duty of loyalty.

* * *

In sum, this Court should reaffirm that the duty of loyalty prevents a lawyer from affirmatively working against a project he was retained to support. Contrary to the Court of Appeal's opinion this is the case regardless whether (1) the lawyer works against the project on his own behalf rather than on behalf of a second client; (2) the lawyer engages

in his disloyal conduct in furtherance of some perceived public policy goal; or (3) the former client can affirmatively demonstrate that the lawyer disclosed confidential information in his efforts to oppose the project.

II. Contrary to the Court of Appeal's analysis, under the first step of the anti-SLAPP test, it is improper to consider "irrelevant" merits-based arguments, particularly defendants' argument here that is in direct conflict with numerous published decisions holding an attorney's abandonment of his client by switching sides in the client's ongoing matter breaches his duty of undivided loyalty and is activity unprotected by anti-SLAPP laws

The second issue under review concerns the "two step process" a court must undertake in ruling on an anti-SLAPP motion to strike. Under the first step the defendant must make "a threshold showing that the challenged cause of action is one arising from protected activity." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67; accord, *Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) "'A defendant meets this burden by demonstrating that the act underlying the plaintiffs cause of action fits one of the categories spelled out in section 425.16, subdivision (e)' [citation]." (*Navellier, supra,* at p. 88.)

If and only if that first prong is satisfied does the Court then determine whether the plaintiff's claim has even "minimal merit" to withstand an anti-SLAPP motion. (*Equilon, supra,* 29 Cal.4th at p. 67; accord, *Navellier, supra,* 29 Cal.4th at p. 88.)

Here, however, the Court of Appeal conflated the two prongs. The Court recognized "a substantial line of cases holds that section 425.16 does not apply to litigation which is actually about an attorney's breach of the duty of loyalty." (Opinion, p. 8.)

This is where the Court's two-step analysis should have ended. Once the Court held that plaintiff's cause of action against defendants was not based on activity fitting within section 425.16, the trial court's ruling denying defendants' anti-SLAPP motion should have been affirmed. (*Freeman v. Schack* (2007) 154 Cal.App.4th 719, 733 ["These merits based arguments have no place in our threshold analysis of whether plaintiffs' causes of action arise from protected activity. Where Schack cannot meet his threshold showing, the fact he might be able to otherwise prevail on the merits under the 'probability' step is **irrelevant.**" Emphasis added]; *Commonwealth Energy Corp. v. Investor Data Exchange, Inc.* (2003) 110 Cal.App.4th 26, 32 [considering merits-based arguments "would, in effect, turn the anti-SLAPP statute into a cheap substitute for summary judgment"].)

However, despite acknowledging that plaintiff's claims arose from an attorney's duty of loyalty, and not protected conduct, the Court of Appeal proceeded to determine

that the anti-SLAPP statute nevertheless applied because, according to the Court, plaintiff could not establish its claim for breach of the duty of loyalty and therefore it was wrong on the merits. In other words, in determining whether the first prong of the anti-SLAPP analysis was satisfied, the Court skipped to the second step. This misapplication of the two-step process clearly violated the many decisions of this Court and of Courts of Appeal holding that merits-based arguments are simply irrelevant to the analysis.

Moreover, the Court of Appeal's irrelevant analysis that plaintiff's claim for breach of loyalty was insufficient on the merits is based on an utterly wrong premise. The Court of Appeal erroneously considered "a subsequent representation" as a fact that was critical to each of the settled cases which ruled that a cause of action for breach of loyalty does not implicate protected activity for purposes of prong one of the statute. Largely relying on the terms of the Rule of Professional Conduct 3-310(E), the Court proceeded to hold that because there was no subsequent representation in this case, a claim for breach of duty of loyalty could not be stated as a matter of law. (Opinion, pp. 8-9.)

But the Court's reasoning flies in the face of that settled line of cases which recognizes that section 425.16 does not apply to litigation which is actually about an attorney's breach of the duty of loyalty. While it is true that each of those cases involved an attorney's successive representation, that fact was flatly immaterial to the determination that the gravamen of the claim did not implicate protected activity under the statute.

In truth, the sole issue for purposes of the prong one determination in those cases (like this case) was whether the gravamen of the pleaded claim "arose out" of protected activity or not. Hence, those cases did not focus on the existence of a second client; rather they focused on the fact that the lawyer had "switched" sides to the detriment of the client who was entitled to the lawyer's undivided loyalty. The activity from which the claims in those cases arose was the accused lawyer's abandonment of the client and taking a diametrically opposite position to the client. It was not determinative in those cases that the conflicting position was on behalf of a second client. Certainly, none of the opinions discussed much less held that a second representation is required in order for the attorney's switching sides to constitute a breach of his loyalty to the client. As the Court of Appeal itself recognized, of course, "cases are not authority for propositions not considered therein." (Opinion, p. 14, citing *People v. Burnick* (1975) 14 Cal.3d 306, 317.)

Thus, in *Benasra v. Mitchell Silberberg & Knupp LLP* (2004) 123 Cal.App.4th 1179, former clients sued the defendant law firm and certain of its lawyers for breach of fiduciary duty for accepting representation of a client in a subsequent matter whose interests were antagonistic to the plaintiffs'. As here, the defense attorneys' anti-SLAPP motion in *Benasra* argued that the lawsuit arose from the lawyers' "free speech" conduct on behalf of the second client. Rejecting the argument out of hand, the *Benasra* Court reversed the Trial Court and denied defendants' motion. The underlying "activity," it

concluded, was defendants' disregard of its former client's interests, and the "thrust" of the claim was for breach of loyalty. No "protected activity" was implicated. "[T]he misconduct [sued upon is] not what occurs in the Courtroom during the second representation, but the very acceptance of that adverse engagement." (*U.S. Fire Ins. Co. v. Sheppard Mullin Richter & Hampton, LLP* (2009) 171 Cal App 4th 1617, 1627, explaining the *Benasra* decision.)

Several years later, in *Freeman v. Schack, supra,* 154 Cal.App.4th 719, a lawyer was sued by two clients for breach of fiduciary duty, breach of contract and negligence -- the same exact claims asserted in the Complaint at bar -- after the lawyer abandoned the clients to assume representation for other parties in the exact same case. The Complaint specified the lawyer's activities on behalf of the new clients. Taking the identical position as Goldman here, and as defendants in *Benasra*, the defendant lawyer sought anti-SLAPP protection, contending that the things he did and said for the new clients comprised the essence of the lawsuit and constituted protected activity. (*Id.* at pp. 722-723.)

Although the trial court agreed, the Court of Appeal reversed. The "activity" giving rise to the case was counsel's abandonment of his first client and undertaking to represent his opponent. The "principal thrust" of the Complaint, therefore, was counsel's side-switching disloyalty, not what he did or said in the course of the second representation. In words directly applicable to the case at bar, the Court wrote:

"We agree with plaintiffs that the principal thrust of the conduct underlying their causes of action is not Schack's filing or settlement of litigation. Stated another way, the 'activity that gives rise to [Schack's] asserted liability' is his undertaking to represent a party with interests adverse to plaintiffs, in violation of the duty of loyalty he assertedly owed them in connection with the Freeman II litigation. '[I]f the allegations of protected activity are only incidental to a cause of action based essentially on unprotected activity, the mere mention of the protected activity does not subject the cause of action to an anti-SLAPP motion." 154 Cal App 4th at 732. The key, said the *Freeman* Court, is to "focus upon the 'activity that gives rise to [defendant attorneys'] asserted liability.' " (154 Cal App 4th at 733, quoting *Navellier*, *supra*, 29 Cal 4th at 92.)

As in *Freeman*, the activity giving rise to the cause of action here is Goldman's disloyalty to his former client. This case is clearly not about the truth or falsity or merits of what Goldman said. If anyone other than Goldman said or did what Goldman said and did, it would not be actionable. This case is actionable only because it is Goldman who, as Oasis' former lawyer, was bound by a fiduciary duty of perpetual loyalty, not to switch sides to publicly oppose the very project he previously championed while the matter was still pending. The undeniable thrust of Oasis' claims is Goldman's side-switching, not Goldman's specific statements after the switch took place.

The last case of the trio is *U.S. Fire Ins. Co. v. Sheppard Mullin Richter & Hampton, LLP, supra,* 171 Cal App 4th 1617, which reconfirms the analysis of the earlier opinions. In *U.S. Fire*, the Court of Appeal once again denied a defendant law firm's anti-SLAPP motion on the first prong. The principal thrust of the misconduct averred in the complaint, the Court held, was the law firm's acceptance of representation adverse to the former client in a subsequent action.

As in all the earlier opinions it cites, the *U.S. Fire* Court concluded that the particular content of the law firm's work in the second representation was merely incidental to the gravamen of the claim. Rather, the real essence of the claim, wrote the court, is disloyalty -- and that occurs "once the attorney accepts a representation in which confidence disclosed by a former client may benefit the new client." In other words "the breach occurs not when the attorney steps into court to represent the new client, but when he or she abandons the old client." (*Id* at p. 1627, quoting *Benasra*, *supra*, 13 Cal App 4th at 1189.)

Here, although Goldman abandoned Oasis, his client, to further his own personal interests rather than the interests of a second client, the same unprotected "activity" is present – like the attorneys in the breach of loyalty cases, Goldman abandoned his client and switched sides in the client's ongoing matter (as this Court notes, the "most egregious conflict of interest"). In sum, not only did the Court of Appeal consider defendants' "irrelevant" merits-based arguments in analyzing the first step of the anti-SLAPP process,

it did so erroneously, in direct contradiction to the numerous published decisions holding that an attorney's switching sides in the client's ongoing matter constitutes a breach of loyalty, activity that is flatly unprotected by the SLAPP laws.

III. Even assuming the Court of Appeal could proceed to step two – whether plaintiff's claim for breach of duty of loyalty lacked minimal merit – the Court employed an inappropriate standard of review in erroneously reaching its conclusion

A. Plaintiff's minimal burden

"The plaintiff need only establish that his or her claim has minimal merit to avoid being stricken as a SLAPP." (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291.) The plaintiff's burden "has been likened to that in opposing a motion for nonsuit or a motion for summary judgment." (*Peregrine Funding* (2005) 133 Cal.App.4th 658, 675.) Thus, the Court shall "accept as true the evidence favorable to the plaintiff and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law." (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 326.)

B. The Court of Appeal misapplied the proper standard of review

Here, the Court of Appeal held, "Because there was no breach of duty, Oasis did not show a legally sufficient claim. Moreover, 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." (Opinion, p. 17.) The Court's cryptic holding was error.

The Court was prohibited from weighing the evidence much less drawing inferences against plaintiff. (*Flatley v. Mauro, supra,* 39 Cal.4th at 326.) "An anti-SLAPP-suit motion is not a vehicle for testing the strength of a plaintiff's case, or the ability of a plaintiff, so early in the proceedings, to produce evidence supporting each theory of damages asserted in connection with the plaintiff's claims. It is a vehicle for determining whether a plaintiff, through a showing of minimal merit, has stated and substantiated a legally sufficient claim." (*Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 906.)

In disregard of these settled rules of review, 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.

A glaring example of this is the Court's discussion of Goldman's appearance at and statement to the City Council. The Court stated: "Goldman did not speak in

opposition to the project; he expressed his opinion on good government practices." (Opinion, p. 13.) However, Oasis argued a trier of fact could reasonably infer from Goldman's comments that Goldman spoke on behalf of the Project opponents and for their specific benefit in easing the burden the rule placed on those soliciting signatures to place their opposition referendum on the ballot. Consequently, anything that would ease the burden on those who solicited signatures could only serve to hurt Oasis and help the cause of its opponents.

If he had made his appearance before the Council to argue to relax the rule in a vacuum as pertains to a matter which did not involve a former client and was the very matter on which he had been retained, his position could perhaps be considered general comment of a "neutral" nature on a matter of public interest. But he made that appearance in the context of discussion concerning the Oasis Project, specifically to help its opponents by a targeted tactical move that would serve only to strengthen Oasis' opponents ability to bring the Project to referendum vote.

Moreover, as the Court of Appeal acknowledged, Goldman was taking other affirmative actions, outlined in detail above, in opposition to the project. Thus, a trier of fact would certainly infer that when he appeared before the council it was to oppose the project, not simply to foster good government.

The Court of Appeal, however, disregarded these reasonable inferences, did not accept them as true as it was required to do, and instead weighed the evidence against

plaintiff's inferences.

Further, the Court mistakenly concluded that the trial court erroneously denied the anti-SLAPP statute because, according to the Court, Oasis was unable to substantiate the all of the $4 million in damages it was seeking to recover due to its costs in opposing the referendum which was the result of Goldman's disloyal conduct. The Court thus appears to rule that if a plaintiff cannot substantiate all of the damages it is claiming, then the action must be dismissed on anti-SLAPP grounds. This is mistaken. As just explained, under the applicable standard, a plaintiff need "only establish that his or her claim has minimal merit to avoid being stricken as a SLAPP." (*Soukup v. Law Offices of Herbert Hafif, supra,* 39 Cal.4th at p. 291.) It was therefore only necessary for Oasis to demonstrate the fact that it suffered damages in any amount to satisfy the second prong. It was not necessary for Oasis to establish each dollar of damages it was claiming.

Here, it is uncontroverted that Oasis was billed and paid well in excess of $3,000 in legal fees solely to address Goldman's duplicity and to attempt to restrict further misconduct. (JA 209, 213.) These damages alone would be sufficient to support Oasis's claim regardless whether it was also entitled to recover the millions of dollars of additional damages caused by Goldman. (See *Butcher v. Truck Ins. Exchange* (2000) 77 Cal.App.4th 1442, 1469-1470 [it is only uncertainty as to the fact of damage--not uncertainty as to the amount–"which negatives the existence of a cause of action"].)

Thus, the Court of Appeal held Oasis to far too high a standard by concluding that because, in its view, Oasis could not establish that it was entitled to recover the entire $4 million it was claiming the anti-SLAPP motion should have been granted.

In short, in addition to the fact that the Court erroneously concluded that defendants had not breached their duty of loyalty owed to Oasis when Goldman affirmatively worked against an ongoing matter he had been retained to support, the Court further erred by conflating the two prongs of the anti-SLAPP statute by evaluating the merits of the action in analyzing whether the first prong of the anti-SLAPP test has been satisfied.

CONCLUSION

For two independent reasons the Court of Appeal decision should be reversed: (1) first the Court was mistaken in concluding that defendants' conduct did not violate their duty of loyalty owed to Oasis and (2) the Court mistakenly conflated the anti-SLAPP standard by considering the merits of the Oasis's claim in deciding whether that claim falls within the scope of the anti-SLAPP statute.

Dated: July 8, 2010

ROSOFF, SCHIFFRES & BARTA

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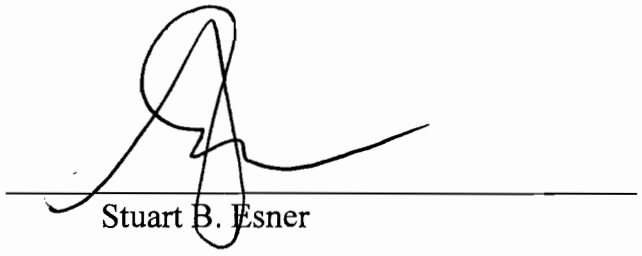

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