S181781

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

OASIS WEST REALTY, LLC,

Plaintiff and Respondent,

v.

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 COURT CASE NO. SC101564

ANSWERING BRIEF ON THE MERITS

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I. ISSUES PRESENTED

1. Does California's anti-SLAPP statute, Civil Procedure Code section 425.16, apply to a tort cause of action founded on an attorney's brief speech to a local city council, soliciting signatures for a referendum petition from a handful of other citizens, and an email to a supporter of the petition drive, when the statements relate to a matter on which the attorney once worked and the attorney did not represent a new client?

2. Can an attorney violate the duty of loyalty by engaging in political speech and petitioning activity on a matter of public interest related to a former representation, when the attorney did not represent a new, adverse client and did not disclose or use confidential information obtained in the former representation?

3. Does a construction of the duty of loyalty that categorically prohibits an attorney from engaging in protected speech and petitioning activity adverse to a former representation violate constitutional safeguards protecting freedom of speech?

4. Does a claim for violation of the duty of loyalty fail on the merits if the plaintiff cannot show that the attorney's conduct proximately caused any legally recoverable damages?

II. INTRODUCTION

Plaintiff and respondent Oasis West Realty, LLC ("Oasis"), a property developer, claims defendants and appellants Reed Smith, a law firm, and Kenneth Goldman, one of its partners (collectively "Defendants"), should be subject to tort liability because Goldman made three brief statements related to a politically controversial real estate development project (the "Hilton project") that he had worked on two years earlier for Oasis, even though Goldman never disclosed nor suggested he had any confidential information about it.

Here, Oasis' effort to develop the Hilton project in the center of Beverly Hills generated an enormous political controversy, resulting in a public referendum. Goldman exercised his fundamental right as a citizen to participate in that political controversy, albeit in a very limited way.

Goldman: (1) spoke at a hearing of the Beverly Hills City Council (the "City Council"), where he expressed no opposition to the Hilton project, but briefly opposed a requirement that those gathering signatures for the referendum had to carry 15 pounds of documentation; (2) obtained, in about 90 minutes, five or six signatures from his neighbors on the petition related to the referendum, and left a note for a few more neighbors who were not home at the time; and (3) in two sentences in an email, expressed doubt about the accuracy of public traffic studies concerning the Hilton project and an adjacent development in an email to an opponent of

the Hilton project. All of these statements concerned matters of public record and Goldman disclosed no confidential information obtained from Oasis. Nor did Goldman, when making the statements, represent any client or party adverse to Oasis. Nonetheless, Oasis contends that Goldman's three statements violated the duty of loyalty and subjects Defendants to tort liability in excess of $4 million.

The Court of Appeal rejected Oasis' claims in a unanimous opinion. First, it held that Oasis' lawsuit was a Strategic Lawsuit Against Public Participation suit subject to Civil Procedure Code section 425.16 (the "anti-SLAPP statute") (Opinion dated March 3, 2010 ("Op.") at 7-8), because Goldman's conduct giving rise to the claim involved protected speech and petitioning activity. Second, it held that Oasis had failed to establish a probability of prevailing on the merits because it could not show that Goldman breached a duty of loyalty *and* also because it could not show any damages caused by Goldman's conduct. (Op. at 9-17.) Those holdings were correct and should be affirmed.

The anti-SLAPP statute expressly protects statements made to a legislative body like the City Council and those made in furtherance of free speech and petitioning activity, like Goldman's statements to his neighbors and his email. Oasis' argument that duty of loyalty cases are categorically exempt from the anti-SLAPP statute relies on cases in which the violation of the duty of loyalty – agreeing to represent a second client adverse to the

first – occurred *before* any protected speech or petitioning activity. Because Goldman's allegedly improper *conduct* involved only speech and petitioning activity and he never represented a second client against Oasis, the anti-SLAPP statute applies.

The anti-SLAPP statute requires Oasis to establish a probability of success on the merits. Oasis cannot do so for three separate reasons.

First, Oasis cannot show a breach of the duty of loyalty. To support a breach, Oasis relies on cases in which attorneys have a conflict of interest because they represented a second client against a first client. Those conflicts exist because the attorneys are subject to conflicting ethical duties – owing an obligation to the first client to maintain its confidences on the one hand, while owing an obligation to the second client to provide a vigorous representation, including using all information at the attorneys' disposal, on the other. Those cases are irrelevant here, because Goldman did not represent a second client and had no duty to disclose or use information he obtained from Oasis. Oasis cites no case that provides that the duty of loyalty exists in such circumstances.

Nor does Oasis offer any legitimate policy rationale for creating an entirely new common law duty of loyalty that categorically prevents attorneys from speaking on matters of public interest on which they previously worked when the attorneys do not disclose or use confidential information. Oasis claims that clients will be disinclined to divulge

confidential information to their attorneys if the attorney can speak on a public controversy related to the representation well after the representation has ended. But where, as here, there is no subsequent conflicting representation and the attorney's statements do not disclose or use confidential information or provide any ground to suspect confidential information was used, a client has no reason for mistrust. Nor is there any reason to find a breach of the duty of loyalty on a client's unsubstantiated fear that a former lawyer might use such information, because that would hold attorneys liable for an appearance of impropriety – a standard which California courts have repeatedly and correctly rejected.

Second, Oasis' call for an expansion of the duty of loyalty cannot survive First Amendment scrutiny. Oasis seeks an unprecedented expansion of the duty of loyalty to restrict attorneys' political speech and impose a content-based restriction on such speech. To be constitutional, such restrictions must serve a compelling state interest and they must be the least restrictive way of accomplishing that goal. The only possible compelling interest here is ensuring that lawyers do not divulge their former client's confidential information. That interest already is protected by existing, less restrictive rules that expressly prohibit disclosure of such information. A client's "suspicion" that an attorney might use its information is not a compelling governmental interest that justifies prohibiting all attorney political speech adverse to former clients.

Third, Oasis' claim also fails because it established no damages caused by Goldman's conduct. Oasis claims that it would not have been forced to spend $4 million fighting the petition drive and obtaining voter support for the referendum on the Hilton Project without Goldman's three statements. However, the evidence showed that opponents of the Hilton Project mobilized without Goldman's involvement and obtained more than 3,200 signatures to place the Hilton Project on the ballot – 1,100 more signatures than required. At most, Goldman was responsible for six of those signatures, and none of his other statements was shown to have made a difference in the referendum being placed on the ballot. Oasis' $4 million claim, accordingly, is meritless and is exactly the kind of economic coercion that the anti-SLAPP statute was designed to prevent.

Oasis' alternative theory of damages is equally unavailing. Oasis claims as "damages" the $3,000 in fees it incurred to research possible claims against Defendants and to send cease-and-desist letters to them after Goldman's statements occurred. Oasis offers no legal authority or argument to support the theory that pre-litigation attorneys' fees are a form of damages, and none exists, because pre-litigation fees are not damages under California law. Thus, Oasis has offered no evidence of damages. Its case should be dismissed for this reason alone.

Oasis is trying to revamp California law in several significant and deleterious ways: by changing the foundation for judging the applicability

of the anti-SLAPP statute, i.e., by ignoring the conduct giving rise to the claim; by expanding the duty of loyalty to reach beyond subsequent conflicting representations to allow tort claims against attorneys who engage in protected speech and petitioning activity; and by providing that a breach of the duty of loyalty can be found without provable or recoverable damages. Its efforts should be rejected and this Court should affirm the result reached by the Court of Appeal.

III. FACTUAL AND PROCEDURAL BACKGROUND

A. Oasis Hires Defendants To Advise On The Hilton Project.

On January 26, 2004, Oasis retained Defendants to represent it in its effort to redevelop a property (the Hilton project) in Beverly Hills on which it wished to build a new hotel, luxury condominiums, and other improvements. (1 JA 2.)

Oasis alleges that Defendants were retained to "render advice, counsel, strategic planning and assistance in the formation of" the Hilton project and "to interface" with officials in the City of Beverly Hills (the "City") "from whom Oasis sought support" for the Hilton project. (1 JA 2.) According to its Complaint, Oasis sought Goldman's assistance because he was an expert in civic matters and because he was "a well-respected, influential leader who was extremely active in Beverly Hills politics." (1 JA 2.)

Defendants represented Oasis until April, 2006 (1 JA 3, 60), terminating the relationship a few months *before* the Hilton project was submitted to the City for review (1 JA 70). Goldman averaged 4.5 hours per month on the matter. (1 JA 60.)

B. Over The Next Two Years, The City Reviews The Hilton Project, Which Generates Substantial Public Opposition.

The Hilton project was introduced to the City in June 2006, two months after Defendants' representation ended. (1 JA 70.) Over the next two years, the project underwent a "rigorous review process" that involved over 18 public hearings, reviewing "thousands of pages of technical studies," and considering "hundreds of comments" from "community members." (1 JA 74, 79.) Through these "detailed meetings . . . the project's initial scope was significantly altered." (1 JA 70.) It finally received preliminary approval by the City on April 29, 2008. (1 JA 74.) Final approval came two weeks later. (1 JA 79.)

During those two years, when Defendants had no involvement in the matter, opposition to the Hilton project grew. In particular, residents opposed a proposed amendment to the City's General Plan, which would allow the Hilton project to go forward. (1 JA 64.) The day after the amendment's preliminary approval, on April 30, 2008, a political action committee named "Citizens Right to Decide Committee" (the "Citizens'

Committee") was registered to oppose both the amendment and the Hilton project. (*Ibid.*)

The Citizens' Committee conducted a petition drive to have the amendment placed on the November 2008 ballot. (1 JA 64.) It obtained 3,216 signatures, which exceeded the number required by more than 1,100. (1 JA 65, 92.) The ballot measure became known as Measure H. (1 JA 64.)

The Citizens Committee conducted a vigorous public campaign against Measure H by:

- Obtaining and reproducing the petition and City resolution regarding the amendment for the Hilton project;
- Forming a Steering Committee of 15 people to oversee the petition drive and referendum effort;
- Raising approximately $100,000 to support the petition drive and referendum effort;
- Holding an initial meeting with 25 people to begin circulating petitions and collecting signatures to place the amendment on the ballot;
- Creating and designing mailers to circulate to Beverly Hills residents;

- Conducting phone calls soliciting votes against passage of Measure H;
- Creating yard signs expressing opposition to Measure H;
- Creating and placing advertisements in the local newspaper opposing Measure H; and
- Organizing community rallies against Measure H.

(1 JA 64-65.) Goldman did *not* participate in any of these activities. (*Ibid.*) He was not a member of the Citizens' Committee, did not contribute money to it, or attended its meetings and rallies.[1] (*Ibid.*)

Oasis countered with a vigorous campaign in favor of Measure H. Between June 19, 2008 and February 20, 2009, it apparently spent more than $4 million in connection with its campaign. (1 JA 213-214, 217-220.) These expenditures were made to public relations, law, and lobbying firms, among others. (1 JA 217-220.)

In November 2008, Measure H passed by 129 votes, allowing the Hilton project to proceed. (1 JA 64.)

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[1] Oasis claims that "Goldman *immediately* participated in efforts of the Citizens' Committee." (Opening Brief ("OB") at 8, emphasis added.) That statement is not supported by the evidence. Oasis' sole authority for that statement is its Complaint. (*Ibid.* [citing 1 JA 3].) All the evidence is to the contrary.

C. Two Years After Representing Oasis, Goldman Makes Limited Statements About The Hilton Project And Referendum.

In 2008, two years after Defendants had completed their representation of Oasis, as the Hilton project neared final approval from the City and the Citizens' Committee began its efforts to place Measure H on the ballot, Goldman made limited statements related to the Hilton project and petition. In these few statements, Goldman did not disclose or use any confidential information concerning Oasis about the Hilton project. (1 JA 62.)

1. Goldman Briefly Speaks At A City Council Meeting Against The Heavy Documents That Signature-Gatherers Must Carry.

Individuals collecting signatures to put Measure H on the ballot were required to carry the entire City Council resolution regarding the amendment. (1 JA 60-61.) Because the resolution included both the draft and final Environmental Impact Report ("EIR"), it weighed more than 15 pounds. (*Ibid.*)

At a meeting of the City Council on May 6, 2008 – after the City Council had approved the amendment for the Hilton project – several people, including Goldman, spoke out against this requirement.[2] In making

[2] In support of the anti-SLAPP motion, Goldman's counsel provided a transcript of Goldman's statements at the City Council meeting, as well as a link to an online video of the full hearing. (1 JA 68.) The link <

his remarks, Goldman took no position for or against the Hilton project itself and said nothing that disclosed confidential information, as his full remarks demonstrate:

> Good evening members of the Council. I am here to speak on a very narrow issue concerning the Hilton that has been discussed and eluded [sic] to tonight. It is hard for me to believe that anyone in this Chamber would view it as being fair, whether you're for the Hilton or for the Referendum, to have to carry around 15 ½ pounds of material from home to home to home to home, whether you're 15 years old or 85 years old. It's never been done.
>
> We all know it's not necessary to inform anybody to whom a petition is being presented. They don't need to read the entire EIR, the entire draft EIR, never been done. I dare say 99 percent of the people in this room, whether they are for the Hilton or whether they are against the Hilton, none of them have read the entire EIR and DEIR. It's just not necessary. You can take the executive summary, you can take the resolution.
>
> I know every single one of you. I know every single one of you is fair and right and I cannot believe that you would think it is fair and right, whether you're for it or against it, to have someone, to require someone to carry that kind of material around with them when they are trying to seek whatever they are trying to seek. We've never done it before in this city, we shouldn't do it now. It's just not right; again, whether you're for the Hilton or for the Referendum. Don't require it, because it's not fair and each of the five of you knows that. It's not right. It's not necessary to inform the citizenry. There's a lot of material there. Nobody is going to read

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http://beverlyhills.granicus.com/MediaPlayer.php?view_id=2&clip_id=973&meta_id=43933 > provides minutes from the meeting, which indicate that 32 citizens spoke about the Hilton project (Item E-2), including five citizens plus the City Attorney who are specifically identified as speaking about the materials for circulation of the petition. Goldman was one of those five citizens.

through that. Nobody that's spoken tonight, I guarantee you, I haven't read through that. Thank you.

(1 JA 60-61, 77.)

Goldman's and the other speakers' efforts proved unsuccessful. The City Council did not waive the requirement for the resolution regarding the amendment, so signature-gatherers were forced to carry the entire 15 pounds of documents. (1 JA 61.)

2. Goldman Asks A Few Neighbors To Sign A Petition For A Referendum Opposing The Hilton Project.

After the Hilton project was approved and the Citizens' Committee began its referendum effort, Goldman spent less than 90 minutes on a single day asking neighbors on his street to sign the petition to place the amendment on the November 2008 ballot. (1 JA 61.) Although Oasis claims "Goldman personally solicited dozens of his neighbors" (OB at 8), he actually talked to about 10 people and collected only about five or six signatures.[3] (1 JA 61.)

At four or five homes where no neighbor was home, he left a note. (1 JA 61.) Signed by Goldman and his wife, it stated:

Lori and Ken Goldman

Dear Neighbor:

Sorry we missed you when we stopped by.

[3] Goldman's wife also collected some signatures without Goldman's participation. (1 JA 61.) In total, they obtained approximately 20 signatures. (*Ibid.*)

> We stopped by to see if you would sign the Referendum Petition to overturn the City Council's recent approval of the Hilton plans. The Council approved an additional 15-story Waldorf-Astoria Hotel (where Trader Vics is now), a new 16-story condo tower on the corner of Merv Griffin Way and Santa Monica and a new 6-8 story condo tower on the corner of Wilshire and Merv Griffin Way. At the last minute, the Council also allowed the developer to remove one of the floors of parking that they had previously agreed to add! And all of this is in addition to the 232 condos that the Council had just finished approving on the Robinson's-May site [the 9900 project, which was adjacent to the Hilton project]. And all of this at one of the busiest intersections on the entire Westside!
>
> And all this is in the name of more and more revenue. And they don't even make any plans to seriously correct the awful intersection and lines of waiting traffic that will grow and grow.
>
> So we will sign the Referendum Petition and urge you to do likewise. Please call us at [phone number omitted] to figure out a convenient time to sign. We have only 2 weeks!
>
> *Ken and Lori*

(1 JA 82.)

As the note's content reflects, Goldman disclosed no confidential information and did not suggest or imply that his opposition was based on the receipt of confidential information. (1 JA 62, 66.) On the contrary, the note focused solely on the public aspects of the Hilton project. (1 JA 82.)

3. Goldman Responds To An Email From An Opponent Of The Hilton Project.

In February 2008, Goldman became involved in an email exchange that dealt primarily with various developments unrelated to the Hilton project. (1 JA 205, 207.) One of his emails in the exchange contained two

sentences expressing doubt about public studies purportedly showing how the Hilton project and an adjacent development (the "9900 project") would affect city traffic.[4] (1 JA 204.) Again, no confidential information or anything conceivably related to Goldman's past representation of Oasis was mentioned. Instead, the two sentences related to publicly disclosed facts.

D. Oasis Delivers Cease-And-Desist Letters To Defendants And Goldman's Wife.

After Goldman and his wife visited their neighbors, Oasis threatened him with a lawsuit. (1 JA 84-85.) Alleging that Goldman's visit to his neighbors had caused "extreme and very likely irremediable" damages, Oasis' initial letter demanded that Goldman "terminate and withdraw from any and all activities that may in any manner be construed as adverse to the Project, its approval or Oasis' interests." (1 JA 85.) In a follow-up letter, Oasis demanded that Goldman "and his wife" retract their letter and support for the petition and referendum, contending that Goldman and his wife were "mutual agents of the other" and that Mrs. Goldman was "also Mr. Goldman's agent . . . such that any further conduct on her part that is

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[4] Inexplicably, Oasis claims that Goldman "sent several emails and correspondence . . . in which he expressed his leadership role in the opposition movement" against the Hilton project. (OB at 8-9.) The evidence does not support this statement. Nowhere did Goldman express any leadership role regarding the Hilton project. And the record shows he did not have one. Nor, as noted, did he say anything that disclosed confidential information.

adverse to Oasis West's interests will be considered chargeable to Mr. Goldman and Reed Smith." (1 JA 90.)

After these threats, Goldman did nothing further concerning the referendum. (1 JA 62.) The political controversy over Measure H continued for another five months. (1 JA 64.) Eventually, Measure H passed and the Hilton project was approved. (*Ibid.*, 1 JA 79.)

E. Oasis Sues Defendants.

Although it obtained voter approval of the project, Oasis nevertheless sued Defendants on January 30, 2009. (1 JA 1.) It alleged three causes of action: (1) breach of fiduciary duty; (2) professional negligence; and (3) breach of contract. (1 JA 6-9.) Each cause of action alleges a breach of Defendants' duties of "complete loyalty and confidentiality."[5] (*Ibid.*)

Oasis alleged that, but for Defendants' conduct, it "would not have had to spend in excess of $4 million to oppose the [referendum petition] and then to actively campaign for the approval of Measure 'H'." (1 JA 4;

[5] The claim for professional negligence stated that "Defendants committed professional malpractice, as their conduct was careless, below the professional standard of case [sic], and in violation of their legal and ethical duties as aforesaid." (1 JA 8.) The breach of contract claim contended that Oasis and Goldman breached the covenant of good faith and fair dealing, claiming the covenant requires an "attorney to perform its services consistent with the professional and ethical standards of the profession." (1 JA 9.)

see also 1 JA 9.) Oasis also sought "reasonable attorneys' fees pursuant to" its contract with Defendants. (1 JA 9.)

F. The Superior Court Denies Defendants' Anti-SLAPP Motion.

On March 9, 2009, Defendants filed a special motion to strike pursuant to the anti-SLAPP statute. (1 JA 24.) They argued that the anti-SLAPP statute applied here, that Goldman did not violate the duty of loyalty or disclose client confidences, and also that Oasis could not show that Goldman's conduct caused any damages. The Superior Court denied the motion, holding that the statute did not apply. (2 JA 266-269.)

G. The Court Of Appeal Reverses.

The Court of Appeal reversed. After thoroughly analyzing the arguments and relevant case law, it unanimously held that "[t]here is no doubt that on the evidence presented here, Goldman's activities were protected activity" under the anti-SLAPP statute. (Op. at 8.) It then held that Oasis had failed to establish a probability of prevailing on the merits of its claim for two separate reasons: (1) Goldman's conduct did not violate the duty of loyalty because he had not undertaken an adverse representation and he did not disclose or use any confidential information (Op. at 11-17); and (2) Oasis had not established any damages proximately caused by Goldman's actions (Op. at 17).

H. Oasis Petitions For Review.

In its Petition for Review, Oasis asked this Court to review two issues: (1) whether the anti-SLAPP statute applies to Goldman's conduct; and (2) whether Goldman's conduct violates the duty of loyalty.

Oasis did not seek review of the Court of Appeal's conclusion that Oasis failed to establish a probability of prevailing on its damages claim.

IV. ARGUMENT

A. Standard of Review

Oasis' Opening Brief contains no discussion of the standard of review applicable to this appeal. Appellate review of this matter is de novo. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3; *Tutor-Saliba Corp. v. Herrera* (2006) 136 Cal.App.4th 604, 610.)

In reviewing an anti-SLAPP motion de novo, an appellate court applies the same two-part test as the trial court. "First, the court decides whether the defendant has made 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; see also *Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) This threshold showing is satisfied if the gravamen of the cause of action is founded on protected speech or petitioning activity. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79.)

Second, if the defendant has satisfied its burden of showing that the gravamen of the cause or causes of action is protected activity, the court then determines whether the plaintiff "has demonstrated a probability of prevailing on the claim." (*Equilon*, *supra*, 29 Cal.4th at p. 67; *Navellier*, *supra*, 29 Cal.4th at p. 88.) For this determination, the appellate court independently reviews the record as a whole. (*Tutor-Saliba*, *supra*, 136 Cal.App.4th at p. 610, citing *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 653, overruled on other grounds in *Equilon, supra*, 29 Cal.4th at p. 68, fn. 5.)

B. California's Anti-SLAPP Statute Applies Here.

1. The Anti-SLAPP Statute Is Applied Broadly And Extends To Any Claim Founded On Protected Activity.

When the Legislature enacted the anti-SLAPP statute, its express goal was to prevent lawsuits that chill the exercise of constitutionally protected free speech. (Code Civ. Proc., § 425.16, subd. (a).)[6] The anti-

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[6] The express legislative intent is set forth at the beginning of the anti-SLAPP statute:

> The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled

SLAPP statute allows a defendant to bring a special motion to strike, or "anti-SLAPP motion," when the activity giving rise to the alleged liability is an "'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.'" (*Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1232, quoting Code Civ. Proc., § 425.16, subd. (e).)

The statute defines the covered activities to include: "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (Code Civ. Proc., § 425.16, subd. (e).)

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through abuse of the judicial process. To this end, this section shall be construed broadly.

(Code Civ. Proc., § 425.16, subd. (a).)

To prevent the chilling effect on protected speech, these provisions are to be "construed broadly." (Code Civ. Proc., § 425.16, subd. (a); *City of Cotati, supra*, 29 Cal.4th at 75 [legislative history establishes Legislature's intent that anti-SLAPP statute be construed broadly].)

2. Goldman's Speech Is Classic First Amendment Political Speech Protected By The Anti-SLAPP Statute.

This case presents "the *typical* SLAPP suit":

> The *typical* SLAPP suit involves citizens opposed to a particular real estate development. The group opposed to the project, usually a local neighborhood, protests by distributing flyers, writing letters to local newspapers, and speaking at planning commission or city council meetings. The developer responds by filing a SLAPP suit against the citizen group alleging defamation or various business torts. (Barker, *Common-Law and Statutory Solutions to the Problem of SLAPPS* (1993) 26 Loyola L.A. L.Rev. 395, 396.)

(*Dixon v. Superior Court* (1994) 30 Cal.App.4th 733, 741, fn. omitted, original emphasis; see also Pring and Canan, SLAPPS: Getting Sued for Speaking Out (1996) ("Pring") pp. 2-3, 30 [stating that real estate SLAPPs by developers are the leading category of SLAPP lawsuits over a ten-year period].) Such lawsuits are designed to punish activists for their speech and to curtail future opposition by forcing them to incur substantial litigation costs. (*Ibid.*) That is precisely the situation here.

Oasis' claim against Goldman is founded on three specific acts of protected speech and petitioning activity:

- Goldman spoke once at a meeting of the City Council where he briefly advocated that it was unfair for signature-gatherers – whether for or against Oasis' project – to be required to carry 15 pounds of documents;

- Over a period of less than 90 minutes Goldman obtained 5-6 signatures from neighbors in support of requiring a referendum on the proposal, and at a few houses, left a note seeking their support; and

- Goldman expressed concerns about publicly disclosed traffic studies regarding the Hilton project and an adjacent development in two sentences in a single email about various development projects.

Each of these actions falls squarely within the scope of the anti-SLAPP statute.

First, Goldman's statements at the City Council meeting are expressly covered by the anti-SLAPP statute because they are statements made before a legislative or executive proceeding. (Code Civ. Proc., § 425.16, subd. (e)(1); *Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 19 [anti-SLAPP statute applied to statements made in "local legislative proceedings before the city council"]; see also Pring, *supra*, at 2 [listing "testifying against a real estate development at a zoning hearing" as a subject of an anti-SLAPP motion].)

Second, Goldman's statements to his neighbors directly concerned the referendum. Courts consistently have found that statements made in connection with political campaigns are protected under the anti-SLAPP

statute, even when such statements are made privately.[7] (*Macias v. Hartwell* (1997) 55 Cal.App.4th 669, 674 [private conversations concerning a flyer for a union election campaign are protected]; *Averill v. Superior Court* (1996) 42 Cal.App.4th 1170, 1175 [where defendant, critic of plaintiff charitable organization's efforts to obtain approval for establishment of a shelter for battered women in her neighborhood, made statements to her employer requesting that it not support plaintiff's charitable activities, they were also protected].) Thus, Goldman's statements to his neighbors are protected by the anti-SLAPP statute.

Third, the two sentences in the email referring to the traffic impact from the Hilton project and an adjacent development related directly to a matter of public concern under consideration by a legislative body. That, too, is speech protected by the anti-SLAPP statute. (*Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal.App.4th 713, 728 [anti-SLAPP statute applied to statements in draft EIR because it pertained to

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[7] The anti-SLAPP statute also applies to more public statements in a political campaign, including mailers. (*Beilenson v. Superior Court* (1996) 44 Cal.App.4th 944, 950 [applying anti-SLAPP statute to a libel action by a losing political candidate against the winner for statements made in campaign mailers]; *Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 542 [applying anti-SLAPP statute to statements made in a campaign flyer concerning a candidate]; *Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 355 [applying anti-SLAPP statute to statements made in a mailer in connection with a recall election]; see also Pring, *supra*, at 3 [describing "campaigning for or against a ballot issue" and "collecting signatures on a petition" as subjects of anti-SLAPP motions].)

application to city for approval of a development], disapproved on another ground in *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123, fn. 10.)

California law is unequivocal in this instance: Goldman's statements fall squarely within the protection of the anti-SLAPP statute. Accordingly, as the Court of Appeal held, "[t]here is no doubt that on the evidence presented here, Goldman's activities were protected activity."[8] (Op. at 8.)

3. The Anti-SLAPP Statute Applies To The Claim For Violation Of The Duty Of Loyalty Because The Only Conduct Giving Rise To The Claim Is Speech, Unlike The Conduct In The Cases Cited By Oasis.

Oasis attempts to ignore the specific conduct that indisputably forms the basis for its claims – the speech and petitioning activity discussed in section IV(B)(2), above – and argues that actions for breach of loyalty against an attorney are categorically exempt from the anti-SLAPP statute. (OB at 33-40.) Oasis' argument is premised on a fundamental misunderstanding of how the anti-SLAPP statute applies and a misinterpretation of the cases that it cites.

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[8] Oasis argues that the Court of Appeal "conflated the two prongs" of the anti-SLAPP statute by considering the merits before it determined if the statute applied. (OB at 4.) Oasis is wrong. It is clear from the Opinion that the Court of Appeal first held that the anti-SLAPP statute applied (Op. at 8) before it analyzed the duty of loyalty, in part, to repudiate Oasis' argument that duty of loyalty cases are not covered by the statute (Op. at 8-9 [distinguishing cases involving concurrent or subsequent representations of adverse clients]; see section IV(C)(1)(a), below.) In any event, this Court's opinion will provide the controlling analysis.

As courts have long held, the focus for the first prong of the anti-SLAPP inquiry is not the cause of action, but the gravamen of the claim; if the conduct that gives rise to the claim is protected speech or petitioning activity within the scope of the anti-SLAPP statute, the action is subject to the anti-SLAPP statute. (*Navellier, supra*, 29 Cal.4th at p. 92 ["The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability – and whether that activity constitutes protected speech or petitioning."], original emphasis; accord *U.S. Fire Ins. Co. v. Sheppard, Mullin, Richter & Hampton* (2009) 171 Cal.App.4th 1617, 1625; *California Back Specialists Medical Group v. Rand* (2008) 160 Cal.App.4th 1032, 1036-1037.) The three statements are indisputably the foundation for Oasis' tort claims and are clearly protected speech and petitioning activity within the broad construction of the anti-SLAPP statute.

Nevertheless, Oasis attempts to argue that all duty of loyalty cases fall outside the anti-SLAPP statute. (E.g., OB at 34-40.) This argument is similar to argument made in the past that malicious prosecution claims categorically fall outside the scope of the statute. This Court rejected that contention in *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 734-735, 738 (holding that the statute did not focus on the cause of action, but on the underlying conduct). Courts have no authority to rewrite the

statute to exclude causes of action that the Legislature did not exempt. (*Id.* at p. 737)

While courts have refused to apply the anti-SLAPP statute in several breach of loyalty cases, they have done so only because the activity that gave rise to the claim involved a representation of a second client adverse to the first. In those cases, the basis for the claim was "the very acceptance of that adverse engagement," not protected activity performed after the representation began. (E.g., *U.S. Fire Ins., supra*, 171 Cal.App.4th at p. 1627 ["the principal thrust of the misconduct averred in the underlying complaint is the acceptance by Sheppard Mullin of representation adverse to U.S. Fire"]; *Benasra v. Mitchell Silberberg & Knupp LLP* (2004) 123 Cal.App.4th 1179, 1186-1187 [holding that the complaint was not based on statements made by a law firm in an arbitration on behalf of a second client, which used confidential information obtained from the former client, but in accepting representation in violation of Rule 3-310(C) of the State Bar Rules of Professional Conduct]; *Freeman v. Schack* (2007) 154 Cal.App.4th 719, 732 [complaint alleged violation of Rule 3-310(C) where attorney allegedly abandoned relationship with two plaintiffs to represent another plaintiff in the same and a second case, despite interests adverse to the original clients].)

Here, there is no dispute that Goldman never accepted any adverse representation. To the contrary, Goldman's alleged breach of the duty of

loyalty allegedly occurred only when he made the three statements. While Oasis labels that conduct as a breach of the duty of loyalty, that label cannot change the gravamen of the causes of action, which are founded expressly on Goldman's protected speech and petition activity, not any other conduct. Thus, Oasis' Complaint falls within the broad scope of the anti-SLAPP statute.

C. Oasis Failed To Establish A Probability Of Prevailing On The Merits For Three Separate And Independent Reasons.

Because the anti-SLAPP statute applies, the second prong of the statute must be analyzed to determine if Oasis showed a probability of prevailing on the merits. It did not carry its burden for three separate and independent reasons: (1) Oasis cannot show that Goldman violated any duty of loyalty; (2) Oasis' construction of the duty of loyalty to apply to Goldman's statements would violate the First Amendment; and (3) Oasis failed to establish damages.

1. Oasis Has Not Shown A Violation Of The Duty Of Loyalty.

a) The Duty Of Loyalty Does Not Prohibit Statements Like Goldman's Because He Was Not Representing An Adverse Party And Did Not Disclose Any Confidential Information.

Oasis claims that Goldman "switched sides" on the Hilton project and thereby violated the duty of loyalty by making his three statements. It cites no ethical rules that apply the duty of loyalty to prevent political

statements like Goldman's, because there are none. Nor do any of its cases involve similar facts. Instead, Oasis asks this Court to create a broad common law rule that would prevent an attorney from engaging in protected activity if it is adverse to the subject of a former representation, even when he does not disclose or use any confidential information. However, neither the cases nor the policy rationale Oasis offers supports such a rule. To the contrary, political activity regarding matters of public importance is fully consistent with the duty of loyalty when no confidential information is disclosed.

Oasis relies on broad pronouncements about the duty of loyalty, claiming that a "legion of cases" emphasize the importance of the duty of loyalty. (OB at 14-16.) Yet the cases cited by Oasis all involve an actual or alleged violation of the duty of loyalty arising out of attorneys representing a second client against a former client. (*People ex rel Dept. of Corporations v. SpeeDee Oil Change Systems* (1999) 20 Cal.4th 1135 [alleged conflict involved law firm that represented intervening franchisees in action against oil company where oil company consulted with another attorney in same law firm]; *Flatt v. Superior Court* (1994) 9 Cal.4th 275 [alleging legal malpractice by attorney who failed to advise prospective client about statute of limitations when representation was rejected because of conflict between prospective and existing clients]; *Anderson v. Eaton* (1930) 211 Cal. 113 [attorney representing father of decedent suing

decedent's employer had represented employer's insurer before Industrial Accident Commission proceedings regarding the decedent's death]; *City and County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal.4th 839 [defendant's former attorney became City Attorney in office that then brought action against the defendant]; *In re Zamer G.* (2007) 153 Cal.App.4th 1253 [conflict involving legal services organization that concurrently represented siblings with adverse interests]; *Knight v. Ferguson* (2007) 149 Cal.App.4th 1207 [conflict when attorney switched from client that consulted attorney about business venture to representing adverse party in lawsuit against first client involving same venture]; *Pound v. DeMera DeMera Cameron* (2005) 135 Cal.App.4th 70 [conflict when attorney represented one party and then was hired by law firm that represented opponent in litigation]; *City National Bank v. Adams* (2002) 96 Cal.App.4th 315 [conflict when attorney retained by defendant had previously represented plaintiff by giving an opinion letter regarding contract that was the subject of the action]; *Henriksen v. Great American Savings & Loan* (1992) 11 Cal.App.4th 109 [conflict when law firm hired associate who had previously represented adverse party in same proceeding]; *Dill v. Superior Court* (1984) 158 Cal.App.3d 301 [same]; *Dettamanti v. Lompoc Union School Dist.* (1956) 143 Cal.App.2d 715 [conflict where plaintiff's attorney had investigated accident that was the

subject of lawsuit during previous employment with district attorney's office].)

"The holding of a decision is limited by the facts of the case being decided, notwithstanding the use of overly broad language by the court in stating the issue before it or its holding or in its reasoning." (*People v. Jennings* (Aug. 12, 2010, S081148) __ Cal.4th __, 2010 WL 3168459, *42, internal quotations and citation omitted.) The scope of the duty of loyalty delineated by these cases, thus, is limited to situations where an attorney "switches sides" by *representing a second client* adverse to a former client – conduct that is expressly forbidden by existing Rule 3-310(C) and (E) of the Rules of Professional Conduct.[9]

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[9] In relevant part, this rule states:

(C) A member shall not, without the informed written consent of each client:

(1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or

(2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or

(3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

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(E) A member shall not, without the informed written consent of the client or former client, accept employment adverse to

These cases, therefore, do not establish a common law duty of loyalty that prevents an attorney from engaging in political activity adverse to a former client when the attorney does not represent a second client and does not disclose the first client's confidential information. Nor has Oasis cited a case that creates such a duty.

There is good reason for this. As Oasis states, the fundamental purpose underlying the duty of loyalty is to ensure client "'trust and confidence in counsel.'" (OB at 18, quoting *Flatt*, *supra*, 9 Cal.4th at pp. 282, 285.) However, as *Flatt* explains (and Oasis repeatedly stresses), the fundamental concern underlying the duty of loyalty in subsequent representations *is the risk of disclosure or use of confidential information* obtained from a prior client. (*Flatt*, *supra*, 9 Cal.4th at p. 283.)

Successive representations of clients on the same matter creates conflicting obligations between the duty to maintain the former client's confidences and the duty to vigorously represent the current client using all information known to the attorney. (*SpeeDee Oil*, *supra*, 20 Cal.4th at p. 1147; *Anderson*, *supra*, 211 Cal. at p. 116.) In the classic case where an

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> the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.

(Cal Rules Prof. Conduct, rule 3-310(C), (E).)

attorney who was counsel for one party in a lawsuit agrees to represent an adverse party, the attorney has a duty to maintain the first client's confidences, but also a duty to represent the second client to his best ability, including by using confidential information. The rules prohibiting such representations exist "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." (*SpeeDee Oil*, *supra*, 20 Cal.4th at p. 1147; *Ishmael v. Millington* (1966) 241 Cal.App.2d 520, 526-528 [attorney could not represent wife in divorce after representing husband, because he would have to use knowledge of husband's dealings or "set a shallow limit on the depth to which he will represent the wife"]; *Anderson*, *supra*, 211 Cal. at p. 116 [successive representation places attorney in "position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent."].)

However, when Goldman spoke about the size of petition materials or asked a few neighbors to sign a petition, he had no obligation to disclose or use any confidential information he had previously obtained from a client, because he was not representing a second client and had no conflicting duties. Nor did he disclose any confidential information. Thus, there is no reason to *presume* that an attorney speaking in a manner similar

to Goldman would undermine the "trust" his former client had placed in him, and thus no reason to expand the duty of loyalty to preclude an attorney from ever taking a political position adverse to a former client.[10]

The Restatement is consistent with this view, and endorses an attorney's right to engage in speech and petitioning activity contrary to the interests of even existing clients:

> In general a lawyer may publicly take personal positions on controversial issues without regard to whether the positions are consistent with those of some or all of the lawyer's clients. Consent of the lawyer's clients is not required. Lawyers usually represent many clients, and professional detachment is one of the qualities a lawyer brings to each client.

(Rest.3d Law Governing Lawyers, § 125, com. e.)

Oasis nonetheless argues that extending the common law duty of loyalty to prohibit speech like Goldman's is necessary because otherwise clients will not trust their attorneys enough to tell them everything they need to know to represent the client. (E.g., OB at 20.) Oasis thus argues that the common law requires that an attorney not be permitted to "'do anything which will injuriously affect his former client in any manner in which he formerly represented him. . . .'" (OB at 14, quoting *Wutchumna*

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[10] For this reason, the fact that Goldman spoke about a project on which he worked is irrelevant. Regardless of whether Goldman received confidential information on the same matter about which he spoke or about a different matter, he still was under no duty to disclose or use that information, because he had no duty to a second client.

Water Co. v. Bailey (1932) 216 Cal. 564, 573-574; OB at 18, quoting *Flatt*, *supra*, 9 Cal.4th at p. 282.) There is no justification for such a broad prohibition.

We agree that the duty of loyalty (and the duty of confidentiality) prohibit an attorney from disclosing confidential information. However, Goldman's statements, made two years after the representation ended, addressed matters entirely of public record and topics of avowed public interest that did not exist at the time Defendants represented Oasis: the size of the petition materials; the EIR and traffic studies; and changes to the Hilton project and other projects that did not relate to Oasis. None of these statements disclosed any confidential information Goldman had obtained years earlier.

Indeed, Oasis does not even contend that Goldman disclosed any confidential information.[11] And there is nothing in the record that indicates he ever disclosed or used any confidential information. Had he done so, his actions would have violated an existing, defined ethical rule. (Cal Rules Prof. Conduct, rule 3-100 [rule requiring attorneys to maintain client confidences].)

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[11] The substance of Goldman's statements (talking about his views on the size of the Hilton project, the materials signature-gatherers must carry, and his belief about traffic congestion at a particular intersection – all very public matters) do not in any way suggest he was using any of Oasis' confidential information against it.

Given these facts, Goldman's speech could not undermine the trust that clients have in their attorneys when disclosing confidential information. Their confidences are maintained, so there is no reason why limited political statements by an attorney who represented a client years before would undermine the client trust in attorneys when the attorney did not disclose or suggest he was relying on confidential information.

Since no confidential information was disclosed, Oasis contends that it should be *presumed* that Goldman used such information against it, i.e., that the duty of loyalty is violated merely by the suspicion that an attorney might use confidential information. This argument fails because it amounts to nothing more than claiming the duty of loyalty is violated when there is an appearance of impropriety – that, even in the absence of any proof that an attorney is using confidential information, the attorney cannot speak out about a political matter on which he previously worked because the former client might suspect the attorney is violating the duty of confidentiality.

However, it is well-settled that California courts do not apply such an appearance of impropriety standard to conflict situations. (*Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776, 807, fn. 27; *In re Jasmine S.* (2007) 153 Cal.App.4th 835, 843; *Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 306-307.) As leading legal ethics scholar Ronald Rotunda explains, the "appearance of impropriety standard" is concocted from whole cloth:

> Those who claim that there is some sort of conflict in situations involving friendship or public statements about policy matters do not refer to any rules, regulations, case law, or ethics opinions to support their charge. That is because the law on this subject all points the other way. Consequently, those who raise this charge are left with asserting that something must be wrong, even if they cannot explain why. They rely on the "appearance of impropriety."

(Rotunda, *Alleged Conflicts of Interest Because of the "Appearance of Impropriety"* (2005) 33 Hofstra L.Rev 1141, 1146.)

This standard "is too vague and too ad hominem to be a real rule itself." (Rotunda, *supra*, at p. 1145; *Gregori*, *supra*, 207 Cal.App.3d at p. 307 ["appearance of impropriety standard" has surface charms but its "standard is too imprecise to furnish a reliable judicial guideline"].) As Geoffrey Hazard, the reporter for the original ABA Model Rules, wrote, the "appearance of impropriety" standard is "a 'garbage' standard." (ABA/BNA Lawyers' Manual on Professional Conduct (1997) 13:31-32.)

The mere fact that a client suspects that its information might be used against it, without more, does not establish a violation of the duty of loyalty. For example, courts have held that law firms can employ "ethical wall" screening mechanisms to avoid the firm having imputed knowledge of confidential information received by attorneys who previously worked for adverse parties. (*In re Charlisse C.* (2008) 45 Cal.4th 145, 162 [screening of former government attorneys]; *Kirk, supra*, 183 Cal.App.4th 776 [private attorneys].) In such circumstances, the suspicion that an

attorney or law firm may be using confidential information is not enough to warrant disqualification; courts accept that the attorneys within the firm will protect confidential information. Thus, in the absence of any evidence establishing that an attorney is impermissibly disclosing, using, or suggesting he is using confidential information when engaging in political speech, there is no reason to presume the attorney is violating the duty of confidentiality.

Oasis nonetheless contends that this Court should apply the "substantial relationship" test, a test that examines conflict situations by evaluating how closely related two representations are, e.g., if they are closely related or the same, it is conclusively presumed that the attorney received confidential information from the first client and cannot represent the second client. (OB at 28-29, citing *Global Van Lines, Inc. v. Superior Court* (1983) 144 Cal.App.3d 487, 489.) This test makes sense in cases involving second adverse representations, because the attorney faces conflicting duties to the two clients, as discussed above. It makes no sense, however, to apply the substantial relationship test to a situation that does not involve a second representation, because the attorney is under no conflicting duties. In the latter circumstance, there is no reason to assume that the attorney will violate his ethical obligation to maintain confidences and, thus, no reason to presume that an attorney speaking on his own behalf

in a political arena on a matter of public record is using confidential information.

Finally, adopting the broad categorical bar on attorney speech that Oasis seeks would needlessly subject all sorts of political speech to tort liability. For instance, Oasis' argument that the duty of loyalty is violated by speech that leads a client to suspect an attorney is acting on confidential information would apply to any attorney in the law firm. To avoid the possibility of client suspicion and a wrongful appearance, all attorneys in the law firm would have to avoid any political activity, regardless of whether they actually represented the former client. This would be the only way the law firm could avoid liability because it would be impossible for every attorney to know of all the firm's prior representations and their scope. This extreme rule cannot be the law.

In fact, Oasis' interpretation seemingly would mean that Goldman – or any other Reed Smith attorney – would have acted unethically merely by voting against Measure H. Such conduct is adverse to a former client on the subject matter of the past relationship and would violate the duty of loyalty.[12] But this demonstrates that Oasis' interpretation of the duty of loyalty goes much too far.

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[12] It is easy to dismiss this point by saying that how people vote is not publicly known. However, that is nothing more than saying it is okay for attorneys to violate their ethical obligations when those violations are

In sum, this Court should hold that Goldman's protected activity did not violate any duty of loyalty to Oasis, because he did not represent a second, adverse client and did not disclose or suggest he was relying on any confidential information from Oasis.

b) In Any Event, Extending The Duty Of Loyalty As Oasis Wants To Create Tort Liability For Political Speech Would Violate Goldman's First Amendment Rights.

(1) The Right To Petition Government Is Fundamental, And Attorneys Retain Those Rights Even If Their Views Are Contrary To Their Clients'.

The right to petition the government and speak freely on issues of public interest, like the statements involved here, are among "the indispensable democratic freedoms secured by the First Amendment." (*Thomas v. Collins* (1945) 323 U.S. 516, 530.)[13] The First Amendment reflects our "profound national commitment to the principle that debate on

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unlikely to be detected. A truly ethical attorney will abide by his duties, regardless of whether he will be caught. Accordingly, even if an attorney's vote may not be discovered, an attorney complying with Oasis' construction of the duty of loyalty would still be prevented from casting a vote against a former client.

[13] References in this brief to the "First Amendment" and "freedom of speech" should also be understood to refer to Article I, section 2 of the California Constitution, which states: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." The California Constitution's guarantee of free speech is "at least as broad" as the federal Constitution's First Amendment. (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 958-959; *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 490-491.)

public issues should be uninhibited, robust, and wide-open." (*New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 270.) A citizen's right to speak on matters of public concern "'is more than self-expression; it is the essence of self-government.'" (*Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* (1985) 472 U.S. 749, 759, citation omitted.) "[S]peech on public issues occupies the 'highest rung of the hierarchy of First Amendment values.'" (*Ibid.*, citation omitted.)

"[D]isciplinary rules governing the legal profession cannot punish activity protected by the First Amendment, and that First Amendment protection survives even when the attorney violates a disciplinary rule he swore to obey when admitted to the practice of law." (*Gentile v. State Bar of Nev.* (1991) 501 U.S. 1030, 1054; see also *Standing Committee on Discipline of the United States Dist. Ct. for the Central Dist. of Cal. v. Yagman* (9th Cir. 1995) 55 F.3d 1430, 1438 [applying constitutional standards applicable to defamation to action by disciplinary committee sanctioning attorney for statements about judge by requiring that only false statements could be actionable]; see also *Jacoby v. State Bar* (1977) 19 Cal.3d 359, 368-380 [First Amendment protected attorneys' statements to media regarding their low-income legal services clinic in proceeding alleging violation of State Bar rules prohibiting solicitation of clients].)

(2) Any Attempt to Sanction Attorneys For Engaging In Political Speech Must Satisfy Exacting First Amendment Scrutiny.

When rules and laws seek to regulate expressive and associational conduct by attorneys "at the core of the First Amendment's protective ambit," *In re Primus* (1978) 436 U.S. 412, 424, as here, the Supreme Court has held that "government may regulate in the area only with narrow specificity." (*NAACP v. Button* (1963) 371 U.S. 415, 433 ["*Button*"].) In both of these cases, attorneys were disciplined for violating ethical rules or statutes prohibiting attorneys from "soliciting" clients for litigation. However, the Supreme Court held that the communications in those cases were protected expressive and associational conduct. (*Button*, *supra*, 371 U.S. at p. 460 [NAACP meetings with community members to explain the legal steps necessary to achieve desegregation advanced the beliefs and ideas of the organization and were deserving of highest First Amendment protections]; *Primus*, *supra*, 436 U.S. at p. 431 [letter from attorney to woman with whom she had previously met advising that ACLU would represent her for free fell "within the generous zone of First Amendment protection reserved for associational freedoms"].)

"Broad prophylactic rules in the area of free expression are suspect," and "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." (*Button*, *supra*, 371 U.S. at p. 438.)

It is just such a broad and "bright line, prophylactic rule" that Oasis seeks. (OB at 28.)

To punish an attorney for expressive conduct, the state's action "must withstand the 'exacting scrutiny applicable to limitations on core First Amendment rights . . . .'" (*Primus*, *supra*, 436 U.S. at p. 432, quoting *Buckley v. Valeo* (1976) 424 U.S. 1, 44-45.) Thus, the state must demonstrate "'a subordinating interest which is compelling,' [Citation], and that the means employed in furtherance of that interest are 'closely drawn to avoid unnecessary abridgment of associational freedoms.'" (*Ibid.*, quoting *Buckley, supra*, 424 U.S. at p. 25.)

The *Primus* court acknowledged that:

> The States enjoy broad power to regulate "the practice of professions within their boundaries," and "[t]he interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'"

(*Primus*, *supra*, 436 U.S. at p. 422, quoting *Goldfarb v. Virginia State Bar* (1975) 421 U.S. 773, 792.) Yet despite that power, the *Primus* Court held that the disciplinary rules in that case were unconstitutional as applied to the plaintiff, because they punished political expression and association without any showing that they actually served any legitimate state purpose. (*Primus*, *supra*, 436 U.S. at pp. 433-437; see also *Jacoby*, *supra*, 19 Cal.3d at pp. 368-380 [rule prohibiting attorneys from soliciting clients failed test

because state could not show compelling state interest for curtailing attorney statements to media about legal clinic that provided services to low and middle income persons, because statements concerned a matter of public interest].)

The *possibility* that there might be "some potential for overreaching, conflict of interest, or other substantive evils whenever a lawyer gives unsolicited advice and communicates an offer of representation to a layman" could not justify restricting the attorney's "political expression and association" so broadly; "[i]n the context of political expression and association . . . a State must regulate with significantly greater precision." (*Primus*, *supra*, 436 U.S. at pp. 437-438.) Thus, the standards in *Primus/Button* must be applied to Oasis' proposed broad, prophylactic rule to determine if it is constitutional.

Oasis responds by quoting at length from a concurring opinion by Justice Stewart to suggest that the First Amendment must give way to ethical rules. (OB at 24, quoting *In re Sawyer* (1959) 360 U.S. 622, 646-647 [Stewart, J., concurring].) However, the concurrence does not help Oasis.

First, *Sawyer* involved an action against an attorney who criticized a local judge, but the Court reversed on the grounds that the factual record did not identify any violation. It did not address the First Amendment implications of applying the rules to speech, as *Primus* and *Button* later did.

Second, the *Sawyer* concurrence predated *Primus* and *Button*, which clearly establish that when broad, prophylactic rules are applied to protected speech, they are subject to strict scrutiny.

Third, the concurrence is just that – a concurrence by a single Justice. It is hardly binding precedent in the face of *Primus* and *Button*. *Primus* and *Button*, not *Sawyer's* concurrence, are binding here.

The strict scrutiny standard applies for yet another reason: Oasis' construction of the duty of loyalty would impose a content-based restriction on what attorneys can say. "[A] law is content-based if . . . it differentiates based on the content of speech on its face." (*Ctr. for Bio-Ethical Reform, Inc. v. Los Angeles County Sheriff Dep't* (9th Cir. 2008) 533 F.3d 780, 787, citation and internal quotation marks omitted; see also *U.S. v. Playboy Entertainment Group, Inc.* (2000) 529 U.S. 803, 811 [regulation prohibiting "signal bleed" by cable channels that carried sexually explicit material was content-based when no regulation applied to "signal bleed" from cable channels carrying different content].)

Oasis' proposed rule prohibiting all statements "adverse" to former clients' interests is content-based because statements not adverse to a client would be permissible. As such, Oasis' interpretation of the duty of loyalty is a content-based restriction, subject to strict scrutiny. (*Pleasant Grove City, Utah v. Summum* (2009) 129 S.Ct. 1125, 1132; *Fashion Valley Mall, LLC v. NLRB* (2007) 42 Cal.4th 850, 865.) The test is the same one as in

Primus and *Button*: the content-based rule "must be necessary to serve a compelling interest and be narrowly drawn to achieve that end." (*Pleasant Grove*, *supra*, 129 S.Ct. at p. 1132; *Fashion Valley*, *supra*, 42 Cal.4th at p. 869.)

Oasis cannot meet this stringent test.

(3) Oasis' Construction Of The Duty Of Loyalty Cannot Survive Strict Scrutiny.

Oasis' construction of the common law duty of loyalty to prohibit attorneys from saying anything "injurious" or "adverse" to a former client about any matter an attorney previously worked on cannot survive strict scrutiny.[14] Oasis has offered only a single justification for construing the duty of loyalty to prohibit attorney statements "injurious" or "adverse" to former clients – clients' fear that they might not believe they can safely tell their attorneys confidential information. (E.g., OB at 18 [stating that duty

[14] That Oasis attempts to rely on common law for its broad prohibition on speech instead of a specific rule or statute does not change this analysis. First Amendment protections apply to common law tort claims. (*Hustler Magazine v. Falwell* (1988) 485 U.S. 46, 56 [holding First Amendment barred claim for intentional infliction of emotional distress by public figure because state interest in preventing reputational damage was insufficient to justify restriction on speech]; *New York Times, supra*, 376 U.S. at p. 277 [applying First Amendment protections to civil defamation claim because "[w]hat a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel"].)

of loyalty is necessary to preserve "'client trust and confidence in counsel'"], quoting *Flatt*, *supra*, 9 Cal.4th at pp. 282, 285].)

Oasis suggests two possible approaches to the meaning of "trust": (1) trust affected by an actual disclosure of confidential information; or (2) trust affected by the client's suspicion that a former attorney may be acting on confidential information. Under either theory, Oasis' construction of the duty of loyalty to restrict political speech like Goldman's cannot survive constitutional scrutiny.

The first approach, preserving client trust by preventing *actual* disclosures of client confidences, we assume to be a sufficiently compelling state interest to restrict political speech. However, Oasis' construction of the duty of loyalty is not narrowly tailored to this state interest, because it extends beyond prohibiting actual disclosures. A provision fails the strict scrutiny test "if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." (*Reno v. ACLU* (1997) 521 U.S. 844, 874 [striking down internet indecency law designed to protect children from accessing pornography because software would soon be widely available that would allow parents to restrict their children's access and, thus, restrictions that interfered with adult access were not narrowly tailored]; *44 Liquormart, Inc. v. Rhode Island* (1996) 517 U.S. 484, 507-508 (plurality op.) [striking down ban on

advertising alcohol prices because of less restrictive alternatives, such as an "educational campaign" or "counterspeech"].)

Here, prohibiting all "injurious" or "adverse" attorney speech is not the least restrictive way to serve a state interest in preventing actual disclosure of client confidences. Less restrictive alternatives already exist: Rule of Professional Conduct 3-100, which prevents attorney disclosure of confidential information, and Rule 3-310, which prevents attorneys from engaging in representations where they are subject to a duty to use confidential information obtained from a current or former client to aid a new client. Those specific rules act in a tailored fashion to prevent actual disclosures of confidential information. The broad common law duty that Oasis advocates, by comparison, reaches well beyond the purpose the ethical rules are intended to serve and is not the least restrictive way to prevent actual disclosures.

Conversely, if the need to maintain client trust is premised on concern about preventing client suspicions that their former attorneys will use confidential information, that is not a compelling state interest. As discussed above, this theory is nothing more than an appearance of impropriety standard, which our courts have rejected as improper. (*Kirk*, *supra*, 183 Cal.App.4th at p. 807, fn. 27; *In re Jasmine S.*, *supra*, 153 Cal.App.4th at p. 843; *Gregori, supra*, 207 Cal.App.3d at pp. 306-307.) Because our courts do not even apply an appearance of impropriety

standard to prevent conduct unprotected by the First Amendment, preventing such appearances cannot be a compelling state interest to justify prohibiting speech like Goldman's. (*Primus*, *supra*, 436 U.S. at pp. 433-437 [possibility of "substantive evils" from attorney's speech cannot justify broad restrictions on political expression].)

Either way, the broad rule Oasis advocates is unconstitutional. Rules already exist to prevent actual disclosures, and suspicion without proof is not a compelling government interest that justifies broad prophylactic prohibitions of political speech.

2. Oasis Must Show Damages Caused By The Alleged Violation Of The Duty Of Loyalty; It Has Failed To Do So.

As the Court of Appeal recognized, Oasis failed to offer any evidence of actual damages caused by Goldman's three statements. (Op. at 17.) Damage proximately caused by the breach of the duty of loyalty is an essential element of a tort claim.[15] (*Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 410; *Pierce v. Lyman* (1991) 1 Cal.App.4th 1093, 1101.)

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[15] Damages proximately caused by the alleged wrongful conduct also are elements of Oasis' causes of action for breach of fiduciary duty, professional negligence, and breach of contract. (*Pellegrini v. Weiss* (2008) 165 Cal.App.4th 515, 524 [elements of breach of fiduciary duty claim include "resulting damages"]; *Shopoff & Cavallo LLP v. Hyon* (2008) 167 Cal.App.4th 1489, 1509 [elements of professional negligence claim include "actual loss or damages resulting from the professional negligence"]; *CDF Firefighters v. Maldonado* (2008) 158 Cal.App.4th 1226, 1239 [elements of breach of contract include "damages to plaintiff as a result of the breach"].)

Here, however, Oasis contends that it suffered $4 million in damages – the cost of fighting the petition drive and campaigning in favor of Measure H – because of Goldman's statements. That contention is factually and legally unsustainable.

Because Oasis cannot establish a probability of prevailing on its damages claim, the Court should affirm the Court of Appeal on that independent ground. Also, because any holding against Defendants on the duty of loyalty would require deciding the First Amendment issues discussed above (section IV(C)(1)(b)), this Court should decide the merits solely on the basis that Oasis failed to establish damages without reaching any other issues. (E.g., *Lyng v. N.W. Indian Cemetery Prot. Assn.* (1988) 485 U.S. 439, 445) ["A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them."]; accord *In re Marriage of Harris* (2004) 34 Cal.4th 210, 232; *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 230-231.)

a) Oasis Has Offered No Evidence That Goldman Caused It To Incur Any Costs To Obtain Passage Of Measure H.

Oasis defeated the referendum, so it cannot claim its project was ended by referendum. Thus, Oasis' Complaint alleges only damages resulting from the campaign over Measure H – the $4 million it claims to have spent "to oppose the Petition and thereafter actively campaign to seek

citizen approval of Measure 'H'" and the cost of the delay due to the referendum campaign. (1 JA 7-8.) In short, Oasis alleges that, but for Goldman's three statements, there would have been no Measure H for it to fight. Given the very limited nature of Goldman's three statements, this assertion is not credible on its face. The Court of Appeal rejected this damages claim because Oasis presented *no* evidence that Goldman caused them. (Op. at 17.)

Oasis contends that the Court of Appeal erred because it allegedly held that Oasis could not show a probability of prevailing because it could not show that the *entire* $4 million it spent to oppose Measure H was due to Goldman's conduct. (OB at 43.) That, however, is not what the Court of Appeal held; it held that Oasis "presented no evidence that Goldman caused those damages" and that it did not establish that *any* of its expenditures regarding Measure H were caused by Goldman's activities, as distinct from the actions of thousands of Beverly Hills citizens who opposed the Hilton project. (Op. at 17.)

Oasis relies on a single case that stands for the proposition that a claim will not fail when there is factual evidence of damages but uncertainty in their amount. (OB at 43, citing *Butcher v. Truck Ins. Exchange* (2000) 77 Cal.App.4th 1442, 1469-1470.) The question here is not the amount of damages; the question is causation.

To establish proximate causation, a party must show the conduct was a "substantial factor," i.e., "a factor that a reasonable person would consider to have contributed to the harm" and not a "remote or trivial factor." (CACI No. 430.) This standard is not met "if the harm would have been sustained" in the absence of the alleged breach. (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1240, quoting Rest.2d Torts, § 432.) Oasis' expenditures on the petition and referendum could be damages caused by Goldman's statements only if those expenditures would have been avoided if Goldman had not spoken. Put simply, to recover the petition and referendum expenditures, and any alleged damages due to delay during the referendum process, Oasis must establish that there never would have been a petition drive or referendum if Goldman had not made his three statements.

Oasis did not make such a showing. It offered *no* evidence about causation in the Superior Court. It merely listed the total amount of money it spent on the petition and referendum, but cited nothing to prove that Goldman's three statements caused the petition drive or tipped the balance in favor of Measure H being placed on the ballot. Indeed, the only evidence offered below compels the exact opposition conclusion – that Goldman's conduct did not cause the petition drive or the referendum.

Goldman's statements to the City Council could not have caused Oasis any damages, because the City Council did not reduce the size of the materials that signature-gatherers had to carry. (1 JA 61.) Even if lighter

documents would have led to more signatures (a speculative proposition itself), the relevant materials were never lightened and the petition had 1,116 signatures more than it needed anyway. Goldman's statement to the City Council, thus, had no impact on the petition drive or the referendum that followed.

Goldman's obtaining 5 or 6 signatures on a petition and leaving a note for a few of his neighbors also did not cause any damages. The Citizens' Committee (in which Goldman was not involved) obtained 3,216 signatures, i.e., 1,116 signatures more than the 2,100 needed. (1 JA 65.) Five or six came from Goldman. (1 JA 61.) Even assuming that not one of those people would have signed a petition in favor of the referendum but for Goldman approaching them, there still would have been 1,110 more signatures than needed. Goldman's statements to his neighbors and the letter left at a handful of homes on his street could not have come close to tipping the balance and causing the $4 million in expenditures Oasis seeks.

Finally, Goldman's email caused no damages. The only mention of the Hilton project in that email chain were two sentences expressing skepticism about the accuracy of public traffic studies. (1 JA 204.) Goldman's email, which was sent to only a few people, did not even mention, much less support, the referendum effort. (*Ibid.*) Moreover, it is clear that the organizer of the Citizen's Committee (Larry Larson) intended to begin the petition drive and seek the referendum with or without

Goldman. (*Ibid.* [Larson's initial email to Goldman stated: "The North is going to do a referendum and council recall on the Hilton"].) In short, there is absolutely no evidence that Goldman's statements caused Oasis to incur any of the expenses it made to oppose the petition drive and campaign in favor of Measure H.

b) Oasis Cannot Claim Its Pre-Litigation Legal Fees As "Damages."

Although not alleged as "damages" in its Complaint, Oasis now claims that it incurred $3,000 in legal fees (OB at 43) to research possible claims against Goldman and to draft cease-and-desist letters (1 JA 210 [declaration of Oasis' counsel describing services to include reviewing emails, Goldman's letter and transcripts of City Council hearings, performing legal research, drafting cease-and-desist letters, and discussing "the available recourse" with Oasis].) These expenses are not recoverable "damages."

First, Oasis cites no law that supports its recovery of these attorneys' fees. Having offered no legal basis to support its recovery of these fees, this argument is waived. (*Berger v. California Ins. Guarantee Assn.* (2005) 128 Cal.App.4th 989, 1007 [where opening brief makes conclusory one-paragraph argument that claim states a cause of action without making a coherent argument or citing any authority to support their contention, the argument is waived]; *Interinsurance Exchange v. Collins* (1994) 30

Cal.App.4th 1445, 1448 ["Parties are required to include argument and citation to authority in their briefs, and the absence of these necessary elements allows this court to treat appellant's [contentions] as waived"]; Cal. Rules of Court, rule 8.204(a)(1)(B) [brief must "support each point by argument and, if possible, by citation of authority"].)

Second, Oasis' claim is also inconsistent with California law. It is well-settled that "California follows what is commonly referred to as the American rule, which provides that each party to a lawsuit must ordinarily pay his own attorney fees." (*Trope v. Katz* (1995) 11 Cal.4th 274, 278.) The costs of researching a possible claim and engaging in pre-litigation communications is not a form of damages, but rather fees incurred as part of the litigation itself. (E.g., *Stokus v. Marsh* (1990) 217 Cal.App.3d 647, 654 [allowing recovery of prefiling work, including issue evaluation, but as attorneys' fees in post-judgment fee award under Civil Code section 1717]; see also *Webb v. Bd. of Educ. of Dyer County, Tenn.* (1985) 471 U.S. 234, 243 [post-judgment fee award may include money for tasks completed in anticipation of litigation if they were "both useful and of a type ordinarily necessary to advance the . . . litigation."].) None of these cases, nor any other that Defendants have found, considers the cost of researching a possible claim, drafting pre-litigation demand letters, and discussing a client's possible "recourse" to be damages.

Oasis' claims against Defendants do not fall within the exception to the American Rule that allows recovery of fees incurred when a party "has been required to act in the protection of his interests by bringing or defending an action against a third person. . . ." (*Prentice v. North Am. Title Guaranty Corp.* (1963) 59 Cal.2d 618, 620; see also *Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498, 505, 507-508.)

In this case, that exception might apply if Goldman's conduct forced Oasis to file a lawsuit against the City or other third parties. However, this tort of another doctrine does not permit recovery of attorneys' fees spent on litigation against the same party from whom the fee award is sought. (*Prentice*, *supra*, 59 Cal.2d at p. 620.) The doctrine applies only to attorneys' fees incurred "bringing . . . an action against a third person." (*Ibid.*; accord *Golden West Baseball Co. v. Talley* (1991) 232 Cal.App.3d 1294, 1302-1303 [doctrine inapplicable where plaintiff sought to recover against principal for attorneys' fees incurred against agent, because principal and agent were one party].) Because the pre-filing investigation and demand letters were directed by Oasis at the parties they sued, the tort of another doctrine is inapplicable here.

Accordingly, Oasis may not rely on its claimed legal fees as "damages" to salvage its claim. Therefore, Oasis cannot show that it incurred damages caused by Goldman's conduct, and the Court of Appeal's decision should be affirmed on this ground alone.

V. CONCLUSION

California law, constitutional imperatives, and public policy support affirmance of the Court of Appeal's decision. This Court should hold that the anti-SLAPP statute applies to Goldman's speech and petitioning activity and find that Oasis failed to establish a probability of prevailing on the merits.

Respectfully submitted,

Dated: September 10, 2010

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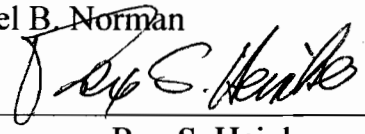
By 

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CERTIFICATE OF COMPLIANCE

[Cal. Rules of Court, Rule 8.520(c)]

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STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 2029 Century Park East, Suite 2400, Los Angeles, California 90067. On September 10, 2010, I served the foregoing document described as: **ANSWERING BRIEF ON THE MERITS** on the interested parties below, using the following means:

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Executed on September 10, 2010, at Los Angeles, California.

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