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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

REPLY BRIEF ON THE MERITS

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INTRODUCTION

In their answer brief, defendants Reed Smith LLP and Ken Goldman strive to avoid the overriding truth at the core of the issue before this Court: A lawyer retained to further a very specific project because he is influential in the community where the proposed project is going to be built, cannot, once his retention ends, affirmatively use his community influence to work to stop the very project he was retained to support. In the litigation context, what these defendants did was the equivalent of a law firm successfully representing a client in a matter through the Court of Appeal and then, after the representation stops, filing an amicus brief on its own behalf urging this Court to accept review based on the manner in which the Court of Appeal resolved a legal issue in the former client's favor and urging this Court to resolve the issue in a way that the former client loses the case. Under defendants' logic, simply because there is no second client and no direct evidence that confidential information was disclosed in the amicus brief, there would be nothing wrong with this. However, there is obviously something seriously wrong with such disloyalty.

Framed in these terms, defendants' argument that Goldman, in his post retention conduct, "exercised his fundamental right as a citizen to participate in [a] political controversy" (AB 2), is meritless. Just like any other lawyer, Mr. Goldman knowingly and willingly sacrificed certain rights once he accepted employment, among them the

right to publicly oppose the ongoing project on which he formerly worked.

Likewise, defendants' effort to minimize the nature of Goldman's opposition to the Oasis project is a straw man. This matter is presently before the Court in the context of a ruling on an anti-SLAPP motion. It is irrelevant whether the breaching conduct involved multiple acts of disloyalty or only a few; either way, disloyalty occurred and the issues before this Court one whether such disloyalty is actionable (prong 2) and whether a claim for such disloyalty falls within the anti-SLAPP statute (prong 1). In any event, defendants' attempt to characterize their conduct as trivial and ineffective is misleading.

First, Goldman's effort to literally lighten the load of those gaining signatures for the referendum to shut down the Oasis project he had been retained to support, had only one possible beneficiary: those opposing the project. This was therefore not neutral conduct on Goldman's part. Everyone in that City Council room understood that Goldman was lending his support to the backers of the referendum to stop the development.

Further, Goldman's email and his efforts to gather signatures were specifically targeted to stopping the very same on-going project Goldman had been retained to support. Just because the client insisted that the lawyer stop engaging in further conduct before even more harm was inflicted does not mean that the lawyer gets a free pass for the disloyal conduct in which he already engaged.

The test for whether the duty of loyalty has been breached is not and should not be based upon the amount of disloyal conduct in which the lawyer engages. Rather, as explained in the opening brief, and as this Court has recognized in other contexts, there needs to be a bright line test to let lawyers know what conduct is appropriate and what conduct is unethical. Here, that bright line rule is that lawyers cannot affirmatively work against an on-going project they had been retained to support just as they would not be able to switch sides in on-going litigation. This is the rule regardless whether there was a second client or whether there is affirmative evidence that the lawyer disclosed confidential information.

In short, as detailed in the opening brief and elaborated upon below, nothing defendants argue justifies the Court of Appeal's conclusion that there was no breach of the duty of loyalty or that a claim for such breach is a SLAPP-suit.

ARGUMENT

I. Defendants fail to establish that the Anti-SLAPP statute applies to Oasis's breach of loyalty claim.

In its opening brief, Oasis explained that (1) Code of Civil Procedure section 425.16 (the anti-SLAPP statute) did not apply to claims based upon defendants' breach of

their duty of loyalty and (2) the Court of Appeal mistakenly conflated the first prong of the anti-SLAPP statute with its second prong by evaluating the merits of Oasis's claim for purposes of determining whether the statute applied in the first place. (OB 33.)

In response, defendants acknowledge the line of cases referenced in the opening brief holding that the anti-SLAPP statute does not apply to claims against a lawyer for breach of the duty of loyalty because the thrust of such claims focuses on the lawyer's abandonment of the client rather than on the lawyer's subsequent conduct. (See *Benasra v. Mitchell Silberberg & Knupp LLP* (2004) 123 Cal.App.4th 1179, 1189 ["The breach occurs not when the attorney steps into court to represent the new client, but when he or she abandons the old client."]; *Freeman v. Schack* (2007) 154 Cal.App.4th 719, 730 [same]; *U.S. Fire Ins. Co. v. Sheppard Mullin Richter & Hampton, LLP* (2009) 171 Cal.App.4th 1617, 1627 [same].)

Defendants argue, however, that these cases do not apply because each concerned the representation of a second client (claimed to be missing here) and because Oasis's claims focus on defendants' conduct in opposing the former client's real estate project by (1) speaking at a City Council meeting; (2) obtaining signatures on a petition and (3) sending an email raising concerns about the project. According to defendants, a complaint seeking redress for these post side-switching acts has been characterized as a "typical SLAPP suit." (AB 20-24.)

Thus, defendants argue that the fact Oasis's claim is labeled as "breach of the duty of loyalty" is not dispositive because "the focus for the first prong of the anti-SLAPP inquiry is not the cause of action, but the gravamen of the claim. . . ." (AB 25.) Defendants insist that counsel's aforesaid speech activities are the gravamen of the claim.

Defendants are mistaken. The fact that defendants manifested their disloyalty by conduct which, if viewed in isolation, might fall within the anti-SLAPP statute does not change the fact that the gravamen of plaintiff's claim is that defendants abandoned plaintiff and chose to affirmatively work against the very on-going project they had been retained by plaintiff to support. This is precisely why the Courts of Appeal have concluded that duty of loyalty claims such as this do not fall within the anti-SLAPP statute even though the manifestation of the disloyalty might involve actions which, if viewed in isolation, comprise speech-related activities that seem to fall within the statute. These cases are not alone.

Thus, in *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76-80, this Court held in part: "[T]he mere fact an action was filed after protected activity took place does not mean it arose from that activity. [Section 425.16] cannot be read to mean that 'any claim asserted in an action which arguably was filed in retaliation for the exercise of speech or petition rights falls under section 425.16, whether or not the claim is based on conduct in exercise of those rights.' [Citation.]" (*Id.* at p. 78.)

In other words, an allegation concerning protected petitioning activity that is evidence useful to prove a claim does not make the claim subject to section 425.16. Accordingly, in *Gallimore v. State Farm Fire & Casualty Ins. Co.* (2002) 102 Cal.App.4th at p. 1399, the plaintiff alleged that an insurer had engaged in wrongful conduct, the evidence of which was its communications with the California Department of Insurance ("DOI"). The insurer filed an anti-SLAPP motion claiming that its communications with the DOI were protected. The Court of Appeal rejected this argument, explaining: "This contention confuses State Farm's allegedly wrongful acts with the evidence that plaintiff will need to prove such misconduct. Plaintiff seeks no relief from State Farm for its communicative acts, but rather for its alleged mistreatment of policyholders and its related violations and evasions of statutory and regulatory mandates." Numerous other cases draw the same distinction: See *PrediWave Corp. v. Simpson Thacher & Bartlett LLP* (2009) 179 Cal.App.4th 1204, 1220-1228 [client's suit against attorneys was based on alleged fraud, legal malpractice, unfair business practices and breach of fiduciary duty, not on attorneys' right of petition or free speech in making statements or conducting litigation on client's behalf]; *Robles v. Chalilpoyil* (2010) 181 Cal.App.4th 566 [action alleging false testimony of expert not within anti-SLAPP statute]; *Graffiti Protective Coatings, Inc. v. City of Pico Rivera* (2010) 181 Cal.App.4th 1207, 1222-1223 [plaintiff's claim based on City's failure to follow competitive bidding laws not within anti-SLAPP statute because the City's communicative conduct would

simply be evidence to support the plaintiff's claim and was not the basis for that claim]; *Santa Monica Rent Control Bd. v. Pearl Street, LLC* (2003) 109 Cal.App.4th 1308, 1317-1319 & fns. 11, 14 [suit by rent control board against landlord was based on restrictions in rent control law, not on documents landlord filed with board to obtain rent increase]; *Department of Fair Employment & Housing v. 1105 Alta Loma Road Apartments, LLC* (2007) 154 Cal.App.4th 1273, 1287-1288[suit by department of fair employment and housing against landlord was based on antidiscrimination law, not on landlord's earlier suit to evict disabled tenant]; *Scott v. Metabolife Internat., Inc.* (2004) 115 Cal.App.4th 404, 416-418[consumer's suit against manufacturer of dietary supplement was based on personal injuries consumer sustained from taking supplement, not on manufacturer's right to advertise product].)

Thus, a client's claim against its attorney for breach of loyalty does not arise out of petitioning activity for purposes of the anti-SLAPP statute just because the breach results in petitioning activity which standing alone would fall within that statute. Rather, the claim arises out of the disloyalty itself, which is wrongful without regard to whether it results in further action. And such further action, if it occurs, is merely a consequence -- rather than the gravamen -- of that breach. Accordingly, the gravamen of Oasis's claim was not the particular activity in which defendants engaged to manifest their disloyal conduct. Instead, it was defendants' act of abandoning their relationship with Oasis and switching allegiance to the groups that were fighting against the very project defendants

had been retained to support. Viewed in this way, this case is no different than any of above cited cases which held that a claim based on the abandonment of a client is not within the anti-SLAPP statute even though the defendant-lawyers manifested their disloyalty through conduct which, standing alone, would fall within that statute.

Thus, contrary to defendants' argument, the fact that there may not be a second client here is not relevant. Whether or not a lawyer abandons a client's interest and elects to represent a second client with competing interests or whether that lawyer abandons the client and elects to act on his or her own behalf to oppose the client, does not alter the fundamental nature of the plaintiff-client's claim for breach of the duty of loyalty. The substance of both claims arises from the defendant-lawyer's disloyalty and not from the manner in which that disloyalty may have manifested itself.

Finally, in a footnote, defendants take issue with Oasis's claim that the Court of Appeal conflated the two prongs of the anti-SLAPP statute. According to defendants "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. . . ." (AB 24, fn. 8.) Just the opposite is true. It is clear from the Opinion that the Court concluded that because there was no second representation the duty of loyalty did not apply and therefore Oasis's claims were within the anti-SLAPP statute. (Opinion at pp. 8-17.) Thus, the court evaluated the merits of Oasis's claim in determining whether the anti-SLAPP statute applied, therefore conflating the two prongs, something which defendants do not try to

justify.

II. Contrary to defendants' argument, disloyalty can occur even when (1) there is no second representation or (2) there is no affirmative proof that confidential information was disclosed.

In the opening brief, Oasis explained 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; *People ex rel. Deukmejian v. Brown* (1981) 29 Cal.3d 150, 155 [same]; *Med-Trans Corp., Inc. v. City of California City* (2007) 156 Cal.App.4th 655, 664 [same].) Oasis further explained that numerous other published opinions have concluded that an attorney's breach of loyalty is presumed when he switches sides in an ongoing matter. (See OB 14-17.)

The only published opinion that carves an exception to this bedrock principle when the lawyer is acting on his or her own behalf and is not representing a second client *is the Court of Appeal opinion in this case*. Certainly, defendants cite no other authority that recognizes the sweeping exception to the duty of loyalty contained in that opinion.

Defendants seek to justify this limitation because, according to defendants, the fundamental concern underlying the duty of loyalty is the risk that the lawyer will disclose the first client's confidential information to a second client. Therefore, according to defendants, if there is no second client and there is no direct evidence that the lawyer has actually disclosed confidential information, there can be no breach of the duty of loyalty. To support this assertion defendants rely upon *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 283-284. Such reliance is misplaced as *Flatt* actually undermines and certainly does not support defendants' argument.

In *Flatt*, this Court stated that "[w]here the potential conflict is one that arises from the successive representation of clients with potentially adverse interests, the courts have recognized that the chief fiduciary value jeopardized is that of client confidentiality. Thus, where a former client seeks to have a previous attorney disqualified from serving as counsel to a successive client in litigation adverse to the interests of the first client, the governing test requires that the client demonstrate a 'substantial relationship' between the subjects of the antecedent and current representations." (*Ibid.*)

But to argue from this passage that the duty of loyalty must always be linked to the actual disclosure of confidential information unless there is a second client twists *Flatt* beyond recognition.

First, *Flatt* itself illustrates that the duty of loyalty is not dependent upon the risk that confidential information will be disclosed. After this Court made the statement on

which defendants rely concerning a lawyer's subsequent representation in a matter substantially related to the first, this Court proceeded to explain that "where an attorney's potentially conflicting representations are simultaneous . . . .the courts have discerned a distinctly separate professional value to be at risk by the attorney's adverse representations. *The primary value at stake in cases of simultaneous or dual representation is the attorney's duty–and the client's legitimate expectation--of loyalty, rather than confidentiality.*" (*Id.* at p. 283, italics deleted and added.)

Because of these distinct interests involved, this Court elaborated that "[e]ven though the simultaneous representations may have nothing in common, and there is no risk that confidences to which counsel is a party in the one case have any relation to the other matter, disqualification may nevertheless be required." (*Id.* at p. 284.)

The Court continued that "[t]he reason for such a rule is evident, even (or perhaps especially) to the nonattorney. A client who learns that his or her lawyer is also representing a litigation adversary, even with respect to a matter wholly unrelated to the one for which counsel was retained, cannot long be expected to sustain the level of confidence and trust in counsel that is one of the foundations of the professional relationship. All legal technicalities aside, few if any clients would be willing to suffer the prospect of their attorney continuing to represent them under such circumstances. As one commentator on modern legal ethics has put it: "'Something seems radically out of place if a lawyer sues one of the lawyer's own present clients on behalf of another client. Even

if the representations have nothing to do with each other, so that no confidential information is apparently jeopardized, the client who is sued can obviously claim that the lawyer's sense of loyalty is askew.'" (*Id.* at p. 285.)

If it is the case that where there is a simultaneous representation in *unrelated* matters client confidence will be so eroded as to justify automatic disqualification of the lawyer, then that erosion of client confidence is even more likely when the lawyer affirmatively works against *the very subject matter of the representation* once the lawyer ceases working for the client. Borrowing language from *Flatt*, a client who learns that his or her lawyer may affirmatively work against the very project he or she was retained to support "cannot long be expected to sustain the level of confidence and trust in counsel that is one of the foundations of the professional relationship. All legal technicalities aside, few if any clients would be willing to suffer the prospect of their attorney continuing to represent them under such circumstances." Thus, the very same duty of loyalty which was described in *Flatt* should operate to prevent lawyers from breaching the client's trust in this manner.

Second, the substantial relationship test referenced in *Flatt* guards against the risk that the client's confidences will be used against him or her. That risk is not dependent upon there being a second client. Indeed, that risk is at least as strong when there is *no* second client and the lawyer is working against the former client on his or her own behalf. In this setting, because the lawyer is working in a personal and not just a

professional capacity, he or she may lack the detachment needed to avoid the temptation of using the former client's confidences to further the lawyer's own cause.

Third, defendants' argument utterly ignores the fact that this case does not simply involve a second matter that is deemed "substantially related" to the first matter, as described in *Flatt*. Rather, here defendants affirmatively worked against *the very same matter* they were retained to support and they did so while the matter was on-going. 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.) Thus, defendants cannot contest that they obtained client confidences while representing Oasis to support the subject real estate development. If that is the case, then when they affirmatively worked against the project that was the very subject of that former representation, there was a significant risk that they were motivated by or otherwise used confidential information obtained during that former representation – and Oasis will never be able to know the role those confidences played. If nothing else, when as here a lawyer who was retained in the first place because he was known in the community, turns around and affirmatively works against the project, the public will view this high profile lawyer's decision as being motivated by something that the lawyer learned during his earlier representation of the client whether disclosed or not.

In their answer brief, defendants next argue that "Oasis asks this Court to create a broad common rule law 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." (AB 28.) According to defendants the "scope of loyalty . . . is limited to the 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(E) and (E)." (AB 30.)

For a number of reasons, defendants are mistaken. First, it bears emphasis that Oasis is not asking this Court to craft a new common law rule, as defendants suggest. Rather, Oasis merely asks this Court not to artificially limit the existing duty of loyalty a lawyer owes to a client by imposing the dual requirements of a second client and affirmative evidence that confidential information has been disclosed.

Next, defendants' suggestion that the Rules of Professional Conduct are the beginning and the end of a lawyer's duties, is just wrong. As this Court has recognized, "[a]n 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 [abrogated by statute on other grounds].) Thus, regardless whether Goldman's conduct violated the precise terms of the Rules of Professional Conduct, it was undoubtably directly antagonistic to Oasis's interests with respect to the very subject of his representation and therefore violated the duty of loyalty.

Next, and contrary to defendants' claim, just because many of the cases which discuss the duty of loyalty happen to arise primarily in the context of a lawyer representing a second client, does not mean that subsequent representation is a necessary element to a breach of the duty of loyalty claim. (See OB 22.)

Not a single one of the cases cited in the opening brief 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, the defining essence of these cases is that the lawyer abandoned the client's interests to work against the subject of his or her earlier representation.

In their answer brief, defendants do not even try to justify why, from the perspective of the client, it matters whether the attorney who switches sides does so on behalf of a second client or does so on his or her own behalf. As explained in the opening brief and largely ignored by defendants, 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 – especially one who was retained because he was influential in the community – 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.

Defendants next argue that comment e to the Restatement 3d Governing Lawyers, section 125, is consistent with their view restricting the duty of loyalty to cases where the lawyer was retained by a second client. (AB 33.) Whether or not the Restatement comment on which defendants rely reflects California law, defendants are mistaken. The comment states in part:

> e. A lawyer openly expressing public-policy views inconsistent with a client's position. 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. . . .
>
> However, a lawyer's right to freedom of expression is modified by the lawyer's duties to clients. Thus, a lawyer may not publicly take a policy position that is adverse to the position of a client that the lawyer is *currently representing* if doing so would materially and adversely affect the lawyer's representation of the client in the matter. . . .

(Italics added.)

This comment deals *only* with whether *the views* of a lawyer happen to be the same as the client. Here, Oasis is not basing its breach of loyalty claims just on Goldman's "views." Rather, it is based on the fact that Goldman abandoned Oasis and elected to affirmatively work against the very on-going project he was retained to support. Nothing

in the referenced Restatement comment endorses such disloyal conduct. *Indeed, the comment expressly acknowledges that "a lawyer's right to freedom of expression is modified by the lawyer's duties to his clients."*

Next, defendants again argue that unless there is direct evidence that confidential information was actually disclosed, the duty of loyalty is not breached. (AB 34.) According to defendants, applying the presumption that confidential information will be disclosed is akin to applying "an appearance of impropriety standard in conflict situations" which standard, defendants argue, has been rejected. (AB 35.) Defendants are again off base.

It will be the rare case that a client is able to actually demonstrate that a lawyer who affirmatively works against the client is using confidential information obtained during the lawyer's earlier representation of the client. The former client will not be privy to what the lawyer is doing outside the public view. Nor will the client 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.

As explained in the opening brief (at pp. 29-31), this is the very reason why the Courts have crafted a conclusive presumption that the lawyer has acquired confidential information while representing the client. That rule 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.)

As further explained in the opening brief (at pp. 29-31), if it is not presumed that the lawyer who switched sides actually used that confidential information against the former client, the conclusive presumption that the lawyer obtained confidential information would be of little use to the client.

Further, it is not the case as defendants argue, that Oasis advocates for an "appearance of impropriety" standard. In this case there is much more than the mere appearance of an impropriety. Here, defendants engaged in actual impropriety by affirmatively advocating against an on-going project they were retained to support.

This case is thus far different than *Kirk v. First American Title Ins. Co.* (2010) 183 Cal.App.4th 776, 808, cited by defendants, where the Court rejected the argument that "even if an ethical wall may be factually effective, the presence of a tainted attorney at opposing counsel's firm gives rise to an appearance of impropriety which the courts should not countenance." (*Ibid.*) In *Kirk* the Court concluded that an ethical wall provided actual protections to guard the client against the infected lawyer working against the client or sharing confidential information with other lawyers in the firm, leaving only the appearance of impropriety. Here, there are no such possible protections. The very

lawyer who had earlier represented the client as to a particular matter is now working against the client in that very same matter. No wall, no matter how high or how strong would have done any good whatsoever. And of course no effort to protect was even made.

Defendants next argue that the mere fact that the client suspects that the attorney might be using confidential information against the client is not sufficient to demonstrate a breach of the duty of loyalty. (AB 36.) But defendants continue to ignore that it is not just that the danger that confidential information may be used that creates the breach of the duty of loyalty. Rather, it is the conduct of the defendants in deciding and then implementing the decision to affirmatively work against the client that creates the breach of the duty of loyalty. One of the dangers of this practice will be that while the representation is still in place, the client will know that any minute the lawyer may decide to cease representing the client and elect to personally work against it. Knowing that is the case, how could a client possibly be completely candid with its lawyer?

Finally, defendants' supposed parade of horribles only illustrates the lengths to which they must go in an effort to argue around the existence of a duty of loyalty here. First, it is not the case that if Oasis's position were accepted then members of law firms must resist engaging in political activity. Rather, just as with any other matter, before an attorney affirmatively works on another matter a conflict check should be run. For example, if a firm were retained to qualify a proposition measure for a ballot, a lawyer in

that firm should know that he or she cannot affirmatively work for the removal of that proposition from the ballot.

Nor is it the case that the rule Oasis proposes would spill over to the voting booth. A lawyer maintains the right to vote any way he or she wants or to harbor any views about a matter. The only thing that the lawyer sacrifices by accepting representation is the right to publically and openly work against the very on-going project he or she was retained to support while that project is still pending.

In short, nothing defendants argue justifies what occurred here. As now explained, defendants effort to seek refuge in the First Amendment likewise fails.

III. Defendants' First Amendment arguments are without merit.

Defendants argue that Oasis cannot prevail on its duty of loyalty claim because the recognition of that claim would violate Goldman's rights under the First Amendment of the United States Constitution and the Freedom of Speech clause of the California Constitution. (Cal. Const. Article 1, section 2.) (AB 39.) This argument is without merit.

It appears to be defendants' position that because evidence that Goldman breached the duty of loyalty concerns conduct which would otherwise be protected under the First Amendment (i.e., speaking at a city council meeting and circulating a petition), Oasis's

claims are unconstitutional. Yet, defendants fail to cite a single case that addresses, much less supports, the proposition that a lawyer representing a private client is somehow constitutionally entitled to breach the duty of loyalty owed the client so that the lawyer may exercise his free speech rights. This absence is understandable in view of the nature of the attorney-client relationship.

As this Court explained in *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 548: "This court's statement of the attorney's duty of loyalty to the client over 60 years ago is still generally valid: 'It 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 . . . . 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.' [Citation.]"

It is thus inherent to the attorney-client relationship that attorneys must necessarily sacrifice certain rights once they agree to represent a client with respect to a particular matter.[1] For example, even defendants would agree that Goldman could not have

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[1]The Supreme Court has long acknowledged that membership in the bar is a "privilege burdened with conditions," *(Theard v. United States* (1957) 354 U.S. 278, 281, 1 L. Ed. 2d 1342, 77 S. Ct. 1274) and that the states have a strong interest in regulating attorney conduct and integrity, an interest that sometimes weighs against First Amendment rights that unregulated parties, such as the press, would enjoy. (See *Gentile v. State Bar of Nevada* (1991) 501 U.S. 1030, 1073-75, 115 L. Ed. 2d 888, 111 S. Ct. 2720; see *American Motors Corp. v. Huffstutler* (Ohio 1991) 575 N.E.2d 116, 120 ["Further, as a quid pro quo for the privilege of being licensed to practice law, an

affirmatively opposed the subject project while he was still working for Oasis. And they would appear to agree that Goldman would have no constitutional right to disclose confidential information. (See AB 47-48.)[2] Likewise defendants appear to agree that Goldman would not have been constitutionally entitled to represent a second client in opposing the on-going real estate development he had been retained to support. (See AB 47.)[3]

Thus, the only supposed constitutional objection defendants have to Oasis's breach-of-the-duty-of-loyalty claim is that Goldman was no longer representing Oasis, that he was supposedly acting in his own interest and that there was no affirmative evidence that he disclosed confidential information. As already explained however, these facts do not eliminate defendants' duty of loyalty to Oasis.

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attorney surrenders a fraction of the right of free speech guaranteed under the First Amendment. '. . . 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.'"]; see also *Vargas-Harrison v. Racine Unified Sch. Dist.* (7th Cir. Wis. 2001) 272 F.3d 964, 970-971 [In the setting of the discipline of a school administrator the Court reasons: "As a policy-maker in the School District, she owed her superiors a duty of loyalty with respect to this subject. The First Amendment does not protect her against discharge based on her opposition to the School District's proposal."])

[2]Disclosure of confidential information does not qualify for protection against prior restraint under the First Amendment. *Seattle Times Co. v. Rhinehart* (1984), 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17.

[3]See *City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4th 17, 23.

To support their argument that regardless whether their conduct has breached the duty of loyalty they owed to Oasis, that conduct was constitutionally protected, defendants rely on cases where courts have considered whether disciplinary rules governing how lawyers act in relation to the court or in the operation of their business violate the First Amendment. (See *Gentile v. State Bar of Nev.* (U.S. 1991) 501 U.S. 1030, 1033 [Court considers Nevada rule which "prohibits an attorney from making 'an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.'"]; *NAACP v. Button* (1963) 371 U.S. 415 [Court concludes that rule against client solicitation unconstitutionally applied to punish First Amendment activity]; *In re Primus* (1978) 436 U.S. 412, 437-438 [Court concludes that attorney punishment for written solicitation of client in that case was unconstitutional. *Standing Comm. on Discipline of the United States Dist. Court v. Yagman* (9th Cir. Cal. 1995) 55 F.3d 1430, 1438 [Court concludes that a lawyer charged with violating a rule which prohibits attorneys from "impugning the integrity of the judge," is "entitled to other First Amendment protections applicable in the defamation context."]; *Jacoby v. State Bar of California* (1977) 19 Cal.3d 359 [Court vacates suspension of lawyers alleged to have violated rule against

solicitation of clients through interviews with the media])[4]

These cases, however, do not deal with rules governing a lawyer's relationship with his or her client or, more specifically, the duty of loyalty a lawyer owes to his or her client.

In other settings, courts have held that when a person voluntarily enters into a contractual relationship he or she can agree to sacrifice First Amendment rights. (See *Cohen v. Cowles Media Co* (1991) 501 U.S. 663, 670-671.) That is precisely what is involved here. Oasis advocates a rule that recognizes that when a lawyer agrees to represent a client as to a particular project he or she also agrees not to affirmatively work against that very on-going project after the lawyer-client relationship ends.

It should not matter that here defendants happened to have represented Oasis concerning a real estate development which defendants now characterize as a matter of public concern. Just because these defendants characterize as being a public concern the matter on which they agreed to represent and get paid by Oasis does not mean they are entitled to greater First Amendment protection than a lawyer who represented a client in a matter that was not of public concern. In both settings, the lawyers voluntarily agreed to act loyally to their clients – even if that meant not later working on an opposing matter that was of personal interest them.

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[4]See this Court's discussion of the in *Button-Primus* line of cases in *Frye v. Tenderloin Housing Clinic, Inc.* (2006) 38 Cal.4th 23, 42.

Further still, as explained in the opening brief on the merits (at pages 36) and elaborated upon above (at pages 3-9), Oasis's claim is based on defendants' abandonment of Oasis's interests and not on the allegedly protected free speech activity by which the abandonment was manufactured. Since the protected activity is only proof of the disloyalty which is the gravamen of the claim, such activity does not implicate the anti-SLAPP statute. For the same reasons, therefore, defendants' First Amendment argument is simply a red herring, which is perhaps why it wasn't raised before. If defendants' argument were accepted, then each of the cases concluding that the anti-SLAPP statute did not apply even though evidence supporting the plaintiff's claim included speech or petitioning activity, would likewise be barred under the First Amendment. Indeed, it is hard to imagine a breach of loyalty claim that would not be barred under defendants' logic. As the numerous cases reflecting the viability of that tort reflect, that is not the law.

In any event, even if the First Amendment were somehow implicated here, then any restriction on First Amendment activity would be based on the time, place and manner of that activity rather than upon its content. According to defendants, "Oasis' proposed rule prohibiting all statements 'adverse' to a former clients' interest is content-based because statements not adverse to a client's interest would be permissible." (AB 44.) This tortured analysis utterly disregards the nature of Oasis's claim. To repeat: That claim is based on defendants' decision to abandon Oasis and affirmatively work against

the very project they were retained to support *while that project is still on-going*. What defendants said and did to manifest that decision simply serves as proof of their disloyal conduct. The rule Oasis asks this Court to recognize would apply equally to a lawyer who affirmatively opposed the former subject of his or her representation in a way that did not concern speech or protected activity at all.

This is far different than the content based restrictions referenced in the cases on which defendants rely: See *Pleasant Grove City v. Summum* (2009) 129 S. Ct. 1125, 1132 ["Reasonable time, place, and manner restrictions are allowed, [citation], but any restriction based on the content of the speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest."]; *Fashion Valley Mall, LLC v. National Labor Relations Bd.* (2007) 42 Cal.4th 850, 865 ["The level of scrutiny with which we review a restriction of free speech activity depends upon whether it is a content-neutral regulation of the time, place, or manner of speech or restricts speech based upon its content. A content-neutral regulation of the time, place, or manner of speech is subjected to intermediate scrutiny to determine if it is '(i) narrowly tailored, (ii) serves a significant government interest, and (iii) leaves open ample alternative avenues of communication. [Citation.]' [Citation.] A content-based restriction is subjected to strict scrutiny. "'[D]ecisions applying the liberty of speech clause [of the California Constitution], like those applying the First Amendment, long have recognized that in order to qualify for intermediate scrutiny (i.e., time, place, and manner) review, a

regulation must be ''content neutral'' [citation], and that if a regulation is content based, it is subject to the more stringent strict scrutiny standard. [Citation.]' [Citation.]"]

Accordingly, even if this issue has not been waived and even if defendants had not voluntarily relinquished any First Amendment rights to act disloyally to Oasis, then the intermediate scrutiny outlined in *Fashion Valley Mall, supra*, would apply. That standard is easily satisfied.

First, here any restriction is *narrowly tailored.* The only limitation placed on defendants under Oasis's position is that it cannot affirmatively work against the very on-going project it agreed to support. Next, the rule serves a *significant government interest.* As already explained, 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.) And finally, the rule leaves open ample *alternative avenues of communication.* Under the rule Oasis advocates, lawyers are free to fully exercise all of their First Amendment rights – they simply cannot try to affirmatively defeat the very subject matter of their earlier representation.

In sum, for any number of reasons defendants' First Amendment argument is meritless.

IV. Defendants' argument that Oasis cannot establish damages is without merit.

Defendants' final argument is that Oasis cannot establish that it suffered the damages it claims in its complaint and therefore Oasis cannot satisfy the second prong of the anti-SLAPP statute. (AB 53.) Again defendants are mistaken. But of course if this Court agrees that Oasis's claims do not fall within the anti-SLAPP statute, then it need not even reach this issue.

The Court of Appeal's entire analysis of this issue was that "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 17.)

As an initial matter, defendants chide Oasis for citing only one case standing for the principle that "[W]here the fact of damage has been established, the precise amount of the damage need not be calculated with absolute certainty." (*Noble v. Tweedy* (1949) 90 Cal.App.2d 738, 746; OB 50.) Of course, there are number of authorities supporting this principle. (See also *DuBarry Internat., Inc. v. Southwest Forest Industries, Inc.* (1991) 231 Cal.App.3d 552, 562; *Mann v. Jackson* (1956) 141 Cal.App.2d 6, 12; *Allen v. Gardner* (1954) 126 Cal.App.2d 335, 340.)

And this already liberal standard for proving the amount of damages is even relaxed further where, as here, it is the defendant's conduct that renders the proof of damages difficult. (See *DuBarry Internat. v. Southwest Forest Indus., supra,* 231 Cal.App.3d at p. 562; *Long Beach Drug Co. v. United Drug Co.* (1939) 13 Cal.2d 172, 174; *Allen v. Gardner, supra,* 126 Cal.App.2d at pp. 340-342.)

In their opposition brief, defendants argue "The question here is not the amount of damages; the question is causation." (AB 30.) According to defendants. Oasis cannot recover for the costs it incurred in fighting the referendum because there is no evidence that their disloyal conduct caused Oasis to incur those costs.

Defendants are mistaken. Oasis does not have to prove that Goldman -- and Goldman alone -- "caused...the resolution to be placed on the ballot." That Goldman's tortious conduct may arguably have been coupled with the non-tortious conduct of the other project opponents in no way diminishes Oasis' proof of causation by Goldman.

As this Court has explained, a plaintiff "need only introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. [Citation.] (*Ibid.*) In a case involving allegations of multiple causes, [t]he substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical." (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 978, internal quotation marks omitted.) "[T]he concurrence of the non-tortious cause does not

absolve defendant from liability for the tortious one." (*Hughey v. Candoli* (1958) 159 Cal App 2d 231, 240.)

As The Restatement 2d on Torts (cited to the Court below) explains:

> "[A plaintiff] is not required to eliminate entirely all possibility that the defendant's conduct was not a cause. It is enough that he introduces evidence from which reasonable men may conclude that it is more probable that the event was caused by the defendant than that it was not. The fact of causation is incapable of mathematical proof, since no man can say with absolute certainty what would have occurred if the defendant had acted otherwise. If, as a matter of ordinary experience, a particular act or omission might be expected to produce a particular result, and if that result has in fact followed, the conclusion may be justified that the causal relation exists. In drawing that conclusion, the triers of fact are permitted to draw upon ordinary human experience as to the probabilities of the case." (Rest.2d Torts, § 433B, com. b.)

Oasis' record evidence amply satisfies this burden. Oasis has proven -- and Goldman has conceded -- that Goldman undertook public action to defeat the project and to solicit and encourage others to join in that effort. Oasis has proven that Goldman is a well-regarded leader known throughout the Beverly Hills community and President of the Southwest Beverly Hills Homeowners Association. (JA 223-224.) Oasis has proven that following, and at least in part due to, Goldman's efforts, enough petition signatures were obtained to put the referendum on the ballot. Oasis has submitted undisputed proof that it incurred millions of dollars in expenses to fight the signature drive in which Goldman participated and in efforts designed to defeat the resulting referendum. These facts plainly make the case that due to defendants' conduct Oasis was forced to take greater

action to defeat the referendum. If there is difficulty in proving the precise amount of that additional work, then that difficulty results from the nature of defendants' unlawful conduct and they should therefore not be able to rely upon that to escape responsibility.

Further, Oasis' declarations also prove thousands of dollars were spent in legal fees, specifically to address and attempt to put a stop to Goldman's misconduct. (JA 224, 211, 210.) In its answer brief, defendants argue that these amounts were not recoverable because they constitute an improper effort to seek the recovery of attorney's fees. But Oasis is not seeking to recover these amounts as fees per se. Rather, these amounts were spent on remedial actions undertaken by Oasis in an effort to conduct in damage control. At the time these amounts were incurred Goldman was still taking actions to fight against the very project he had been retained to support, and every day that went by Oasis was suffering additional harm and the risk that the project would be stopped increased. Oasis is entitled to recover these amounts incurred for remedial conduct even if they represent amounts paid to their lawyers.

Defendants acknowledge that they have not located a case holding that such pre-litigation fees are not recoverable as damages. (AB 54.) Rather, they rely upon the fact that (1) there are cases where pre-litigation fees have been recovered as attorney-fees-costs and (2) fees under the "tort of another" doctrine are limited to amounts paid to a second lawyer to fight a claim against a third party and not to fees paid the second lawyer to litigate against the first lawyer. Therefore, according to defendants, it is necessarily the

case that amounts paid to a second lawyer prior to litigation to limit the damages caused by the first lawyer's conduct cannot be recovered as damages.

Defendants' logic is flawed. If, instead of being disloyal lawyers, the defendants' wrongful conduct had been something else such as the negligent installation of a roof, there would be no question that plaintiff would be able to recover the costs of hiring a second roofer to limit the harm caused by the defendants' negligence. In California, the reasonable costs incurred to minimize or mitigate the effect to the defendant's conduct are generally recoverable. (See *Barnes v. Berendes* (1903) 139 Cal. 32, 35-36; *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 464; *Mozzetti v. City of Brisbane* (1977) 67 Cal.App.3d 565, 576.) That result should be no different simply because the nature of the wrongdoing in this case – disloyalty of a lawyer – meant that the person retained and paid to limit the damaging effect of the tortfeasor's conduct was a second lawyer. Indeed, even in the setting of this case, if Oasis had spent these amounts to pay an elections consultant to address Goldman's conduct, then there would have been no question they would be recoverable as damages. Just because these amounts happened to be paid to a lawyer to serve the same function should not dictate a different outcome.

CONCLUSION

For the foregoing reasons and for the reasons explained in the opening brief, there are two independent reasons the Court of Appeal decision should be reversed.

Dated: October 28, 2010

Respectfully submitted,

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