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No. A163315

In the Court of Appeal of the State of California
First Appellate District
Division One

GOLDEN GATE LAND HOLDINGS, LLC, et al.
Plaintiffs and Appellees

v.

DIRECT ACTION EVERYWHERE
Defendant and Appellant.

APPEAL FROM ALAMEDA COUNTY SUPERIOR COURT
THE HONORABLE JUDGE JAMES REILLY
CASE NO. RG21091697

Appellant's Opening Brief

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

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APPELLANT/ PETITIONER: Direct Action Everywhere RESPONDENT/ REAL PARTY IN INTEREST: Golden Gate Land Holdings, LLC, Pacific Racing Association, Pacific Racing Association II	
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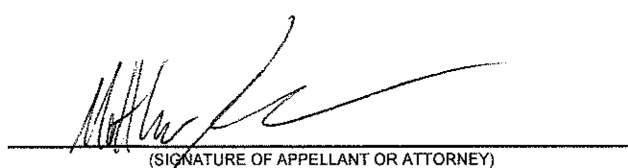
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Introduction

When more than five dozen horses dropped dead at Golden Gate Fields in fewer than two years, animal rights activists wanted accountability. An advocacy organization drafted a petition to the cities of Berkeley and Albany to close the horse racing track. Tens of thousands of people signed it. Activists held protests on the public sidewalk outside the track. And four activists laid down on the track, locked themselves to one another, and shut down racing for half a day. They were arrested for trespassing.

Golden Gate sued the four activists for trespass and interference with prospective economic relations. All well and good. But the track also sued the advocacy organization that authored the petition to shut the track down. And all the track alleged against the organization is that it authored the petition, gathered the signatures, held a protest outside the track, and gave live commentary on the civil disobedience on social media.

Because California's anti-SLAPP statute applies to lawsuits arising from this kind of public participation, the organization moved to strike the track's claims against it. The trial court initially issued a tentative decision granting the motion on the grounds that the track's claims arose from the organization's protected activity and the track failed to show a probability of prevailing on the merits. But after reviewing two

cases that purportedly narrowed the scope of anti-SLAPP protection in cases involving vicarious liability, the trial court switched course and denied the motion. The trial court held that it does not matter what facts the track alleged against the organization. Because the track sought to hold the organization vicariously liable for the illegal actions of the four individual activists, the trial court looked only to what the track alleged against the individuals, *not* what it alleged the organization did.

In short, the trial court found that merely alleging vicarious liability for an illegal act defeats the anti-SLAPP statute.

Within two weeks of the trial court's order, the Supreme Court depublished and vacated one of the two decisions on which the trial court relied in applying this purported new rule of vicarious liability on an anti-SLAPP motion. The remaining decision was not petitioned for rehearing or review, and it conflicts with decades of anti-SLAPP precedent.

Because there is no vicarious liability exception to the anti-SLAPP statute, and because the track's claims against the organization arise out of the organization's protected speech and petitioning activity, the anti-SLAPP statute applies.

This Court should reverse.

Standard of Review

A trial court's determination that the anti-SLAPP statute does not apply to a cause of action is reviewed "de novo, and entails an independent review of the entire record." (*Daniels v. Robbins* (2010) 182 Cal.App.4th 204, 214.)

Statement of the Case

I. Horses Keep Dying at Golden Gate Fields

A lot of horses die at Golden Gate Fields. In 2020 alone, as most of the country was staying home to alleviate a global pandemic, Golden Gate kept racing horses—and at least 26 of them died there. (See *2-year-old horse dies at Golden Gate Fields*, Fox KTVU (Dec. 21, 2020), available at: https://www.ktvu.com/news/2-year-old-horse-dies-at-golden-gate-fields, cited at Appellant's Appendix (AA) 19.) Twenty horses died there the year before. (*Treatment of Horses at Golden Gate Fields*, City of Berkeley (Oct. 27, 2020) (City of Berkeley), available at: https://www.cityofberkeley.info/Clerk/City_Council/2020/10_Oct/Documents/2020-10-27_Item_19_Treatment_of_Horses_at_Golden_Gate.aspx, cited at AA 19.)

II. As Local Government Questions Golden Gate's Business Practices, Direct Action Everywhere Organizes Against the Track

Golden Gate's alarming death toll got the attention of animal rights activists and local government. The City of Berkeley wrote to the Chairman of the California Horse Racing Board—the state entity that regulates horse racing—requesting the Board investigate the track and the deaths. (City of Berkeley, *supra*, cited at AA 19.)

The city pointed out that Golden Gate's owner, the Stronach Group, also owns Santa Anita Park in Arcadia, where an inordinate number of horses also drop dead, including 38 in 2019 alone. (City of Berkeley, *supra*, cited at AA 19.) The City recognized that Stronach took some measures to try to reduce the number of horses who die at its facilities, but it stressed that these measures seemed ineffective, stating, "the fact that more deaths have occurred [in 2020], compared to 2019, shows that more must be done to address the treatment and welfare of racehorses." (*Ibid.*) "What is causing the deaths of these horses," the city asked. (*Ibid.*) "What measures can be done to prevent such deaths from occurring?" (*Ibid.*)

While the Racing Board did nothing to respond to the city's concerns, the track responded to the city in a letter addressed to Mayor Jesse Arreguín. (*Golden Gate Fields Responds to Berkeley City Council Request to Investigate Equine Fatalities*, Paulick

Report (Nov. 19, 2020), available at: https://www.paulickreport.com/news/the-biz/golden-gate-fields-responds-to-berkeley-city-council-request-to-investigate-equine-fatalities/, cited at AA 19.) The track failed to explain its death rate but instead dismissed the City's concerns, claiming "[i]t is no exaggeration to state that the State of California and the Stronach Group race tracks have the most rigorous safety programs and most restrictive medication rules in North America,"—which again only raises the question of how the Stronach Group could still kill so many horses every year. (*Ibid.*)

Frustrated both by the death toll and the lack of effective action by state or local government, animal rights activists pressed for more.

Defendant Direct Action Everywhere (DAE) is a nonprofit advocacy organization dedicated to promoting and achieving animal rights. (AA 35.) DAE authored a petition to the cities of Berkeley and Albany asking the cities to "shut [Golden Gate Fields] down for good." (AA 35, 38–45.) "More than 500 horses have died at the Golden Gate Fields horse racing track since 2007," the petition begins. (AA 40.) It details some of the common cruelty endemic to horse racing, including that the industry uses "[d]evices like twitches (tongue ties) and stud chains (attached to the halter and going under the upper lip against the gum) . . . to get young horses into the starting gate." (AA 41.) And it stresses

how the industry is rife with drug abuse, where pain killers "hid[e] smaller injuries that lead to catastrophic injuries during exertion." (*Ibid.*)

By May 2021, the petition gained 38,314 signatures. (AA 39.)

III. Four Activists Lock Down to the Track

DAE shares a mission with dozens of local DAE chapters and other affiliated activists throughout North, Central, and South America, as well as Europe, Asia, Australia, and the Middle East. (AA 35.) DAE chapters are independent of DAE-the-501(c)(3), and the 501(c)(3) does not operate any of the local chapters. (*Ibid.*)

A local chapter of DAE also opposes Golden Gate's treatment of horses. (AA 35–36.) The local chapter held a protest on the public rights of way outside the track. (AA 4 [Compl. ¶ 18]; AA 35–36.) These protesters "stood on a sidewalk just outside [the track]," and "held up a large sign stating 'Shut Down Golden Gate Fields.'" (AA 4 [Compl. ¶ 18].)

While the sidewalk protest happened outside the track, four people—Rachel Ziegler, Rocky Chau, Omar Aicardi, and James Crom—went into the facility, laid on the track, and locked themselves to one another. (AA 4 [Compl. ¶ 17].) Police arrested the four individuals for criminal trespass for their civil disobedience. (AA 5 [Compl. ¶ 21].)

IV. Golden Gate Fields Sues Direct Action Everywhere Based on Its Speech and Petitioning

The three plaintiffs, each of which has a role in operating the track, sued Ziegler, Chau, Aicardi, and Crom for civil trespass and intentional interference with prospective business advantage, seeking both damages and injunctive relief. (AA 2, 6–7 [Compl. ¶¶ 1–3, 5–8, 26–37].)

But the track also sued DAE—the 501(c)(3), not the local chapter. (AA 2 [Compl. ¶ 4].) It complains that DAE runs a website where it describes its mission of promoting animal rights. (AA 4 [Compl. ¶ 15].) It complains that DAE "organized protests" against other companies. (*Ibid*.) It complains that DAE authored and gathered signatures for a petition to "'shut down Golden Gate Fields.'" (AA 4 [Compl. ¶ 16].) It complains that DAE organized a protest on a public right of way—"a sidewalk just outside [the track]"—and "held up a large sign stating 'Shut Down Golden Gate Fields.'" (AA 4–5 [Compl. ¶ 18].) And it complains that DAE cheered on Ziegler, Chau, Aicardi, and Crom on DAE's Facebook page. (AA 5 [Compl. ¶¶ 19–20].) The Complaint conspicuously lacked any allegation that DAE ordered, directed, or ratified the civil disobedience at Golden Gate Fields. (See AA 2–5.)

V. After DAE Files an Anti-SLAPP Motion, the Court Issues a Tentative Order Granting the Motion

DAE moved to strike the track's claims against it under the anti-SLAPP statute. Because the track based its causes of action on DAE gathering petition signatures, holding a protest on a public sidewalk, and engaging in political speech on social media opposing the horse deaths at the track, DAE contended that the statute applied because the track sued DAE over its speech and conduct made in connection with an issue of public interest. (AA 21–23.)

The trial court issued a tentative ruling finding that the statute applied and granting the motion. (Reporter's Transcript of August 4, 2021 Proceedings (1 RT) 6.)

At the initial hearing on the motion, Golden Gate's counsel objected to the trial court looking to the track's allegations against DAE to determine whether the statute applied to DAE. (1 RT 10.) Rather than look at what it alleged against DAE to determine whether the anti-SLAPP statute applied to DAE, the track argued that the court should look to what it alleged against the individual defendants because it sought vicarious liability against DAE for the individual's actions. (1 RT 10–13.) In support of its argument, the track relied on two cases not cited in its original briefing—*Ratcliff v. Roman Catholic Archbishop of Los Angeles* (2021) 63 Cal.App.5th 869 (*Ratcliff*), and *Spencer v. Mowat* (2020) 46 Cal.App.5th 1024 (*Spencer*). (1 RT 10–14.)

The trial court took the motion under advisement to review the track's new authority. (1 RT 26.)

DEA filed a supplemental brief to respond to the track's new authority. (AA 113–117.) And the track filed a supplemental brief to respond to DAE's supplemental brief. (AA 118–123.)

VI. The Trial Court Finds That It Does Not Matter What Direct Action Everywhere Did Because Golden Gate Fields Defeats the Anti-SLAPP Statute by Pleading Vicarious Liability

The trial court issued a second tentative opinion and held a second hearing. The second tentative adopted the horse track's argument that when assessing a claim for vicarious liability, it doesn't matter what is alleged against the moving defendant. It is enough to defeat the anti-SLAPP that the statute would not apply to the actions of other defendants (or non-party third parties) for which a plaintiff seeks to hold the moving defendant vicariously liable. And because the individual defendants' trespass was illegal as a matter of law and the track sought to hold DAE vicariously liable for that trespass, it did not matter that the allegations or evidence showing DAE's vicarious liability was all protected speech and conduct. The second tentative adopted the authority the track cited at the first hearing—*Ratcliff* and *Spencer*—as authority for this rule.

At the second hearing, counsel for DAE noted a pending petition for review in *Ratcliff*. (Reporter's Transcript of August

18, 2021 Proceedings (2 RT) 5.) And he noted that the Supreme Court extended its deadline to consider the petition and that the deadline expired in 20 days. (*Ibid*.) DAE's counsel asked the trial court to delay ruling on the anti-SLAPP motion pending potential guidance from the Supreme Court. (*Ibid*. ["If the Court doesn't grant and doesn't de-publish [then the court] should just adopt the tentative, we can take it up. If it does either of those, we think it would be a strong basis to reconsider the tentative."].) Counsel also noted that both the *Ratcliff* and *Spencer* decisions came from the same judge of the same division of the Second District Court of Appeal and seemed to be a radical departure from a quarter century of anti-SLAPP precedent that looks to what was actually alleged against a moving defendant, rather than the technical cause of action, in assessing whether the statute applied to that defendant. (2 RT 5–6.)

After the trial court took the matter under submission again (2 RT 15), it issued an order denying the motion and adopting its second tentative with a few modifications. (AA 124–126.) Addressing the pending petition for review in *Ratcliff*, the trial court found that "as of today, the decision[] in . . . *Ratcliff* . . . [is] valid and binding on this Court." (AA 125, italics added.) It "decline[d] DAE's request to . . . defer a ruling on [the anti-SLAPP] motion based on the possibility that California Supreme Court may ultimately decide to grant review of the *Ratcliff*

decision and reverse or depublish that decision." (*Ibid*., italics added.) "If the California Supreme Court reverses or depublishes the decision by the Court of Appeal in *Ratcliff*," the court held, "DAE [could] seek reconsideration of this order based on a change in the law." (*Ibid*., italics added).

Because the track had pending discovery demands on DAE issued before DAE filed its anti-SLAPP motion, DAE could not wait on the Supreme Court's action in *Ratcliff* and preserve the discovery stay. So it appealed the same day the trial court denied its anti-SLAPP motion. (AA 129.)

Thirteen days later, the California Supreme Court granted the petition for review in *Ratcliff*, summarily vacated the Second District Court of Appeal's decision, ordered it depublished, and returned the case to the Second District for reconsideration. *Ratcliff v. The Roman Catholic Archbishop of L.A.*, No. S269220, 2021 Cal. LEXIS 6213 (Sep. 1, 2021).

Statement of Appealability

DAE properly appeals from an order finding that the anti-SLAPP statute did not apply to the claims asserted against it. (Code Civ. Proc., § 425.16, subd. (i); *Coltrain v. Shewalter* (1988) 66 Cal.App.4th 94, 100.)

Summary of the Argument

The anti-SLAPP statute does not protect activity that is illegal as a matter of law. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 330–333.) But if a plaintiff alleges a conspiracy to engage in illegal activity, does it matter what facts the plaintiff pleads against the alleged conspirator to show the conspiracy?

Put another way, when a plaintiff asserts a claim on a conspiracy theory, which "acts" are considered to determine whether the anti-SLAPP statute applies to the alleged conspirator: the acts of the party it alleges the moving defendant conspired with, or the moving defendant's own acts evidencing his participation in the conspiracy?

To frame the difference in these two approaches in concrete terms, imagine a pro-choice counter-protester assaults a pro-life activist demonstrating outside a Planned Parenthood reproductive health clinic. The assaulted pro-life activist sues Planned Parenthood alleging a conspiracy with his assailant. His only evidence against Planned Parenthood is that it shares a mission with his assailant and uses similar slogans and rhetoric. If Planned Parenthood filed an anti-SLAPP motion, would the statute apply? If the statute looks to the plaintiff's allegations against Planned Parenthood itself, the statute would seem to apply—the plaintiff's claims against the organization are based on its speech on a matter of public interest. But if the statute

looks only to the acts of the party Planned Parenthood is alleged to have conspired with, the statute wouldn't apply—the counter-protester's assault is illegal as a matter of law.

The trial court here adopted and applied a rule that a court in this situation looks only to the wrongdoer's acts and not what the plaintiff alleges against the moving defendant itself. That rule is wrong.

The trial court based its rule on two recent cases from Division Five of the Second District Court of Appeal purporting to establish this rule—*Spencer v. Mowat* (2020) 46 Cal.App.5th 1024, 1037 and *Ratcliff v. Roman Catholic Archbishop of Los Angeles* (2021) 63 Cal.App.5th 869, 887, vacated and withdrawn by *Ratcliff v. Roman Catholic Archbishop of L.A.*, 2021 Cal. LEXIS 6213 (Cal., Sept. 1, 2021).[1] The rule drew internal criticism from one Justice in the Division. The Supreme Court vacated one of those cases after the trial court here issued its order. And the rule conflicts with decades of anti-SLAPP precedent.

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[1] Because it was one of two cases the trial court relied on to find the anti-SLAPP statute does not apply to the track's claims against DAE, this brief discusses the Second District's *Ratcliffe* decision at length. DAE omits the signal that the Supreme Court vacated and withdrew the opinion in later citations for ease of reading.

Here, DAE concedes that the individual defendants' action—locking down to the horse racing track—was illegal as a matter of law. But it contends that the actions the track pleads to show DAE's supposed conspiracy liability—gathering petition signatures, participating in a public sidewalk protest, and commenting on social media—are all protected activities.

None of which is to say an advocacy organization can never be held liable for the actions of individuals. A long line of precedent exists detailing the interaction of the First Amendment with theories of vicarious liability for advocacy organizations or other individuals associated with wrongdoers, including the United States Supreme Court's decision in *NAACP v. Claiborne Hardware Co.* (1982) 458 U.S. 886, 927 (*Claiborne Hardware*) and the Second District's decision in *Lam v. Ngo* (2001) 91 Cal.App.4th 832 (*Lam*). Those cases establish that a third party can only be held vicariously liable for a wrongdoer's actions when they authorize, direct, or ratify the wrongdoing. (*Claiborne Hardware*, *supra*, 458 U.S. at p. 927; *Lam*, *supra*, 91 Cal.App.4th at p. 838.) But the track here neither alleged nor established that DAE authorized, directed, or ratified the individuals' illegal act.

This appeal comes down to which approach to vicarious liability in the anti-SLAPP context is correct. If the long-established rule that looks to what is alleged against an individual defendant is the correct approach, this Court should

reverse. If the two cases out of the Division Five of the Second District—one of which was vacated by the Supreme Court—are correct, this Court should affirm.

Argument

I. The Anti-SLAPP Statute Applies to Golden Gate Fields's Claims Against Direct Action Everywhere

"The anti-SLAPP law was enacted to protect nonprofit corporations and common citizens from large corporate entities and trade associations in petitioning government." (*FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133, 143 (*FilmOn*), internal quotations omitted.) Identifying the problem it sought to address, the Assembly Committee on the Judiciary recognized that "such lawsuits are often pernicious, masquerading as standard defamation and interference with prospective economic advantage litigation, while really brought by well-heeled parties who can afford to misuse the civil justice system to chill the exercise of free speech . . . by the threat of impoverishing the other party." (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 1296 (1997–1998 Reg. Sess.) as amended June 23, 1997, p. 3.) "To curb what it took to be the disturbing increase in such lawsuits, the Legislature shifted burdens of proof and fees onto the lawsuit filer to compensate the prevailing defendant for the undue burden of defending against litigation designed to chill the exercise of free speech and petition rights." (*FilmOn*, *supra*, 7 Cal.5th at p. 143, cleaned up.)

A. For a Quarter-Century, Anti-SLAPP Protection Hinged on What a Plaintiff Alleged a Defendant *Did*

Since enacted in 1992, California's anti-SLAPP statute looked to what a plaintiff alleged a defendant did to determine whether the statute applied to the plaintiff's claims against that defendant. If one defendant among many filed an anti-SLAPP, courts looked to what the plaintiff alleged against that defendant and not to what was alleged against other defendants or nonparties in finding whether the statute applied to the claims against the moving defendant.

The text of the statute commands this individual focus. It dictates that "[a] cause of action against a person arising from any act *of that person* in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike[.]" (Code Civ. Proc § 425.16, subd. (b)(1).)

For nearly three decades, courts faithfully applied this text. In one of the earlier anti-SLAPP cases to make it to the California Supreme Court, the Court instructed that "[t]he 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." (*Navellier v. Sletten*

(2002) 29 Cal.4th 82, 92 (*Navellier*), emphasis in original.) Both the Supreme Court and the Courts of Appeal relied on this foundational principle in dozens of published decisions. (See, e.g., (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1063 (*Park*) [courts are to "consider the elements of the challenged claim and what actions *by the defendant* supply those elements and consequently form the basis for liability" (emphasis added)]; *Baral v. Schnitt* (2016) 1 Cal.5th 376, 393 (*Baral*) ["'[t]he 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'" (quoting *Navellier*, *supra*, 29 Cal.4th at p. 92)]; *Whitehall v. Cty. of San Bernardino* (2017) 17 Cal.App.5th 352, 361, citing *Navellier*, *supra*, 29 Cal.4th at p. 92 ["the focus is on determining what the defendant's activity is that gives rise *to his or her asserted liability*, and whether that activity constitutes protected speech or petitioning" (emphasis added)]; *Huntingdon Life Scis., Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1244 (*Huntingdon*); *Stewart v. Rolling Stone LLC* (2010) 181 Cal.App.4th 664, 679.)

The California Supreme Court used this rule to ground the corollary rule that a plaintiff cannot evade the anti-SLAPP statute through creative pleading. (*Baral*, *supra*, 1 Cal.5th at p.

393, citing *Navellier*, *supra*, 29 Cal.4th at p. 92.) Because "[t]he anti-SLAPP procedures are designed to shield a defendant's constitutionally protected *conduct* from the undue burden of frivolous litigation," the Court instructed lower courts to look to a "plaintiffs' specific claims of protected activity" and not "reward artful pleading by ignoring such claims if they are mixed with assertions of unprotected activity." (*Ibid*., emphasis in original.) The Court reaffirmed this rule and rejected arguments seeking to limit it just this year. (*Bonni v. St. Joseph Health Sys.* (2021) 11 Cal.5th 995, 1010–1011 (*Bonni*), citing *Baral*, *supra*, 1 Cal.5th at pp. 382, 387–388, 392–396.) The Court reiterated that it "do[es] not believe the Legislature in enacting the anti-SLAPP statute intended to make the protections of the anti-SLAPP law turn on a plaintiff's pleading choices." (*Id.* at p. 1011, citing *Baral*, *supra*, 1 Cal.5th at p. 391.)

These rules work in tandem to prevent SLAPP plaintiffs from evading the statute. The rule from *Naveillier* stops a plaintiff from hauling a defendant into court on the allegations that another defendant—or a nonparty—did something that the statute doesn't protect. And the rule from *Baral* stops a plaintiff from throwing together both protected and unprotected speech or conduct into a single cause of action to evade the statute by pleading the unprotected speech of conduct. Together these rules mean plaintiffs must allege each defendant's wrongdoing giving

rise to a cause of action and face the anti-SLAPP statute if any of that wrongdoing is protected by the statute.

Courts understood these rules to apply to claims alleging conspiracy and other forms of vicarious liability. For instance, in *Contreras v. Dowling* (2016) 5 Cal.App.5th 394 (*Contreras*), a tenant sued her landlords alleging they illegally entered her apartment. She also sued the landlords' attorney, alleging the attorney conspired with the landlords to commit the illegal entries. (*Id.* at p. 399.) The attorney moved to strike the allegations against him under the anti-SLAPP statute, "contending the only actions he was alleged to have taken involved his representation of the [landlords]," which was protected by the statute. (*Ibid.*)

The Court employed both of the above rules to find that the statute applied to the plaintiffs' claims against the attorney.

First, it was not enough for the plaintiff to allege that the landlords' conduct was "illegal as a matter of law" because that conduct "is that of the [landlords]," not the attorney. (*Contreras*, *supra*, 5 Cal.App.5th at p. 414.) And "the facts alleged to show [the attorney's] complicity—his letter to opposing counsel and his advice to Stuart—are those involving his service as counsel," which are protected by the statute. (*Ibid.*) No matter what the plaintiff alleged the *landlords* did, the attorney "d[id] not concede his conduct was illegal," so the plaintiff could not defeat the

statute's application by asserting it involved another party's activity that was illegal as a matter of law. (*Ibid*.)

Second, the plaintiff could not artfully plead around the statute by "alleging conspiracy or aiding and abetting." (*Contreras*, *supra*, 5 Cal.App.5th at p. 413.) "Conspiracy and aiding and abetting . . . are no more than legal conclusions" that "have 'no talismanic significance.'" (*Ibid*., quoting *Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc.* (2005) 131 Cal.App.4th 802, 824.) Because the attorney "*himself* [wa]s not alleged to have done anything outside the scope of normal, routine legal services," and the plaintiff "d[id] not claim [the attorney] *personally* took part in the alleged wrongful entries . . . [c]onclusory allegations of conspiracy or aiding and abetting d[id] not deprive [the attorney's] actions of their protected status. (*Ibid*., emphasis added and internal quotations and citations omitted.)

A contrary conclusion would debilitate the statute. Plaintiffs could allege any manner of protected activity (and only protected activity) but dodge the statute by pleading a legal conclusion: that the defendant is vicariously liable for some illegal act. That would give plaintiffs an absolute immunity from the statute, made from whole cloth.

Two cases out of the Second District sought to create that absolute immunity. Relying on them, the trial court bestowed Golden Gate with that immunity, too.

B. Recent Decisions from One Division Break with Precedent to Purport to Establish a New Rule: Pleading Vicarious Liability Defeats the Anti-SLAPP Statute

One appellate division seeks to overturn this quarter century of unanimous precedent.

In two recent opinions, Division Five of the Second District Court of Appeal purported to establish a new rule: a plaintiff can defeat the anti-SLAPP statute by alleging a conspiracy (or other form of vicarious liability) with someone who did an illegal act. (*Spencer*, *supra*, 46 Cal.App.5th at p. 1037; *Ratcliff*, *supra*, 63 Cal.App.5th at 887.) This rule is wrong and is already facing judicial criticism from within its own Division and from the state Supreme Court.

1. *Spencer v. Mowat*

The initial case in which Division Five sought to establish this new rule arose from a surfer gang violently intimidating non-local surfers to keep them away from a Los Angeles beach. (*Spencer*, *supra*, 46 Cal.App.5th at p. 1028.) The plaintiffs alleged that gang used a "multi-generational practice of extreme 'localism'" and acted in concert with the local police department (which the plaintiffs also sued). (*Id.* at p. 1028–1029.) Two

defendants moved to strike the complaint under the anti-SLAPP statute. (*Id*. at p. 1027.) The Court of Appeal detailed at length the direct involvement of both of the moving defendants in their conspiracy to assault non-local surfers, including direct threats to and intimidation of other surfers. (*Id*. at pp. 1029–1031 [four headings detailing the moving defendants' involvement].) But the plaintiffs also alleged the moving defendants "manipulated the City Manager into calling off [a planned police] sting so that the [surf gang] would be free to harass beachgoers the next day." (*Id*. at p. 1033.) The moving defendants sought to hang their anti-SLAPP motion on the allegation that they communicated with the City Manager. (*Id*. at p. 1032.)

Instead of simply finding that the plaintiffs' claims arose from the moving defendants' unprotected personal involvement in the violent intimidation—and that any communication with the City Manager was incidental and thus the plaintiffs' claims did not arise from the moving defendants' contact with the City Manager—the Court of Appeal purported to establish a new rule: "[w]hen a tort cause of action is asserted on a conspiracy theory," it found, the court should consider "the acts which constitute the tort itself" and not the "acts which evidence the defendant's participation in the conspiracy" to determine whether the statute applies. (*Spencer*, *supra*, 46 Cal.App.5th at p. 1037.) And because the conspiracy involved unprotected activity—violent harassment

and intimidation—the allegation of conspiracy to engage in that unprotected activity was enough to defeat the anti-SLAPP statute's application. (*Ibid.*)

Spencer recognized the contrary ruling in *Contreras* but found it "is distinguishable, both because it involved the factual scenario of an attorney allegedly acting in concert with his clients, and because the appellate court concluded the plaintiff's allegations of conspiracy were conclusory and alleged nothing beyond the provision of routine legal services." (*Spencer*, *supra*, 46 Cal.App.5th at p. 1039.) But neither of those things matter given the rule *Spencer* purported to establish. For one, an attorney representing his client is not afforded elevated protection as compared to other activity protected by the anti-SLAPP statute. (See Code Civ. Proc. § 425.16, subd. (e).) Second, the fact that any conspiracy allegations were conclusory makes no difference under the *Spencer* rule—it held that the court should consider "the acts which constitute the tort itself" and not the "acts which evidence the defendant's participation in the conspiracy" to determine whether the statute applies. (*Spencer*, *supra*, 46 Cal.App.5th at p. 1037.) The rule itself insists the conclusory nature of conspiracy allegations is immaterial to the anti-SLAPP statute's application. To distinguish *Contreras* based on the strength of the allegations about the acts that show the

defendant's participation in the conspiracy is to provide no distinction at all.

The moving defendants did not petition for rehearing or review.

2. *Ratcliff v. Roman Catholic Archbishop of Los Angeles*

Division Five built on its *Spencer* rule in an action stemming from allegations that a priest in the Archdiocese of Los Angeles sexually abused children in the 1990s. (*Ratcliff*, *supra*, 63 Cal.App.5th at p. 873.) The plaintiffs did not sue the priest. (*Id*. at p. 873.) Instead, they sought to hold the Archdiocese "vicariously liable for ratifying the molestation and directly liable for its own negligence in failing to supervise the priest." (*Ibid*.)

The plaintiffs alleged that the Archdiocese hired legal counsel for the priest and made statements supporting him, seemingly included to establish the plaintiffs' theory of vicarious liability. (*Ratcliff*, *supra*, 63 Cal.App.5th at p. 879.) The Archdiocese sought to strike those allegations through an anti-SLAPP motion. (*Id*. at p. 881.)

The Court of Appeal found that the plaintiffs' claims did not arise from those allegations, and, even if they did, it made no difference what the Archdiocese itself did or did not do. (*Ratcliff*, *supra*, 63 Cal.App.5th at p. 887.) The Court of Appeal found that "[w]hen a plaintiff seeks to hold a defendant vicariously liable for another party's tortious conduct, the court's anti-SLAPP analysis

focuses on the underlying tort, not the conduct by which the defendant is allegedly vicariously liable." (*Ibid.*, citing *Spencer*, *supra*, 46 Cal.App.5th at p. 1037.) The Court of Appeal held that because the allegation that the priest sexually abused the plaintiffs was unprotected, the Archdiocese was also unprotected, even if its actions allegedly showing vicarious liability were themselves protected acts. (*Ibid.*)

Justice Baker filed a concurring opinion questioning the majority's approach to vicarious liability. (*Ratcliff*, *supra*, 63 Cal.App.5th at pp. 893–894.) In his view, the Archdiocese's "liability is predicated, in essence, on acts that plaintiffs believe amount to authorization or ratification of child sexual abuse and on various repeated alleged failures of supervision (including failure to investigate complaints of abuse and to take appropriate corrective action)." (*Ibid.*) And while the complaint did reference the Archdiocese hiring an attorney and supporting the priest, "these references [were] collateral, often rhetorical, and not included to support a claim for recovery." (*Id.* at p. 894.) Thus, the plaintiffs' claims did not arise from protected activity and cannot support an anti-SLAPP motion (*Ibid.*) Justice Baker believed that should have been the end of the inquiry and chided the majority for "further cement[ing] in anti-SLAPP jurisprudence the rationale advanced in *Spencer v. Mowat* (2020) 46 Cal.App.5th 1024." (*Id.* at p. 893.)

The Archdiocese petitioned for review. DAE filed an amicus letter in support of the petition raising many of the arguments it raises in this brief as to why Division Five's vicarious liability rule is wrong and dangerous. The Supreme Court granted the petition, vacated the decision, ordered it depublished, and directed Division Five to reconsider the decision "in light of *Bonni v. St. Joseph Health System* (2021) 11 Cal.5th 995, 1009–1012." (*Ratcliff*, *supra*, 2021 Cal. LEXIS 6213, at *1.)

Bonni makes clear why the purported rule from *Ratcliff*, and the anti-SLAPP escape valve that it sought to invent, is wrong. *Bonni* involved a surgeon who received poor peer reviews and, as a result, had two hospitals terminate his privileges. (*Bonni*, *supra*, 11 Cal.5th at pp. 1004–1007.) But the surgeon alleged the hospital retaliated against him for raising safety concerns. (*Id*. at p. 1007.) He based his retaliation claim on both conduct protected by the anti-SLAPP statute and on conduct that isn't. (*Id*. at pp. 1015–1016.) After the trial court granted the hospital's anti-SLAPP motion, the Court of Appeal reversed, finding that his claim was based on a retaliatory motive, which is unprotected. (*Id*. at p. 1108.) But the Supreme Court again rejected attempts to immunize certain types of claims from the anti-SLAPP statute. (*Id*. at pp. 1009–1012.) Instead, the Court instructed lower courts to examine "each act or set of acts supplying a basis for relief, of which there may be several in a

single pleaded cause of action[,] to determine whether the acts are protected and, if so, whether the claim they give rise to has the requisite degree of merit to survive the motion.” (*Id*. at p. 1010.) This command applies even if a defendant seeks to strike an entire cause of action or an entire complaint. (*Id*. at p. 1011.) Any one protected act is enough to get a defendant past the first step. (*Id*. at 1010 [“It does not matter that other unprotected acts may also have been alleged within what has been labeled a single cause of action; these are disregarded at this stage. So long as a court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached with respect to these claims.” (internal citations and quotations omitted)].)

Bonni affirms that there aren’t shortcuts here, including the one *Ratcliff* sought to impose. Rather than deal with the plaintiffs’ factual claims individually, the Second District said discrete allegations about what the church did don’t matter. It was enough that the plaintiff pleaded vicarious liability for actions everyone agreed were illegal. *Bonni* rejects that approach and affirms that individual factual allegations about the moving defendant are central to the anti-SLAPP analysis.

With the erroneous holdings in *Ratcliff* and *Spencer*, three Justices of one appellate division sought to institute a rule that departed from the previously consistent body of case law. Their

rule threatens to cripple the anti-SLAPP statute. They drew criticism from their Division's fourth Justice. And the Supreme Court signaled they got the law wrong. This Court should not adopt their rule.

C. A Rule That Pleading Vicarious Liability Defeats the Anti-SLAPP Statute is Wrong and Dangerous

The trial court relied on the purported rule from *Spencer* and *Ratcliff* to find that the anti-SLAPP statute does not apply to Golden Gate's claims against DAE. The rule is wrong and the trial court was wrong to rely on it.

1. A Rule That Pleading Vicarious Liability Defeats the Anti-SLAPP Statute Allows Plaintiffs to Evade the Statute with Artful Pleading

The *Spencer* and *Ratcliff* rule is wrong because it allows a plaintiff to use a legal conclusion to artfully plead around the anti-SLAPP statute and because it ignores what a moving defendant himself is alleged to have done. It violates both of the foundational rules established in *Navellier* and *Baral*. Like a disreputable internet advertisement that declares, "Never pay your mortgage again with this one weird trick!," the *Spencer* and *Ratcliff* rule offers plaintiffs an easy immunity from the anti-SLAPP statute that is too good to be true. It's exactly as *Contreras* warned: "[c]onspiracy and aiding and abetting" "are no more than legal conclusions" and have "no talismanic

significance." (*Contreras*, *supra*, 5 Cal.App.5th at p. 413, internal quotation omitted.) It cannot be that the Legislature, in mandating the statute be "construed broadly," intended the statute's protections be so easily defeated. (Code. Civ. Proc. § 425.16, subd. (a).)

If *Ratcliff* and *Spencer* are right, the intent of the anti-SLAPP statute would be undermined, as litigious plaintiffs could easily wear down even defendants who had engaged solely in lawful and protected activity.

This would be especially dangerous in the context of political protests and associational rights.

2. A Rule That Pleading Vicarious Liability Defeats the Anti-SLAPP Statute Would Devastate Associational Rights

If the rule from *Ratcliff* and *Spencer* is right, anyone involved in any protest or social movement can be stripped of the anti-SLAPP statute's protection if the plaintiff alleges any one person associated with the protest or movement committed any illegal action.

Imagine a Black Lives Matter march down Telegraph Avenue. About a hundred people attend. The San Francisco Chronicle dispatches a reporter and a photographer. One protester throws a rock through a shop window. The photographer gets a shot of the broken window. The Chronicle runs a story. Now imagine the shop owner sues everyone who

participated in the protest, alleging they conspired with the rock thrower or otherwise were vicariously liable for his rock throwing. Using the *Spencer* and *Ratcliff* rule, because "the court's anti-SLAPP analysis focuses on the underlying tort, not the conduct by which the defendant is allegedly vicariously liable," the vandalism is unprotected, and thus the statute does not apply to any defendant. (*Ratcliff*, *supra*, 63 Cal.App.5th at 887.) The same result would be true if the shop owner sued the Black Lives Matter chapter that organized the protest. The shop owner could escape the statute even if he sued those who didn't organize or participate in the protest, including the photographer, the Chronicle, people who weren't there but shared the video on social media, the protesters' attorneys, or even a city official who granted the permit to march. Those defendants' acts—whether participating in a rally, organizing it, engaging in photojournalism, printing a newspaper, or providing legal or municipal services—would be left stripped of the anti-SLAPP statute's protection just because the plaintiff used the words "conspiracy" or "vicarious liability."[2]

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[2] Of course, some of these hypothetical defendants could presumably prevail on a demurrer, motion for judgment on the pleadings, or a motion for summary judgment. And that's what the trial court held here in addressing DAE's associational rights. (AA 125 ["If DAE contends it cannot be liable for the acts of the individual Defendants under the legal standards set forth in *NAACP v. Claibornrne Hardware Co.* (1982) 458 U.S. 886 and

For decades before the *Spencer* and *Ratcliff* decisions, courts interpreted the statute to protect defendants in such circumstances. In *Lam v. Ngo*, the target of a series of political protests sought to hold the organizer of the protests vicariously liable for all manner of illegal activity the other protesters engaged in—including slashing tires, intimidating customers, and posting banners on and urinating on a building. (*Lam*, *supra*, 91 Cal.App.4th at p. 838.) But applying United States Supreme Court precedent, the Court of Appeal found that vicarious tort liability for the collateral effects of a political protest requires the plaintiff allege and establish the defendant's own personal culpability by showing he "authorized, directed or ratified specific

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Lam v. Ngo (2001) 91 Cal.App.4th 832, it may present such arguments in a motion for judgment on the pleadings or a motion for summary judgment."].) But that's true for most SLAPP suits. The anti-SLAPP statute is designed to provide *additional* protections on top of those provided by demurrers, motions for judgment on the pleadings, or motions for summary judgment, including freezing the pleadings, protecting against discovery, providing an early resolution, and awarding mandatory attorney fees designed to deter SLAPP suits from being filed, to secure representation for SLAPP defendants, and to punish those who bring lawsuits that chill speech rights. (See *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131; Jerome I. Braun, *Increasing SLAPP Protection: Unburdening the Right of Petition in California* (1999) 32 U. C. Davis L.Rev. 965, 996–999 [identifying the compensatory and deterrent functions of fee shifting in anti-SLAPP statutes and distinguishing them from the efficiency functions of mechanisms designed to ensure early dismissal.)

tortious activity." (*Id*. at p. 837, citing *Claiborne Hardware*, *supra*, 458 U.S. at p. 927.) Because the moving defendant's own protest activity was protected by the statute, and the plaintiff did not plead or show authorization, direction, or ratification of the illegal acts, the Court of Appeal found the anti-SLAPP statute applied and the motion should have been granted—despite the allegations of third-party illegal actions. (*Id*. at pp. 845 ["no doubt" the statute applied], 845–851 [no authorization, ratification, or direction by moving defendant of illegal activity].)

Similarly, in *Huntingdon*, the plaintiff sued animal rights protestors for trespass and related torts arising out of protests at an employee's home. (*Huntingdon*, *supra*, 129 Cal.App.4th at p. 1242.) "Many of the persons were holding candles, but others were holding posters that read '"puppy killers"' and 'contained graphic pictures.' Several other persons 'were canvassing the neighborhood putting flyers in mailboxes and on car windshields.'" (*Id*. at p. 1241.) The Court of Appeal concluded that despite allegation of illegality (such as vandalism) by *some* protesters, "the gravamen of the action against defendants here is based on their exercise of First Amendment rights," and the statute applied. (*Id*. at p. 1245.)

Decisions like *Lam* and *Huntingdon* took established anti-SLAPP rules and reached an obvious conclusion: a plaintiff can't escape the anti-SLAPP statute by arguing that someone else at a

protest did something wrong. The statute looks to what the plaintiff alleged against the moving defendant. If the plaintiff brought claims against the moving defendant that arise out of the moving defendant's protected activity, the statute applies. And it doesn't matter that someone else at the protest might have acted illegally because the anti-SLAPP statute cannot be defeated by pleading a legal conclusion like "conspiracy" or "vicarious liability."

D. Applying the Traditional Rules, the Anti-SLAPP Statute Applies to Golden Gate's Claims Against DAE

Without the *Spencer* and *Ratcliff* rule extinguishing DAE's statutory rights, the anti-SLAPP statute applies to Golden Gate's claims against DAE. Under the traditional and established analysis, Golden Gate's claims against DAE arise out of its protected speech and conduct because the claims are based on DAE's speech and conduct in furtherance of free speech in a public forum and in connection with an issue of public interest. (Code Civ. Proc. § 425.26, subds. (e)(3) & (e)(4).)

The track makes only six factual allegations about DAE: (1) that "DAE purports to be a group of animal rights activists"; (2) that "DAE maintains a website" that describes its commitment to animal rights; (3) that "[s]ince its founding, DAE has organized protests that detrimentally impacted various businesses"; (4) that DAE authored and sought signatures on a petition (or, a

“purported ‘petition’”) to “‘shut down Golden Gate Fields’”; (5) that DAE held a protest “on a sidewalk just outside [the track], lit purple incendiary devices, and held up a large sign stating ‘Shut Down Golden Gate Fields’”; and (6) that DAE live-streamed drone footage of the protest and the individual defendants’ civil disobedience on social media. (AA 3–5 [Compl. ¶¶ 14–16; 18–20].)

Maintaining a website, gathering petition signatures on a website, using social media to publicly broadcast events as they unfold, and holding protests on public sidewalks are all speech in a public forum. (*Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 895 [statements published on the internet “hardly could be more public” under step one of the anti-SLAPP]; *McCullen v. Coakley* (2014) 573 U.S. 464, 476 [sidewalks are public forums].)

DAE’s speech meets the two-part inquiry to show that it “participated in, or furthered, the [public] discourse that ma[de] [the] issue one of public interest.” (*FilmOn*, *supra*, 7 Cal.5th at p. 151.)

In the first step, the court determines “what ‘public issue or . . . issue of public interest’ the speech in question implicates—a question [courts] answer by looking to the content of the speech.” (*Id*. at p. 149.) The content of DAE’s speech is promotion of animals right and appeals for elected officials to respond to the deaths at the track, matters that are issues of public interest. (See *City of Los Angeles v. Animal Defense League* (2006) 135

Cal.App.4th 606, 620–621; *Huntingdon*, *supra*, 129 Cal.App.4th at p. 1246.)

In the second step, a court asks "what functional relationship exists between the speech and the public conversation about some matter of public interest." (*FilmOn*, *supra*, 7 Cal.5th at pp. 149–150.) On the second inquiry, the Court stated that a statement is made in connection with an issue of public interest if it "contributes to—that is, 'participat[es]' in or furthers—some public conversation on the issue." (*Id*. at p. 151.) And the Court made clear that this analysis must include a consideration of the context or specific circumstances in which the statement was made, "including the identity of the speaker, the audience, and the purpose of the speech." (*Id*. at pp. 140, 147, 151–152.) In *FilmOn*, a commercial speaker making statements to "a coterie of paying clients" to sell a product did not make the required contextual showing to qualify as a statement made in connection with an issue of public interest. (*Id*. at p. 153.)

The functional relationship of DAE's speech to animal rights is obvious. DAE's petitioning, internet speech, and public protests all contribute to a conversation on that public issue. Unlike *FilmOn*'s commercial speaker, DAE is an animal rights nonprofit advocacy organization. Unlike *FilmOn*'s speech to "a coterie of paying clients," (*FilmOn*, *supra*, 7 Cal.5th at p. 153),

DAE spoke to anyone willing to listen. And unlike FilmOn's commercial purpose, DAE's purpose was to advance its political agenda of promoting animal rights generally and stopping the constant stream of horse deaths at Golden Gate Fields specifically.

And Golden Gate's claims "arise" out of DAE's speech. They must—every factual allegation the track makes against DAE involves protected speech or conduct. (AA 3–5 [Compl. ¶¶ 14–16; 18–20].) It is not as if some protected speech and activity is alleged to "assist in telling the story" but are not the wrongs the plaintiff complains of. (*Graffiti Protective Coatings, Inc. v. City of Pico Rivera* (2010) 181 Cal.App.4th 1207, 1215.) Rather, DAE's "speech or petitioning activity itself is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted." (*Park*, *supra*, 2 Cal.5th at p. 1060.)

In the trial court, the track argued that their claims arose out of the individuals' trespass, not DAE's speech. (AA 55–57.) If the individual defendants who locked down to the racetrack filed anti-SLAPP motions, the track's argument would have merit. The Complaint's allegations about protests and media statements 'tell the story' of their trespass, but the protests and media statements don't undergird the trespass claims against the individuals. But because DAE is a legal entity—a political

advocacy organization—and not a natural person, it does not physically occupy space and cannot physically trespass. A political advocacy organization cannot be held liable for trespass in connection with a political advocacy campaign unless it "authorized, directed or ratified specific tortious activity, incited lawless action, or gave specific instructions to carry out violent acts or threats." (*Lam*, *supra*, 91 Cal.App.4th at p. 837, citing *Claiborne Hardware*, *supra*, 458 U.S. at p. 927.) And everything the track claims to show DAE's authorization, direction, or ratification is speech—public protests, petition-gathering, and social media advocacy. Any argument that the track's claims against DAE do not arise out of speech because it claims trespass is just another gloss on the *Spencer* and *Ratcliff* argument that the track can look past what it alleged against DAE specifically and focus only on the individual defendants.

In *FilmOn*, the Supreme Court described the classic SLAPP suit as one involving "nonprofit corporations and common citizens" sued by "large corporate entities and trade associations in petitioning government." (*FilmOn*, 7 Cal.5th at p. 143.) Golden Gate's lawsuit ticks every box. DAE is a nonprofit corporation advocating a political agenda. The track is a large corporate entity owned by a billionaire. And its lawsuit against DAE is brought, at least in part, against DAE over its lawful petitioning

activity. (AA 4 [Compl. ¶ 16, "DAE has maintained a purported 'petition' on its website . . . [to] 'shut down Golden Gate Fields'"].)

Because Golden Gate sued DAE over its speech in public forums on an issue of public interest, the statute applies.

II. The Court Should Remand for the Second Step of the Anti-SLAPP Analysis

When the Court of Appeal reverses a trial court's order finding that the anti-SLAPP statute does not apply and the trial court declined to address step two, the Court of Appeal has the discretion to reach step two in the first instance or remand to the trial court with instructions to reach step two. (*Malin v. Singer* (2013) 217 Cal. App. 4th 1283, 1300.) "[T]he more prudent course is to remand the matter to the trial court to determine in the first instance whether [the plaintiff] demonstrated a reasonable probability of prevailing on the merits of his causes of action." (*Hunter v. CBS Broadcasting Inc.* (2013) 221 Cal.App.4th 1510, 1527 [collecting cases].)

The trial court here held two hearings on the application of the anti-SLAPP statute to Golden Gate's claims against DAE and is well positioned to determine Golden Gate's probability of prevailing on step two. This Court should remand the step two inquiry to the trial court for consideration of Golden Gate's probability of prevailing in the first instance.

III. Should the Court Decide to Reach Step Two, Golden Gate Fields Would Not Have Prevailed on its Claims Against Direct Action Everywhere

If the Court is inclined to reach the anti-SLAPP statute's second step analysis, the track failed to show a probability of prevailing on its claims against DAE.

On the second step, the burden shifts to the track to establish that its causes of action are both "legally sufficient" (that is, the causes of action would satisfy a demurrer) and "supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821.) In other words, a plaintiff must show that it adequately pleaded the causes of action and that it has prima facie evidence supporting that pleading. DAE's motion should be granted if the track fails to establish either requirement. (See *Navellier*, *supra*, 29 Cal.4th at pp. 88–89.) Its evidence must be competent and admissible, and establish each element of each cause of action. (*Balzaga v. Fox News Network, LLC* (2009) 173 Cal.App.4th 1325, 1337.)

The track fails both burdens.

It fails the first burden because its Complaint is not legally sufficient as against DAE. "An organizer of a political protest cannot be held personally liable for acts committed by other protesters unless he or she authorized, directed or ratified

specific tortious activity, incited lawless action, or gave specific instructions to carry out violent acts or threats." (*Lam*, *supra*, 91 Cal.App.4th at pp. 836–837, citing *Claiborne Hardware Co.*, *supra*, 458 U.S. at p. 927.) The complaint does not allege DAE authorized, directed, or ratified the individuals' civil disobedience. (See AA 2–8.)

It fails the second burden of presenting admissible prima facia evidence of authorization, direction, or ratification, too. Its main evidence was a declaration of David Duggan, the Vice President and General Manager of Golden Gate Fields, in which he purports to authenticate a press release from DAE commenting on the civil disobedience and referring to the four individuals as "affiliated with the global grassroots animal rights network Direct Action Everywhere." (AA 97, 99.) Duggan did not competently authenticate the press release, but even assuming he did, the press release does not authorize, direct, or ratify the actions of the four individual defendants. (See AA 99–100.) Nor does it identify them as being agents or co-conspirators of DAE (the California corporation), but rather says they are affiliated with "the global grassroots animal rights network Direct Action Everywhere." (AA 99.) The track also relied on a declaration of their counsel Alexander Doherty, who quoted a March 31, 2021 email from an attorney who represents the four individuals *and* DAE and assured Golden Gate there would not be protests at the

track between March 31, 2021 and April 10, 2021. (AA 68, 74.) A comment by the counsel for all five Defendants on March 31, 2021 as to their future plans (or lack thereof) does not establish or suggest that DAE authorized, directed, or ratified the actions of the four individual Defendants four weeks earlier. That was the track's only evidence.[3]

Lam shows these failures are fatal. That case arose out of dispute involving a video store owner who hung a North Vietnamese flag and a picture of Ho Chi Minh in the store's window. (*Lam*, *supra*, 91 Cal.App.4th at p. 837.) The protestors then turned their ire on a restaurant owner, Tom Lam, who was also a member of the local city council. (*Ibid.*) The landlord of the restaurant premises, Ky Ngo, was sympathetic to the protestors and allowed them to protest in the parking lot. (*Id.* at p. 838.) The protesters slashed patron's tires, posted banners on the restaurant, urinated on it, and intimidated customers. (*Ibid.*) And Ngo didn't only allow protesters to use the parking lot, he helped organize the protests themselves. (*Id.* at p. 846.) Even after a judge issued a TRO imposing a protest buffer zone around the restaurant, Ngo continued to violate it. (*Ibid.*) The protests hurt Lam's business and drove up his costs by requiring him to

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[3] The track declined to seek discovery of any direction, authorization, or ratification by DAE of the civil disobedience under the anti-SLAPP statute. (Code Civ. Proc. § 425.16, subd. (g).)

hire security guards. (*Id*. at pp. 837–839.) So he sued Ngo and others for intentional infliction of emotional distress, intentional interference with economic advantage, trespass, and nuisance—and Ngo filed an anti-SLAPP motion in response. (*Id*. at p. 839.)

The anti-SLAPP statute mandated dismissal of *Lam*'s lawsuit. (*Lam*, *supra*, 91 Cal.App.4th at pp. 845–851.) Because Lam's action "involve[d] possible tort liability for the collateral effects of a political protest," *Lam* recognized three controlling principles from the Supreme Court's decision in *Claiborne Hardware*:

> (a) Peaceful picketing of a business for political reasons cannot be burdened by state tort liability, even if it has the effect of interfering with prospective economic advantage. (*NAACP v. Claiborne Hardware Co.*, *supra*, 458 U.S. at p. 918 [state may not "award compensation for the consequences of nonviolent, protected activity"].)
>
> (b) Violence and other criminal acts are bases of tort liability and not constitutionally protected, even when committed out of political motives and in the context of a political demonstration. (*NAACP v. Claiborne Hardware Co.*, *supra*, 458 U.S. at p. 916 ["No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence."].)
>
> (c) An organizer of a political protest cannot be held personally liable for acts committed by other protesters unless he or she authorized, directed or ratified specific tortious activity, incited lawless

> action, or gave specific instructions to carry out violent acts or threats. (See *NAACP v. Claiborne Hardware Co.*, *supra*, 458 U.S. at p. 927.)

(*Lam*, *supra*, 91 Cal.App.4th at pp. 836–837.)

Applying those principles, the Second District found it was not enough that Ngo participated in the protests, violated a TRO, or even allowed the parking lot to be used for the protests because there was no allegation or evidence that "such acts were authorized, directed or ratified by Ngo." (*Lam*, *supra*, 91 Cal.App.4th at p. 846.) The Court of Appeal found that "[t]here was, in fact, far more in *NAACP v. Claiborne Hardware Co.*, to link Charles Evers, the field secretary of the state NAACP, to the sporadic acts of violence in that case. Evers organized the boycott, made 'emotional and persuasive appeals for unity in the joint effort,' and even made '"threats" of vilification and social ostracism.'" (*Id*. at p. 846, quoting *Claiborne Hardware*, *supra*, 458 U.S. at p. 926.)

Because "as in *NAACP v. Claiborne Hardware Co.*, tort liability [could not] be predicated merely on Ngo's role as an 'organizer' of protests in which some protesters committed wrongful acts," the Court struck the action under the anti-SLAPP statute. (*Lam*, *supra*, 91 Cal.App.4th at p. 846.)

The same principles apply with even more force here.

Claiborne Hardware and *Lam* could hardly be clearer that the type of derivative liability that the track seeks to impose on

DAE is constitutionally permissible only for harms caused by those "specific tortious activit[ies]" an advocacy organization orders or directs. (*Claiborne Hardware*, *supra*, 458 U.S. at p. 927.)

Claiborne Hardware, as affirmed in *Lam*, announced a clear and definitive rule for suits seeking to hold a protest leader liable in damages for the "unlawful conduct of others" in the context of a protest: They are unconstitutional, unless the leader herself incited, authorized, or otherwise intended the specific harm inflicting behavior. (See *Claiborne Hardware*, *supra*, 458 U.S. at p. 927.) In this case, the track failed to even allege such authorization by DAE. Golden Gate's claims fail on the law and evidence. It failed to establish a probability that it will prevail on its claims against DAE.

Conclusion

No one's statutory rights should be extinguished because of what someone else did. The trial court snatched DAE's anti-SLAPP protections away based on a pleaded legal conclusion. This Court should reverse the trial court's order finding the anti-SLAPP statute does not apply to Golden Gate's claims against DAE and remand to the trial court to determine Golden Gate's probability of prevailing on the second step of the anti-SLAPP analysis.

November 1, 2021

Law Office of Matthew Strugar

By: /s/ Matthew Strugar

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Certificate of Word Count

The text of this brief consists of 9,853 words as counted by Microsoft Word for Mac version 16.34 word processing program used to generate this brief.

Dated: November 1, 2021 By: /s/ Matthew Strugar

Proof of Service

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3435 Wilshire Boulevard, Suite 2910, Los Angeles, California 90010.

On November 1, 2021, I served true copies of Appellant's Opening Brief on the interested parties in this action as follows:

Robert R. Moore Michael J. Betz Alexander J. Doherty Allen Matkins Leck Gamble Mallory & Natsis LLP Three Embarcadero Center, 12th Floor San Francisco, CA 94111-4074	Clerk of the Court California Court of Appeal First Appellate District Division One 350 McAllister Street San Francisco, CA 94102-7421 [Electronic Service Under CRC 8.212(c)(2)]

I served an electronic copy of said document via the Court's TrueFiling portal on November 1, 2021, following the ordinary business practice.

Clerk to the Hon. James Reilly
Alameda County Superior Court
1221 Oak Street
Oakland, CA 94612
[Case No. RG21091697]

By Mail: I enclosed the document in a sealed envelope or package addressed to the persons at the addresses listed above and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with my office's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 1, 2021 at Los Angeles, California.

Matthew Strugar