No. A163315

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
First Appellate District, Division 1

GOLDEN GATE LAND HOLDINGS, LLC, PACIFIC RACING ASSOCIATION d/b/a GOLDEN GATE FIELDS, and PACIFIC RACING ASSOCIATION II d/b/a GOLDEN GATE FIELDS,

Plaintiffs and Respondents,

v.

DIRECT ACTION EVERYWHERE,

Defendant and Appellant.

Arising From an "Anti-SLAPP" Order, Alameda County Superior Court, Case No. RG21091697, The Honorable James Reilly, Dept. 25

RESPONDENTS' BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to Rule of Court 8.208, the following individuals/entities have an ownership interest of at least 10% in Respondents Golden Gate Land Holdings, LLC, Pacific Racing Association, and/or Pacific Racing Association II:

- TSG Developments Investments, Inc.
- TSG Developments Land Holdings, Inc.

Dated: February 15, 2022

ALLEN MATKINS LECK GAMBLE MALLORY & NATSIS LLP

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I. INTRODUCTION

The lawsuit from which this appeal arises is a straightforward trespass action. (AA 006-007.)[1] The Complaint nevertheless contains some allegations of speech activity that are plainly incidental to the two causes of action pled, both of which arise solely from a single unlawful trespass that occurred on March 4, 2021. (AA 004-005, ¶¶ 15-16, 18-20.) Unfortunately, like many defendants in this situation, Defendant and Appellant Direct Action Everywhere ("DAE") could not resist exploiting the anti-SLAPP procedure for a "'free time-out'" in the prosecution of the meritorious claims against it, an abusive tactic that this District has decried on multiple occasions. (*See, e.g., Oakland Bulk & Oversized Terminal, LLC v. City of Oakland* (2020) 54 Cal.App.5th 738, 763.) The trial court correctly denied DAE's anti-SLAPP motion, determining that DAE failed to meet its burden of demonstrating the causes of action are subject to the anti-SLAPP statutes. (AA 124-125.) This Court should affirm.

DAE is a radical animal rights organization that aims to liberate all "nonhuman animals." As its name suggests, DAE's principal tactic is "direct action," a tactic used by political activists that involves actions – usually illegal in nature – that directly target perceived adversaries and that are designed to

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[1] Citations to the single-volume Appellant's Appendix are abbreviated as follows: "AA [page #]:[line #]."

disrupt their business operations. (*See Shell Offshore, Inc. v. Greenpeace, Inc.* (9th Cir. 2013) 709 F.3d 1281, 1284 [distinguishing environmental activists' lawful "stop Shell" political speech campaign with their unlawful "direct actions," including forcibly boarding an oil rig to impede drilling operations].)

Over the past several years, DAE activists have trespassed on and interfered with multiple California businesses that involve animals, including by harassing people eating in restaurants, heckling grocery shoppers, and even stealing animals from farms. As a result of its unlawful activities, multiple injunctive and/or monetary judgments have been entered against DAE and those affiliated with it. (*See, e.g., Whole Foods Market California v. Direct Action Everywhere*, No. RG18921253 (Alameda County Super. Ct.); *Direct Action Everywhere SF Bay Area v. Diestel Turkey Ranch*, No. RG17847475 (Alameda County Super. Ct.); *Costco Wholesale Corporation v. Direct Action Everywhere*, No. 19-cv-07418 (N.D. Cal.).)

As its website indicates, DAE opposes horse racing and aims to shut down Golden Gate Fields, a horse racing track in the San Francisco Bay Area owned and operated by Plaintiffs and Respondents Golden Gate Land Holdings LLC, Pacific Racing Association, and Pacific Racing Association II (together, "Golden

Gate"). (AA 038-044.) On March 4, 2021, four activists affiliated with DAE climbed a fence surrounding the race track and lied down on the track, forming a "human blockade" that prevented any use of the track for several hours. (AA 095, 099 [photo].) A few days later, Golden Gate filed the underlying action for damages and injunctive relief to redress *only that March 4 trespass*.

The Supreme Court has made clear in recent years – beginning with *Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057 – that the anti-SLAPP statute cannot be used to strike a claim unless protected speech/petitioning activity supplies an *element* of the claim. (*Id.* at p. 1060.) In other words, the protected activity alleged in the complaint must truly be the "wrong complained of" and constitute the core injury-producing conduct – otherwise, the statute does not apply. (*Ibid.*)

Golden Gate's two claims for trespass and intentional interference with prospective economic relations do not satisfy this standard. As plainly alleged in the Complaint, both claims arise from and seek legal redress for *only* the March 4 trespass. (AA 006-008.) The claims do not target free speech or any other activity protected by the anti-SLAPP statute. Indeed, if the unlawful trespass had not occurred, and DAE had limited its activities to internet speech against Golden Gate Fields and the

lawful protest conducted on March 4 on *public* property next to Golden Gate Fields, the underlying action would not have been filed, and none of us would be here today. Accordingly, the statute does not apply.

This lawsuit simply is not a SLAPP. The fact the Complaint contains a handful of allegations of assertedly-protected speech activity does not convert a straightforward trespass lawsuit into a SLAPP.

Previous, overeager attempts by defendants to convert a lawsuit that does not target protected activity into a SLAPP through a "myopic reading of the complaint" have been rightly criticized by this District. (*Richmond Compassionate Care Collective v. 7 Stars Holistic Foundation, Inc.* (2019) 32 Cal.App.5th 458, 469.) DAE is attempting to do the same thing here, cherry picking a handful of allegations regarding speech-related activity that plainly are not material to the elements of Golden Gate's trespass-based claims.

As a result, DAE's motion is stopped dead in its tracks at the first step of the anti-SLAPP analysis, just as the trial court concluded. To the extent this Court addresses the second step in the anti-SLAPP analysis – which should not be necessary – the outcome remains the same, as demonstrated below. The order denying DAE's anti-SLAPP motion should be affirmed.

II. STATEMENT OF THE CASE

A. On March 4, 2021, Defendants Trespass on Golden Gate Fields, And Golden Gate Subsequently Initiates The Underlying Action For Damages And Injunctive Relief Stemming Solely From That Trespass

Golden Gate Land Holdings LLC, Pacific Racing Association, and Pacific Racing Association II own and/or operate Golden Gate Fields. (AA 095.) Golden Gate Fields is a horse racing track situated along the border of the cities of Albany and Berkeley that has been in operation since 1941. (*Ibid.*) Golden Gate operates horse races at the track from Thursday through Sunday, with seven to nine races conducted each day. (*Ibid.*) People around the country wager on those races, which is a lawful form of recreation that is highly regulated by the State of California. (*Ibid.*)

On March 4, 2021 at about 11:30 a.m., four people disguised as construction workers used a ladder to climb over a fence surrounding the horse racing track at Golden Gate Fields. (AA 095.) Once on the track, they lit incendiary flares that produced purple smoke, locked their arms using PVC piping to form a "human blockade," and lied down directly on the track. (AA 095, 099 [photo].) Golden Gate's employees unsuccessfully tried to stop them. (AA 095.) At about the same time, roughly a dozen other individuals stood on a public sidewalk just outside Golden Gate Fields, lit purple incendiary devices, and held up a

large sign stating "Shut Down Golden Gate Fields." (*Ibid.*) In addition, a live video feed of the trespass – which included the four natural person defendants scaling the fence surrounding the horse racing track – was broadcasted on DAE's Facebook page. (AA 036.)

The trespassers did not have Golden Gate's permission to enter onto the property. (AA 096.) The trespassers nevertheless refused to leave and remained on the track for about seven hours, until police from the City of Albany arrested and cited them for trespassing. (*Ibid.*) The trespass disrupted Golden Gate's business by preventing the track from being used until after the trespassers were removed and forcing Golden Gate's employees to redirect their efforts to attempting to recover possession of the track. (*Ibid.*) In addition, as a result of the trespass, the City of Berkeley's Public Health Division was forced to shut down its Covid-19 vaccination site in the Golden Gate Fields parking lot, which Golden Gate was allowing the city to use for free. (*Ibid.*)

On March 9, 2021, Golden Gate filed the underlying action against the four people who shut down the track – i.e., Rachel Ziegler, Rocky Chau, Omar Aicardi, and James Crom – and DAE. (AA 001.) Golden Gate's first cause of action for trespass alleged that Defendants trespassed on Golden Gate Fields on March 4, seeking compensatory damages and injunctive relief stemming solely from that trespass – and from no other events. (AA 006-

007, ¶¶ 28-31.) The second cause of action alleged that the March 4 trespass constituted an intentional interference with prospective economic relations, i.e., by interfering with the horse races scheduled to take place that day and thereby disrupting Golden Gate Field's economic relationship with its patrons. (AA 007, ¶¶ 33-37.) Once again, the claim was premised solely on the March 4 trespass – nothing else. (*Ibid.*) The Complaint also alleged that future trespasses were likely to occur, thereby warranting preliminary and/or permanent injunctive relief. (AA 007-008, ¶¶ 39-42.)

No cause of action pled in the Complaint was premised on, arose from, or sought legal redress for any statements made by DAE on the internet or elsewhere relating to the March 4 trespass or the lawful protest conducted on that same day on the public sidewalk outside of Golden Gate Fields. (AA 006-008.)

With respect to DAE in particular, Golden Gate alleged that the four trespassers are affiliated with DAE, which is a non-profit California corporation. (AA 002-004.) Accordingly, the Complaint alleged that DAE is vicariously liable for the natural person defendants' trespass and tortious interference pursuant to agency, conspiracy, aiding-and-abetting, and other theories. (AA 003, ¶ 10; AA 004, ¶ 17; AA 006, ¶ 28.)

B. DAE Files an Anti-SLAPP Motion, Claiming That The Underlying Action Targets Its First Amendment-Protected Speech Activity, But The Motion Is Denied

On May 25, 2021, DAE filed a special "anti-SLAPP" motion to strike the causes of action against it. (AA 009.) In its motion, DAE claimed that Golden Gate sued it for activities alleged in the Complaint that are protected by the First Amendment, i.e., "publishing information about the protest on its Facebook page and website." (AA 018.)

In its motion, DAE argued its speech was made (1) in a public forum, and (2) in connection with an issue of public interest, as required by section 425.16, subdivisions (e)(3) and (e)(4), of the Code of Civil Procedure. (AA 022-023.) However, DAE did not address whether the causes of action pled in the Complaint "ar[ose] from" the assertedly-protected speech activities, as required by subdivision (b)(1). (*Ibid.*) In its opposition, Golden Gate argued that the motion should be denied on the basis of this omission alone, since DAE had failed to meet its moving party burden at the first step of the anti-SLAPP analysis. (AA 054-055.)

In its reply, DAE argued, for the first time, that the elements of a trespass claim are "different" for a non-human entity like DAE than they are for natural persons. (AA 104.) DAE argued that the "arising from" requirement was met at the first step of the anti-SLAPP analysis because, as part of Golden

Gate's argument in its opposition papers regarding the second step of the analysis, Golden Gate purportedly relied on evidence of DAE's speech to demonstrate a probability of prevailing on the merits. (*Ibid.*)

At the hearing conducted on August 4, 2021, Golden Gate cited additional case law responding to the new argument made by DAE for the first time in its reply. After the hearing, supplemental briefs were filed by both parties, and the trial court held another hearing. (AA 113, 118.)

On August 19, the trial court entered an order denying the motion, determining that DAE failed to meet its burden at the first step of the anti-SLAPP analysis. (AA 124.) This appeal ensued.

III. STANDARD OF REVIEW

The de novo standard of review applies. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820.) The anti-SLAPP analysis involves a two-step process. (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 21.) "First, the defendant must make a prima facie showing that the plaintiff's 'cause of action … aris[es] from' an act by the defendant 'in furtherance of the [defendant's] right of petition or free speech … in connection with a public issue.'" (*Ibid.* [*quoting* Code Civ. Proc., § 425.16(b)(1)].) A defendant meets that burden "by demonstrating that the conduct by which plaintiff claims to have

been injured falls within one of the four categories described in subdivision (e) [of section 425.16], and that the plaintiff's claims in fact *arise* from that conduct." (*Rand Resources, LLC v. City of Carson* (2019) 6 Cal.5th 610, 620 [citation and quotation marks omitted].)

"If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384.) The court does not weigh the evidence, make credibility determinations, or resolve conflicting factual claims; rather, the court "accepts the plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law." (*Id.* at pp. 384-85.)

IV. ARGUMENT

A. The Elements of The Cause of Action – Not Any Alleged Theories of Vicarious Liability – Determine Whether The Anti-SLAPP Statute's "Arising From" Requirement Is Met

Only causes of action "arising from" protected activity are subject to an anti-SLAPP motion. (Code Civ. Proc., § 425.16(b)(1).) DAE ignored this critical prerequisite in its moving papers filed below. (AA 022-023.) On appeal, DAE dodges this issue, for the most part, once again – because it cannot offer any persuasive explanation as to how this requirement is met. On this basis alone, the Court should affirm.

1. A Claim May Be Struck Only If The Protected Activity Is The Wrong Complained Of

In *Park*, the Supreme Court explained that the "arising from" requirement means there must be a sufficient "nexus" between the protected activity and the cause of action alleged in the Complaint. (2 Cal.5th at p. 1060.) Specifically, "a claim may be struck only if the 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." (*Ibid.*) To determine whether this standard is met, "courts must 'consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability.'" (*Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871, 887 [*quoting Park* at p. 1063].) If the alleged, protected activity does not supply any element of the cause of action, then that claim does not arise from protected activity and is not subject to the statute.

As this Division explained in *Wong v. Wong* (2019) 43 Cal.App.5th 358, 366, *Park* marked a shift in the law such that, post-*Park*, this "elements-based analysis" is necessary to determine if the "arising from" requirement is met. Since *Park* was decided, other Supreme Court decisions have reaffirmed this narrow interpretation of the "arising from" requirement discussed in *Park*. (*See, e.g., Wilson*, *supra*, 7 Cal.5th at p. 887; *Bonni v. St. Joseph Health System* (2021) 11 Cal.5th 995, 1014.)

This District has likewise emphasized in several recent opinions that, in determining whether the "arising from" requirement is met, the focus must be on whether "'the core injury-producing conduct upon which the plaintiff's claim is premised'" is protected activity. (*Wong* at p. 365 [*quoting Area 51 Productions, Inc. v. City of Alameda* (2018) 20 Cal.App.5th 581, 594]; *Oakland Bulk & Oversized Terminal, LLC*, *supra*, 54 Cal.App.5th at p. 753 [same].)

2. The Court of Appeal Has Consistently Applied These Supreme Court Precedents in Cases Involving Vicarious Liability

A few Court of Appeal cases have applied *Park*'s elements-based analysis to claims alleged against a defendant – like those alleged against DAE here – based on a theory of vicarious liability. All of these cases came to the same conclusion. The "arising from" requirement is met only if *the underlying tort claim* targets protected activity.

In *Spencer v. Mowat* (2020) 46 Cal.App.5th 1024, the plaintiffs sued both the direct tortfeasors and two additional defendants who did not commit the underlying torts but who were alleged, pursuant to a conspiracy theory, to be vicariously liable. Applying *Park*'s elements-based analysis, the court explained that conspiracy is "a doctrine of liability and not a cause of action itself." (*Id.* at p. 1036.) Accordingly, what matters for the purposes of applying the "arising from"

requirement is the acts giving rise to the underlying torts – *not* the acts establishing vicarious liability for those torts: "it is the tort itself that controls, not individual acts that demonstrate the existence of a conspiracy." (*Id.* at p. 1037.) "Indeed, this conclusion is compelled by *Park*.…When liability is asserted for the target act of a conspiracy, the preliminary speech or petitioning activity is simply evidence of the defendant's liability, not 'the wrong complained of.'" (*Ibid.* [*quoting Park*, *supra*, 2 Cal.5th at p. 1060].)

Simmons v. Bauer Media Group USA, LLC (2020) 50 Cal.App.5th 1037 involved a different vicarious liability theory, i.e., agency. Applying *Park*'s elements-based analysis, the court came to same conclusion as in *Spencer*. The wrongful act complained of in the complaint was a private detective's unlawful attachment of a tracking device to a car owned by one of the plaintiffs. (*Id.* at pp. 1045-1046.) The fact that the newspaper publishing company defendant engaged in ostensibly protected newsgathering activity in hiring the detective – thereby creating the agency relationship through which the plaintiffs sought to impose vicarious liability – was immaterial. (*Id.* at pp. 1046-1047.)

Although *Ratcliff v. The Roman Catholic Archbishop of Los Angeles* (2021) 63 Cal.App.5th 869, *depublished by order at Ratcliff v. The Roman Catholic Archbishop of Los Angeles* (Sept.

1, 2021) No. S269220, 2021 Cal. LEXIS 6213, was recently ordered depublished by the Supreme Court – an issue addressed by Golden Gate below – the court in that case came to the same conclusion regarding a third theory of vicarious liability, i.e., ratification. "When 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." (*Id.* at p. 887.)

In each of these three cases, the court correctly applied the *Park* test. In *Spencer*, the "wrong complained of" was the assault and battery – not the protected government petitioning activity that the plaintiffs alleged indicated the existence of a conspiracy. (*Spencer*, *supra*, 46 Cal.App.5th at p. 1037.) In *Simmons*, the "wrong complained of" was the unlawful attachment of a tracking device to a car – not the newspaper publisher's protected newsgathering activity of hiring the private detective who committed that tort. (*Simmons*, *supra*, 50 Cal.App.5th at pp. 1045-1046.) And, in *Ratcliff*, the "wrong complained of" was the defendant priest's molestation of children – not the defendant church's ostensibly protected activity that constituted ratification of that tort. (*Ratcliff*, *supra*, 63 Cal.App.5th at pp. 890-891.)

Further, as the *Spencer* court correctly reasoned, conspiracy is not a cause of action but rather merely a doctrine

for vicariously imposing liability for some cause of action on another party. (*Spencer*, *supra*, 46 Cal.App.5th at p. 1036.) So too with respect to other vicarious liability theories such as agency. As the Supreme Court has affirmed, it is the elements of *the cause of action* that control the elements-based analysis. (*Wilson*, *supra*, 7 Cal.5th at p. 884.) The acts evidencing a conspiratorial agreement or agency relationship for the purposes of determining vicarious liability are immaterial.

B. The Trial Court Faithfully Applied *Park*'s Elements-Based Analysis to Golden Gate's Claims And Correctly Determined The "Arising From" Requirement Was Not Met

In denying DAE's anti-SLAPP motion, the trial court faithfully applied the foregoing precedents and *Park's* elements-based analysis. As the court explained, the allegations in the Complaint about DAE "are not the basis for Plaintiffs' causes of action…for trespass, intentional interference with prospective economic relations, and injunctive relief…." (AA 125.) Accordingly, DAE's motion "necessarily fails" because the "underlying tort (trespass) is not protected activity that satisfies the first step of the anti-SLAPP analysis…." (*Ibid.*)

The trial court got it exactly right. As mandated by *Park*, the court correctly focused on the nexus between the speech-related allegations about DAE and the elements of the causes of action pled in the Complaint. Since the former allegations do not

supply any of the latter elements, the motion had to be denied: "DAE's statements on its website and postings on Facebook are not elements of a claim for trespass." (AA 125.)

More specifically, the Complaint alleges that DAE is an animal rights activist group that maintains a website on which it describes its mission of "'animal liberation,'" i.e., creating "'a world where all animals are respected and viewed as individuals with autonomy over their own bodies.'" (AA 004.) The Complaint further alleges that DAE maintains a petition on its website called "'Shut Down Golden Gate Fields'" and encourages like-minded people to sign it. (*Ibid.*) Golden Gate also alleges that DAE has a Facebook page, and, on March 4, 2021, DAE streamed live video footage of the illegal trespass on the horse racing track. (AA 005.)

As the trial court correctly pointed out, however, *none* of these assertedly-protected, speech-related activities has anything to do with the elements of the causes of action. The wrongful entry onto the horse racing track on March 4, 2021 that forced its shutdown is *the only wrong complained of* in the trespass cause of action. (AA 006, ¶ 28 ["On March 4, 2021, Defendants, acting on their own or through agents acting on their behalf, engaged in an unauthorized entry on the GGF property that disrupted those possessory rights."].) The tortious interference claim is based on the exact same March 4 trespass – nothing else. (AA 007, ¶ 37

["Defendants intentionally trespassed on GGF for the purpose of disrupting that relationship [between Plaintiffs and their patrons who wager on horse races]."].)

The third injunctive relief claim is styled as a "cause of action," but it is actually a remedy, not a cause of action, and therefore not subject to the anti-SLAPP statute to begin with. (*Venice Coalition to Preserve Unique Community Character v. City of Los Angeles* (2019) 31 Cal.App.5th 42, 54 ["An injunction is a remedy, not a cause of action."]; *Department of Fair Employment & Housing v. 1105 Alta Loma Road Apartments, LLC* (2007) 154 Cal.App.4th 1273, 1281, fn.3 [anti-SLAPP statute does not apply to remedies].) Nevertheless, that requested remedy is likewise predicated on the March 4, 2021 trespass. (AA 007-008, ¶ 39 ["Plaintiffs have the right to control GGF on which Defendants have trespassed and threaten to continue to trespass."].)

Nothing DAE stated on its website, its Facebook page, or elsewhere is relevant to proving the elements of the trespass claim. (*Ralphs Grocery Co. v. Victory Consultants, Inc.* (2017) 17 Cal.App.5th 245, 262 ["The elements of trespass are: (1) the plaintiff's ownership or control of the property; (2) the defendant's intentional, reckless, or negligent entry onto the property; (3) lack of permission for the entry or acts in excess of permission; (4) harm; and (5) the defendant's conduct was a substantial factor in

causing the harm."].) So too with respect to the tortious interference claim. (*Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc.* (2017) 2 Cal.5th 505, 512 ["Intentional interference with prospective economic advantage has five elements: (1) the existence, between the plaintiff and some third party, of an economic relationship that contains the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentionally wrongful acts designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm proximately caused by the defendant's action."].) The Complaint could have omitted the allegations of the assertedly-protected speech activities by DAE and *still stated the same causes of action*. (*Park*, *supra*, 2 Cal.5th at p. 1068.)

The Complaint is not complex. Both claims seek legal redress – unambiguously and unequivocally so – for a single event, i.e., the unauthorized entry onto Golden Gate Fields on March 4, 2021. Golden Gate respectfully submits that there is no other way to read the Complaint. The *Park* test simply is not met here.

C. DAE Fails to Apply *Park*'s Elements-Based Analysis, Even Though It Controls Here

DAE cites the controlling elements-based analysis from *Park*, *see* Appellant's Opening Brief ("AOB"), p. 26, but then promptly proceeds to ignore it. What is more, DAE makes no

reference whatsoever to the elements of a claim for trespass or intentional interference with prospective economic advantage. DAE's failure to address either the controlling legal standard or the causes of action that DAE contends must be stricken constitutes a glaring concession that DAE's anti-SLAPP motion and this appeal have no merit whatsoever.

Indeed, this failure is fatal because DAE, as the moving party defendant, bears the burden at the first step of the anti-SLAPP analysis of demonstrating that the allegations of protected activity supply an element of the cause of action. (*Wilson*, *supra*, 7 Cal.5th at p. 887 [defendant bears the burden of comparing the protected activity "against the complaint" and demonstrating "that the activity supplies one or more elements of a plaintiff's claims"].)

In fact, DAE does not even get around to addressing its first-step burden until page 42 of the AOB – at which point it focuses on issues not disputed either below or here, such as whether DAE's alleged speech activities were "in furtherance of free speech in a public forum and in connection with an issue of public interest" within the meaning of subdivisions (e)(3) and (e)(4) of section 425.16 of the Code of Civil Procedure. (AOB, pp. 42-44.)

DAE addresses the "arising from" requirement in only two conclusory paragraphs. (AOB, pp. 45-46.) DAE asserts that

"every factual allegation the track makes against DAE involves protected speech or conduct" – and then simply concludes that that speech activity is "the wrong complained of." (*Id.*, p. 45.) DAE both misreads the Complaint and misunderstands the law.

First, it is false that the Complaint's only allegations against DAE involve protected speech. The trespass allegations are likewise "against DAE" because Golden Gate alleges that the people who trespassed on Golden Gate Fields were DAE's agents. (AA 003, ¶ 10; AA 006, ¶ 28.) "Because a corporation is a legal fiction, it cannot act but through the agency of natural persons." (*Presbyterian Camp & Conference Centers, Inc. v. Superior Court* (2021) 12 Cal.5th 493, 515.) DAE itself makes this same point, but it fails to grasp its import: as alleged in the Complaint, the natural person defendants' March 4 trespass *was* an action *by DAE* as a matter of agency law.

Second, DAE misapplies and misunderstands *Park*. The "wrong complained of" refers specifically to the action *supplying the elements of the causes of action* – here, trespass and tortious interference. As demonstrated above, that action is the March 4 trespass, not any incidental speech activity alleged in the Complaint.

DAE also argues that Golden Gate's argument "would have merit" if the natural person defendants "who locked down to the racetrack," rather than DAE, had filed anti-SLAPP motions.

(AOB, p. 45.) Again, DAE misconstrues the law. Golden Gate did not sue DAE for *different* causes of action predicated on its speech activity – for example, defamation. Rather, Golden Gate sued the natural person defendants and DAE for the exact same trespass and tortious interference claims based on a single tortious act: the unauthorized entry, on March 4, 2021, onto Golden Gate Fields. Thus, the question of whether these two claims "aris[e] from" protected activity has the same answer regardless of the identity of the moving party. Either way, the claims do not "aris[e] from" protected activity because an illegal trespass is not activity protected by the anti-SLAPP statutes.

D. DAE Fails in Its Attempt to Demonstrate That *Spencer* And *Ratcliff* Were Wrongly Decided

As detailed above, *Spencer* is directly on point. Recognizing as much, DAE has no choice but to argue the case was wrongly decided – which it does in hyperbolic fashion, insisting that *Spencer* (as well as the depublished opinion in *Ratcliff*) purports to "overturn [a] quarter century of unanimous precedent," including *Park*. (AOB, p. 30.)

That is nonsense. As demonstrated above, the courts in *Spencer* and *Ratcliff* – as well as *Simmons* – correctly applied *Park*'s elements-based analysis in the context of claims asserted against a defendant based solely on some theory of vicarious liability. This Court should apply the same analysis – and reject

DAE's invitation to create a split of authority with *Spencer* and *Simmons*.

DAE's attack on the validity of these decisions is all the more ridiculous given that, as explained above, DAE essentially ignores *Park*. Yet, in the cases that DAE insists were wrongly decided, the court's holding was based expressly on *Park* and its elements-based analysis. (*Spencer*, *supra*, 46 Cal.App.5th at p. 1036; *Simmons*, *supra*, 50 Cal.App.5th at p. 1045; *Ratcliff*, *supra*, 63 Cal.App.5th at pp. 886-887.) It is impossible to seriously contest the validity of any of these cases without addressing the wellspring case that provided the dispositive rule. For DAE, however, *Park* apparently merits nothing more than two passing references, bereft of analysis, in over 40 pages of briefing. (AOB, pp. 26, 45.) The omission speaks volumes.

1. DAE Misconstrues The Anti-SLAPP Statute

DAE cannot explain how *Spencer* or *Ratcliff* failed to faithfully apply *Park*'s elements-based analysis. So, DAE tries to manufacture other grounds for challenging these decisions. First, DAE looks to the statute. Stressing the clause "any act of that person" in section 425.16(b)(1) of the Code of Civil Procedure, DAE argues that the "arising from" analysis must focus on what each individual defendant is alleged to have done. (AOB, p. 25.) As DAE would have it, the March 4 trespass is irrelevant because it was committed by DAE's co-defendants, not DAE itself.

Rather, the court must look to what the Complaint alleges DAE supposedly did, i.e., "gathering petition signatures, participating in a public sidewalk protest, and commenting on social media." (AOB, p. 23.) The argument has zero merit.

As an initial matter, this simply is not the law. As the statute makes clear, an anti-SLAPP motion can be used to strike only a *cause of action*. (Code Civ. Proc., § 425.16(b)(1).) Accordingly, as the Supreme Court made clear in *Park* and other cases, what matters are the acts giving rise to the *cause of action*. (*Park*, *supra*, 2 Cal.5th at p. 1060.) Allegations of activity that do not supply an element of any cause of action – such as the allegations regarding the statements made on DAE's website – are irrelevant.

In addition, DAE's argument is based on a false dichotomy between actions purportedly by DAE (i.e., the statements made on its website), on the one hand, and actions purportedly by DAE's natural person co-defendants (i.e., the March 4 unauthorized entry onto Golden Gate Fields), on the other hand. The dichotomy is false because, as noted above, "a corporation can only act through natural persons." (*Creative Ventures, LLC v. Jim Ward & Associates* (2011) 195 Cal.App.4th 1430, 1433.) Thus, it is true, as DAE notes, that DAE "does not physically occupy space and cannot physically trespass." (AOB, p. 46.) But the same is true of the alleged publication of statements on

DAE's website and the lawfully-conducted protest conducted on public sidewalks next to Golden Gate Fields on March 4. (AA 004, ¶¶ 16, 18.) DAE *always* acts through humans. Accordingly, the March 4 trespass constituted – just as equally as the publication of statements of its website – an action *by DAE*.

That conclusion becomes even clearer on consideration of the law of vicarious liability. The basic theory underlying vicarious liability is that one defendant who did not commit the tort "stands in the shoes of a culpable person, and the defendant's liability is coextensive with that of the person whose liability is imputed to the defendant." (*Bostick v. Flex Equipment Co., Inc.* (2007) 147 Cal.App.4th 80, 109.) The same concept applies to both agency and conspiracy theories. (*Chee v. Amanda Goldt Property Management* (2006) 143 Cal.App.4th 1360, 1375 ["vicarious liability for torts is imposed by operation of law…upon principals for the acts of their agents"]; *Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc.* (2005) 131 Cal.App.4th 802, 823 ["The essence of the [conspiracy] claim is that it is merely a mechanism for imposing vicarious liability; it is not itself a substantive basis for liability."].) As such, in the eyes of the law, the March 4 trespass was indeed an action *by DAE* because Golden Gate alleges the four people who committed that trespass

were agents of DAE themselves or conspired with or were aided and abetted by agents of DAE.[2] (AA 003, ¶ 10; AA 006, ¶ 28.)

In sum, DAE's argument finds no support in the text of the anti-SLAPP statute. DAE also cites *Navellier v. Sletten* (2002) 29 Cal.4th 82, 93, which merely affirmed that certain causes of action, such as a breach of contract claim, are not categorically excluded from the anti-SLAPP statute's reach. If the acts giving rise to the breach are protected activities, the claim is subject to an anti-SLAPP motion. (*Id.* at p. 92.) Neither DAE nor Golden Gate has made any such argument, so DAE's reliance on *Navellier* is wholly misplaced.

2. Golden Gate's Claims Are Not Mixed Causes of Action

DAE also seeks support for its attack on *Spencer*'s validity in *Baral*, *supra*, 1 Cal.5th 376 and *Bonni v. St. Joseph Health Sys.* (2021) 11 Cal.5th 995. (AOB, pp. 26-27.) Again, DAE misplaces its reliance.

Both cases affirmed the rule that a "mixed" cause of action – which refers to "a cause of action that rests on allegations of multiple acts, some of which constitute protected activity and

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[2] To the extent that DAE denies that the trespassers were *in fact* its agents, that is a matter for the second step of the anti-SLAPP analysis. At the first step, it is the Complaint's allegations that dictate whether the "arising from" requirement is met.

some of which do not" – is subject to the anti-SLAPP procedure. (*Bonni*, *supra*, 11 Cal.5th at p. 1010; *Baral*, *supra*, 1 Cal.5th at p. 393.) The rule prevents a plaintiff from using "artful pleading…to shield particular allegations of protected activity, themselves sufficient to give rise to a claim for relief, from a motion to strike by intermingling them with unprotected acts." (*Bonni* at p. 1010.)

This rule has no application here, however, because Golden Gate's claims are not mixed. Each claim "aris[es] from" a single, *unprotected* action, i.e., the unlawful trespass on Golden Gate Fields on March 4. (AA 006-008.)

3. Contreras v. Dowling Does Not Support DAE's Position

DAE also cites *Contreras v. Dowling* (2016) 5 Cal.App.5th 394. (AOB, p. 28.) *Contreras* is neither persuasive authority nor apposite.

In *Wong*, this Division, in applying the "arising from" statutory requirement, declined to follow a 2014 case on the ground that it "was decided before *Park* and did not employ *Park*'s elements-based analysis." (43 Cal.App.5th at p. 366.) *Contreras* is not persuasive authority for the exact same reason. It was decided before *Park*, and the court did not consider the elements of the causes of action pled in the complaint in assessing whether the first step of the anti-SLAPP inquiry was met. (*Contreras*, *supra*, 5 Cal.App.5th at pp. 408-410.)

In addition, the *Spencer* court rightly distinguished *Contreras* on two grounds. First, the *Spencer* court noted that *Contreras* "involved the factual scenario of an attorney allegedly acting in concert with his clients." (*Spencer*, *supra*, 46 Cal.App.5th at p. 1039.) Indeed, the *Contreras* court based its holding on cases involving this unique context, i.e., claims targeting an attorney for acts committed in the course of his client representation. (*Contreras*, *supra*, 5 Cal.App.5th at p. 410.) No such scenario is presented here.

Second, the *Spencer* court noted that, in *Contreras*, the court disregarded the conspiracy allegations on the ground they were conclusory and therefore "analyzed separately the respective acts of the landlord and attorney," finding that "the only acts alleged against counsel were in advising his client, protected activity." (*Spencer*, *supra*, 46 Cal.App.5th at p. 1039.)

Here, by contrast, DAE is a corporation that cannot engage in any acts except through natural person agents, as discussed above. Accordingly, the unlawful trespass from which both causes of action arise was an act *by DAE* by virtue of the agency relationship alleged in the Complaint. As such, in *Contreras*, the court could distinguish the protected activities of the attorney (i.e., litigation activity) from the unprotected activities of his client (i.e., unauthorized entry into the plaintiff's apartment). That is a distinction that cannot be drawn here, however.

4. DAE Falsely Suggests The Rule Applied in Ratcliff And Spencer Has Been Criticized by The Supreme Court And The Court of Appeal

After misconstruing the anti-SLAPP statute and relying on inapposite case law, DAE suggests that *Spencer* and *Ratcliff* have "fac[ed] judicial criticism" from both the Second District (which decided both cases) and the Supreme Court. (AOB, p. 30.) This is a transparent effort to create the appearance of a split of authority when, in fact, there is none. DAE is simply wrong.

As DAE notes, after the trial court denied its anti-SLAPP motion, the Court of Appeal's opinion in *Ratcliff* was ordered depublished by the Supreme Court. The only conclusion to be drawn here is an uncontroversial one, i.e., that *Ratcliff* is no longer citable.

DAE nevertheless attempts to take the analysis a step further, suggesting the depublication order indicates the Supreme Court's disapproval of the vicarious liability rule from that opinion. (AOB, p. 30.) A careful reading of the depublication order demonstrates otherwise.

The depublication order directed the Court of Appeal to "reconsider the cause in light of *Bonni v. St. Joseph Health System* (2021) 11 Cal.5th 995, 1009–1012…." (*Ratcliff v. The Roman Catholic Archbishop of Los Angeles* (Sept. 1, 2021) No. S269220, 2021 Cal. LEXIS 6213 .) However, *Bonni* did not involve *any* issue of vicarious/indirect liability. In that case, the

plaintiff doctor *directly* sued the hospitals at which he worked for unlawful employment retaliation. (*Bonni* at p. 1007.)

As noted above, the analysis in *Bonni* pertained, instead, to how to apply the anti-SLAPP statute to "mixed" causes of action. (*Bonni*, *supra*, 11 Cal.5th at p. 1010.) The court rejected the suggestion that courts should take a sort of gestalt view of all of the protected and unprotected acts and attempt to determine the single "gravamen" of the cause of action. (*Id.* at p. 1011.) Doing so would force courts "to settle intractable, almost metaphysical problems about the 'essence' of a cause of action that encompasses multiple claims." (*Ibid.*) Rather, a court should analyze "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…." (*Id.* at p. 1010.)

In the depublished *Ratcliff* opinion, the Court of Appeal *affirmed* this erroneous "gravamen" test for mixed causes of action. (*Ratcliff*, *supra*, 63 Cal.App.5th at p. 873 ["the gravamen of the suit against the Archdiocese is not speech—it is the molestation and failure to supervise"].) Accordingly, the significance of the order depublishing *Ratcliff* is clear. The Supreme Court disapproved the *Ratcliff* court's application of the "gravamen" test for mixed causes of action, which the Supreme Court had recently rejected in *Bonni*.

The gravamen test for mixed claims and the vicarious liability issue presented in this appeal are separate and distinct issues. As noted above, this appeal implicates only the latter issue. The depublication order therefore has no significance with respect to the merits of this appeal.

As a last-ditch measure, DAE also suggests that the concurring opinion in *Ratcliff* provides further support for its position. (AOB, p. 34.) However, Justice Baker *concurred* in the disposition, agreeing that, under *Park*, the "wrong complained of" was the priest's molestation, not the church's protected activity incidentally connected thereto. (*Ratcliff*, *supra*, 63 Cal.App.5th at p. 893 [Baker, J., concurring].) Justice Baker nevertheless wrote "separately to explain I find it unnecessary, in reaching that conclusion, to rely on a judgment about what constitutes the 'gravamen' of the lawsuit against defendants or to further cement in anti-SLAPP jurisprudence the rationale advanced in *Spencer v. Mowat* (2020) 46 Cal.App.5th 1024…." (*Ibid.*) In other words, Justice Baker, like the Supreme Court, took issue with the use of the "gravamen" test for mixed claims – which, as demonstrated above, does not apply here.

As Justice Baker noted, the *Spencer* court did use the term "gravamen." (*Spencer*, *supra*, 46 Cal.App.5th at p. 1037, fn. 7 ["[I]t is not [appellant's] offering of input on a matter of public importance that is the gravamen of the complaint against him.

The gravamen is his conspiring with other Bay Boys to harass, assault and batter outside visitors to Lunada Bay."].) As the Supreme Court explained in *Bonni*, however, some courts have used "gravamen" in a different way, one *consistent* with the law: "[s]ome courts have invoked the term not in the way Bonni suggests—to determine the essence or gist of a so-called mixed cause of action—but instead to determine whether particular acts alleged within the cause of action supply the elements of a claim or instead are incidental background" (citation omitted)].) (*Bonni*, *supra*, 11 Cal.5th at p. 1012.) In *Spencer*, the court used the term "gravamen" in this permissible sense, and therefore it is fully consistent with the law.

E. The Rule Applied in *Spencer*, *Simmons*, And *Ratcliff* Is Neither Wrong Nor "Dangerous"

With the law squarely against it, DAE predictably resorts to legal mischaracterizations and hyperbole. DAE insists the rule applied in *Spencer* and other cases is "wrong" because it purportedly violates "foundational rules established in *Navellier* and *Baral*." (AOB, p. 37.) DAE also proclaims that the rule will "devastate associational rights." (*Id.*, pp. 38-42.) Such arguments have no merit.

1. The Complaint Does Not "Artfully Plead Around" The Anti-SLAPP Statute

As demonstrated above, DAE misreads both *Navellier* and *Baral*. *Baral* addressed "mixed" causes of action – of which there

are none in Golden Gate's Complaint. And *Navellier* does not stand for the proposition that a court must focus on allegations about what the moving party defendant did *irrespective of whether those allegations supply any of the elements of the cause of action pled*, as DAE contends.

DAE nevertheless insists that the rule applied by the trial court would allow a plaintiff to use "a legal conclusion" – such as a conclusory allegation of conspiracy or agency liability – to "artfully plead around the anti-SLAPP statute" and thereby obtain "an easy immunity" from the statute. (AOB, p. 37.)

First, this appeal arises from the denial of an anti-SLAPP motion – not the overruling of a demurrer. The specificity of the Complaint's allegations are irrelevant. If DAE took issue with the specificity of the allegations, it could have filed a demurrer. It chose not to.

Second, DAE is simply wrong. "[A]n allegation of agency as such is a statement of ultimate fact," not a legal conclusion. (*Skopp v. Weaver* (1976) 16 Cal.3d 432, 439.) And, as an allegation of ultimate fact, "further allegations explaining how this fact of agency originated become unnecessary." (*Ibid.*)

Third, Golden Gate did not "artfully plead" around the anti-SLAPP statute. The Complaint alleges direct liability against the natural person defendants for trespass and tortious interference and indirect liability theories (e.g., agency,

conspiracy, etc.) against DAE. (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 886 ["Complaints in actions against multiple defendants commonly include conclusory allegations that all of the defendants were each other's agents or employees and were acting within the scope of their agency or employment."].) Golden Gate alleged exactly what it needed to allege to inform defendants of the nature of the claims asserted against them.

2. The Rule Applied by The Trial Court Will Not "Devastate Associational Rights"

DAE also insists that the *Spencer* rule would "devastate associational rights." (AOB, p. 38.) Specifically, "[i]f 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." (*Ibid.*) To illustrate its point, DAE describes a hypothetical scenario in which one Black Lives Matter protester throws a rock through a shop window, and the shop owner seeks to hold other protesters who did not commit that tort vicariously liable.

DAE's hypothetical demonstrates its misunderstanding of anti-SLAPP law. "[T]he anti-SLAPP statute is a procedural law, rather than a substantive immunity." (*Patel v. Chavez* (2020) 48 Cal.App.5th 484, 487.) The statute's goal is to protect all people from some causes of action (i.e., those "arising from" protected

activities) – not to protect some people (i.e., protesters) from all causes of action.

In other words, DAE appears to believe political activists are entitled to the procedural protection of the anti-SLAPP statute *merely because they are engaging in political activism*, irrespective of the nature of the claim alleged against them. That is wrong. (*Schaffer v. City and County of San Francisco* (2008) 168 Cal.App.4th 992, 1002 ["the anti-SLAPP statute is not an immunity statute; it provides a means by which defendants can protect themselves against certain meritless claims at an early stage of the litigation"].)

DAE's hypothetical is missing a critical fact: what *cause of action* did the shop owner plead? So long as the shop owner limits his claims to, for example, a trespass claim seeking legal redress for the broken window – rather than a claim like defamation arising from the exercise of free speech – then the anti-SLAPP statute does not apply, and there is nothing untoward or improper about that.

In that case, any bystander protesters who did not commit the property tort would not be "stripped" of the anti-SLAPP statute's "protection" if they are sued under a vicarious liability theory. Rather, the anti-SLAPP procedure simply did not apply *to begin with* because the lawsuit is not a SLAPP.

And, if the vicarious liability theory is meritless because, for example, no conspiracy existed, then the bystander defendants can defeat the claims through a demurrer, a motion for summary judgment, or the like – in the exact same way that any defendant sued for any meritless claim can.

Accordingly, the threatened "devastat[ion]" of "associational rights" is a wild exaggeration. The application of the *Spencer* rule would not render the bystanders in DAE's hypothetical *substantively liable* for the underlying tort. Rather, they would merely be unable to invoke the anti-SLAPP statute's procedural recourse of an early dismissal of the claims against them.

3. The Lam And Huntingdon Life Sciences, Inc. Cases Do Not Help DAE

DAE suggests its position is supported by two older cases that long pre-date the Supreme Court's decision in *Park*, i.e., *Lam v. Ngo* (2001) 91 Cal.App.4th 832 and *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228. (AOB, pp. 40-42.) DAE is mistaken.

As an initial matter, both cases are not persuasive authority for the same reason detailed above. They pre-date *Park* and its adoption of the elements-based analysis. (*Wong*, *supra*, 43 Cal.App.5th at p. 366.) Indeed, the plaintiff in *Lam* did not even *contest* whether the first step was met, and the court's

analysis consisted of a single, conclusory sentence that did not address any of the elements of the causes of action in the complaint, as *Park* now requires. (*Lam*, *supra*, 91 Cal.App.4th at p. 845; *B.B. v. County of Los Angeles* (2020) 10 Cal.5th 1, 23 ["cases are not authority for propositions not considered"].)

The same is true of *Huntingdon Life Sciences, Inc.* The court resolved the first step of the anti-SLAPP inquiry based on a gestalt impression of the entire case, concluding that the first step was met because the "gravamen" of the entire action "is based on [defendant's] exercise of First Amendment rights." (*Huntingdon Life Sciences, Inc.*, *supra*, 129 Cal.App.4th at p. 1245.) As in *Lam*, the court did not consider the elements of any of the causes of action, as *Park* now requires. Accordingly, both of these pre-*Park* opinions provide no support for DAE's argument.

To the extent DAE purports to rely on these courts' analyses of the *second* step of the anti-SLAPP inquiry for guidance with respect to the first step inquiry here, DAE improperly conflates the two steps. The first step of the anti-SLAPP analysis is not coextensive with the substantive principles of the First Amendment. (*Schaffer*, *supra*, 168 Cal.App.4th at p. 1001.) The "sole inquiry" at the first step is whether the claims "arise from protected speech or petitioning activity," which is a purely procedural requirement. (*Sprengel v.*

Zbylut (2015) 241 Cal.App.4th 140, 156; *Coretronic Corp. v. Cozen O'Connor* (2011) 192 Cal.App.4th 1381, 1389 [at the first step, courts "determine what conduct is actually being challenged," not "whether the conduct is actionable"].)

The courts' analyses themselves demonstrate their lack of utility here. In both *Lam* and *Huntingdon Life Sciences, Inc.*, the courts *affirmed the propriety* of holding a non-tortfeasor defendant vicariously liable for the tort of another; the courts simply found, however, that there was no evidence to support vicarious liability, and therefore the plaintiffs failed to establish a probability of prevailing on the merits. (*Lam*, *supra*, 91 Cal.App.4th at pp. 845-846; *Huntingdon Life Sciences, Inc.*, *supra*, 129 Cal.App.4th at p. 1264.) Such determinations have no bearing whatsoever on whether the claims against DAE satisfy the statutory "arising from" standard, as applied in *Park*.

F. Even If DAE Were Right That *Spencer* and *Ratcliff* Were Wrongly Decided – Which Is Not The Case – It Would Not Matter Because The Statutory "Arising From" Requirement Is Also Not Met If The Protected Speech Provides Evidence of Liability, But Is Not The Basis of Liability

As demonstrated above, DAE's argument fails because the assertedly-protected activities alleged in the Complaint do not supply the element of any cause of action. At best, those activities may relate to the theories of vicarious liability pled in the Complaint.

But assume for the sake of argument that it is proper for a court to consider, in applying the *Park* test, the elements of *the vicarious liability theories*. Would it make any difference here? No.

1. The Supreme Court Has Emphasized That Courts Must Respect The Distinction Between The Actions That Form The Basis of Liability And The Actions That Provide Evidence of Liability

As a corollary to its elements-based analysis, the *Park* court stressed that courts must "take[] care to respect the distinction between activities that form the basis for a claim and those that merely…provide evidentiary support for the claim." (*Park*, *supra*, 2 Cal.5th at p. 1064.) "[A] claim may be struck only if the speech or petitioning activity *itself* is the wrong complained of, and not just evidence of liability…." (*Id.* at p. 1060.) In the face of this principle too, DAE's legal analysis cannot stand.

The distinction between speech that is the basis of liability, as opposed to evidence of liability, is illustrated in a case decided two years after *Park*, i.e., *Rand Resources, LLC*, *supra*, 6 Cal.5th 610. In that case, the plaintiffs alleged claims for fraud and tortious interference, among others, arising out of the defendant city's decision to replace plaintiffs with another company as the city's agent in conducting negotiations with the National Football League over building a new stadium. (*Id.* at pp. 616-619.) The

court held the fraud claim did *not* satisfy the *Park* test, while the tortious interference claims *did*.

The key difference was this. While the protected speech relating to the fraud claim *evidenced* that the City was acting in bad faith – as required for such a claim – that speech was not the fraudulent representation itself about which the plaintiffs complained. (*Rand Resources, LLC*, *supra*, 6 Cal.5th at p. 628.) By contrast, the protected speech relating to the tortious interference claims itself "constitute[d] the conduct by which plaintiffs claim to have been injured in their intentional interference claims. Similarly, although Bloom's secret communications with the City served as evidence of, or context for, claims based in fraud, those very communications *are* the interference now complained of in claims five and six." (*Id.* at p. 629 [citation omitted].)

Accordingly, the elements-based analysis requires more than simply connecting the protected speech with an element of the cause of action. The protected speech may very well be connected to an element insofar as it provides evidentiary support for it, but that is not sufficient under *Park*. (*C.W. Howe Partners Inc. v. Mooradian* (2019) 43 Cal.App.5th 688, 700 ["The 'elements' analysis as articulated by the Supreme Court in *Park*, *supra*, 2 Cal.5th at page 1063 and adopted in *Wilson*, *supra*, 7 Cal.5th at page 884 does not mean any allegation of protected

activity supporting an element of a cause of action subjects that cause of action to a challenge under section 425.16."]; *Oakland Bulk & Oversized Terminal, LLC*, *supra*, 54 Cal.App.5th at p. 755 ["But these acts are not the basis for plaintiffs' claim, merely evidence of the City's failure to honor its contractual obligations….[T]his claim arises out of the City's breach of its obligation to cooperate, not its representatives' speech opposing disbursement of funds."].)

2. At Most, DAE's Speech Might Evidence The Existence of a Conspiracy, Agency Relationship, or Other Basis For Imposing Vicarious Liability

This distinction between "the wrong complained of" and mere "evidence of liability" – a distinction ignored by DAE – is fatal to this appeal. (*Park*, *supra*, 2 Cal.5th at p. 1060.) At best, DAE's argument demonstrates that speech activity *might* constitute *evidence* to support Golden Gate's vicarious liability theories – which is not enough.

The crux of a conspiracy is not speech, but rather "an agreement to participate in an unlawful activity…." (*American Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451, 1474; *Stone v. Regents of University of California* (1999) 77 Cal.App.4th 736, 748, fn. 9 ["The elements of a civil conspiracy are an agreement, a wrongful act by any of the conspirators pursuant to the agreement, and damages."].) The existence of the agreement might be *evidenced* by speech activity

from which the agreement may be inferred. (*Munoz v. Superior Court* (2020) 45 Cal.App.5th 774, 780 ["It is frequently necessary to infer the existence of a conspiracy through circumstantial evidence of the conduct, relationship, interests, and activities of the alleged conspirators before and during the alleged conspiracy." (quotation marks omitted)].) But that does not mean that an allegation of a conspiracy *targets* speech activity.

The same is true of agency. The crux of agency is a relationship between two parties in which one party consents to act on the other's behalf and under his control. (*van't Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549, 571.) Such a relationship might be evidenced by speech. (*Id.* at p. 573 ["Proof of an agency relationship may be established by evidence of the acts of the parties and their oral and written communications." (quotation marks omitted)].) As with a conspiracy theory, however, vicarious liability is premised on the underlying relationship or agreement – not the speech activity that might merely evidence the existence of that relationship or agreement.

DAE tacitly concedes as much. In its own words, DAE "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." (AOB, p. 23.) The key word is "show." Golden Gate might – or might not – rely on

evidence of DAE's speech activities to show the existence of the underlying agreement that is the essence of a civil conspiracy. But that does not convert this lawsuit into a SLAPP, as made abundantly clear in *Park* and *Rand Resources, LLC*, among other cases.

Accordingly, even if it were appropriate to look at the elements of the vicarious liability theory – as opposed to the elements of *the cause of action*, as *Park* instructs – it would not change the outcome of this appeal.

This case demonstrates the importance of this principle. DAE mischaracterizes the Complaint when it contends that the allegations of DAE's speech activity were pleaded "to show DAE's conspiracy liability." (AOB, p. 23.) The Complaint does allege conspiracy liability, *see* AA 003, ¶ 10, and it does allege speech activity on DAE's website and elsewhere, *see* AA 004-005, ¶¶ 15-16, 18-20. But the Complaint does *not* allege that that speech activity demonstrates the existence of a conspiracy.

At summary judgment or trial, Golden Gate might very well need to rely on evidence of such speech activity to establish its theory – or not. Golden Gate might be able to establish vicarious liability based on evidence relating to acts that clearly are *not* protected by the anti-SLAPP statutes, such as evidence of an informal agreement establishing an agency relationship between the natural person trespassers and DAE.

And that is exactly why the principle affirmed in *Park* is so important. It cannot be that a cause of action is subject to being stricken depending on *which evidence* the plaintiff happens to rely on to prove up his case. Such a scenario would both improperly collapse the distinction between the first and second steps in the anti-SLAPP analysis, as well as render the application of the statutes inconsistent and unprincipled.

G. *Flatley v. Mauro* Provides a Separate, Independent Basis to Affirm

In *Flatley v. Mauro* (2006) 39 Cal.4th 299, 320, the court held that when "the defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was [criminally] illegal as a matter of law, the defendant is precluded from using the anti-SLAPP statute to strike the plaintiff's action." In other words, an allegation of criminal misconduct renders the anti-SLAPP statutes inapplicable, so long as the defendant *concedes* illegality. (*Gerbosi v. Gaims, Weil, West & Epstein, LLP* (2011) 193 Cal.App.4th 435, 445 ["To the extent Finn alleges criminal conduct, there is no protected activity as defined by the anti-SLAPP statute."].)

That is exactly what DAE does here: "Here, DAE concedes that the individual defendants' action—locking down to the horse racing track—was illegal as a matter of law." (AOB, p. 23.) Indeed, DAE notes that the "[p]olice arrested the four individuals

for criminal trespass for their civil disobedience." (*Id.*, p. 15.) As DAE points out, trespass is not only a civil cause of action but also a criminal offense, and their respective elements overlap. (*Compare* Pen. Code, § 602(k), (m) & *In re Y.R.* (2014) 226 Cal.App.4th 1114, 1118 ["Section 602, subdivision (m) provides that a person commits misdemeanor trespass by '[e]ntering and occupying real property or structures of any kind without the consent of the owner, the owner's agent, or the person in lawful possession.'"] *with Ralphs Grocery Co.*, *supra*, 17 Cal.App.5th at p. 262 ["The elements of trespass are: (1) the plaintiff's ownership or control of the property; (2) the defendant's intentional, reckless, or negligent entry onto the property; (3) lack of permission for the entry or acts in excess of permission; (4) harm; and (5) the defendant's conduct was a substantial factor in causing the harm."].)

Of course, as a corporation, DAE did not physically enter onto Golden Gate Fields, and its liability is vicarious in nature. But that does not change the *Flatley* analysis, as demonstrated by both *Simmons*, *supra*, 50 Cal.App.5th 1037 and *Novartis Vaccines & Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2006) 143 Cal.App.4th 1284.

In *Simmons*, the court applied the rule from *Flatley* to the claims asserted against *both* the tortfeasor private investigator *and* the newspaper publisher that hired him. (*Simmons*, *supra*,

50 Cal.App.5th at pp. 1046-1047.) The publisher conceded the illegality of the investigator's attachment of a tracking device on the plaintiff's car, but it "insist[ed] it merely hired [the investigator] to take photographs, not illegally place a tracking device." (*Id.* at p. 1047.) That did not change the analysis, however, because the complaint *alleged* vicarious liability for that tort, and the application of the *Flatley* rule at the first step of the anti-SLAPP analysis depends on what is alleged, not what the evidence demonstrates. (*Ibid.* ["This factual dispute goes to the merits of plaintiffs' claims and is not relevant to the first prong of the anti-SLAPP inquiry. Because Bauer's alleged conduct in the first amended complaint falls outside the protections of the First Amendment and the bounds of section 425.16, the trial court properly denied the anti-SLAPP motion." (citations omitted)].)

In *Novartis Vaccines & Diagnostics, Inc.*, Division 2 reached the same conclusion. That case involved claims by a pharmaceutical company against an animal rights organization and its members alleging various tortious/criminal misconduct, such as vandalizing the cars owned by employees of the pharmaceutical company, leaving excrement on their doorsteps, and the like. (*Novartis Vaccines & Diagnostics, Inc.*, *supra*, 143 Cal.App.4th at p. 1288.) Applying *Flatley*, the court held the claims – which defendants conceded were based on acts illegal as a matter of law – were not subject to being stricken. (*Id.* at pp.

1296-1297.) And that *included* the claims against the animal rights organization premised on vicarious liability because statements made in furtherance of a conspiracy are protected by neither the First Amendment nor the anti-SLAPP statutes. (*Ibid.*)

Accordingly, the *Flatley* rule likewise defeats DAE's anti-SLAPP motion at the first step of the analysis. As in *Simmons*, Golden Gate alleges an agency relationship between the direct tortfeasors and DAE. (AA 003, ¶ 10; AA 006, ¶ 28.) DAE may deny the existence of such a relationship, but any such factual dispute on this issue does not reach the preliminary, threshold matter, at the first step of the anti-SLAPP analysis, of whether the conduct alleged is protected activity. As the *Simmons* court aptly put it, "[a] showing that a defendant did not do an alleged activity is not a showing that the alleged activity is a protected activity." (*Simmons*, *supra*, 50 Cal.App.5th at p. 1047 [quotation marks omitted].)

Further, as affirmed in *Novartis Vaccines & Diagnostics, Inc.*, the First Amendment does not protect speech made in furtherance of a conspiracy. (143 Cal.App.4th at pp. 1296-1297; *McCollum v. CBS* (1988) 202 Cal.App.3d 989, 1000 [affirming speech in connection with a conspiracy falls "outside the scope of First Amendment protection"].) This principle is commonly applied in the context of criminal conspiracies. (*See, e.g., People*

v. Ware (2020) 52 Cal.App.5th 919, 944-945 [use of social media postings to support criminal conspiracy did not violate the First Amendment]; *United States v. Rahman* (2d Cir. 1999) 189 F.3d 88, 117 [if speech "crosse[s] the line into…conspiracy to violate the laws, the prosecution is permissible"].) Thus, the First Amendment does not provide DAE any refuge from the *Flatley* rule.

The *Flatley* rule provides a separate, independent basis on which this Court can and should affirm. Accordingly, even if DAE's analysis of the "arising from" requirement was correct – which it is not – it would not change the outcome of this appeal.

H. Golden Gate Met Its Burden of Demonstrating "Minimal Merit" at The Second Step of The Anti-SLAPP Analysis

Having determined DAE failed to meet its burden at the first step of the anti-SLAPP analysis, the trial court did not reach the second step. This Court should hold likewise. To the extent the Court deems it appropriate to reach the second step, however, it will find that Golden Gate met its minimal burden of demonstrating a probability of prevailing on the merits.

1. Golden Gate's Evidence Must Be Accepted as True, And DAE Can Prevail Only If Its Evidence Is So Compelling That It Defeats Golden Gate's Evidence As a Matter of Law

A plaintiff's burden at the second step "is a limited one. The plaintiff need not prove her case to the court; the bar sits

lower, at a demonstration of minimal merit." (*Wilson*, *supra*, 7 Cal.5th at p. 891 [citation and quotation marks omitted].) Only a cause of action that "lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." (*Navellier*, *supra*, 29 Cal.4th at p. 89.)

In addition, the second step of the anti-SLAPP inquiry is not a trial on the merits. (*Wilson*, *supra*, 7 Cal.5th at p. 891.) Each side's evidence is *not* treated equally. Rather, the court must "accept as true the evidence favorable to the plaintiff." (*Dickinson v. Cosby* (2019) 37 Cal.App.5th 1138, 1155.) To the extent the defendant submits its own evidence, "the court does not *weigh* the credibility or comparative probative strength of competing evidence." (*Taus v. Loftus* (2007) 40 Cal.4th 683, 714.) Rather, the defendant's evidence is evaluated "only to determine if it has defeated that submitted by the plaintiff as a matter of law." (*Oasis West Realty, LLC*, *supra*, 51 Cal.4th at p. 820.) In other words, the defendant's evidence must be so compelling that the defendant necessarily prevails irrespective of the nature and quality of the plaintiff's evidence. (*Park*, *supra*, 2 Cal.5th at p. 1067.)

2. Golden Gate's Evidence Satisfies The Elements of Both Causes of Action

With these framework principles in mind, it is clear that Golden Gate's evidence satisfies the elements of the trespass claim, which is simply an unauthorized entry onto the land of

another. (AA 095-096.) The elements of the tortious interference claim are also met. (AA 095, ¶ 2; AA 096, ¶¶ 8-9; *see supra* pp. 28-29 [reciting elements of trespass and tortious interference claims].)

Indeed, this conclusion is undisputed; DAE does not raise any issue regarding the elements of Golden Gate's claims. Instead, DAE challenges Golden Gate's evidence of vicarious liability and raises a substantive First Amendment affirmative defense.

3. Golden Gate's Evidence of DAE's Vicarious Liability – Accepted as True, as It Must Be – Meets The Low "Minimal Merit" Threshold

In *Novartis Vaccines & Diagnostics, Inc.*, *supra*, 143 Cal.App.4th 1284, the court determined that the defendant pharmaceutical company met its minimal burden of establishing the vicarious liability (conspiracy) of an animal rights organization. (*Id.* at p. 1300.) The court cited circumstantial evidence of a conspiracy, including postings on the organization's website providing assistance for the protests, and other statements that effectively ratified the protester's actions "by announcing, with approval, the results of these activities and encouraging persons to continue the harassment." (*Id.* at pp. 1300-1301.)

Similarly, in *Ralphs Grocery Co.*, *supra*, 17 Cal.App.5th 245, the minimal, second-step burden was met with respect to the

existence of an agency relationship based on limited evidence that included the agents' statements they were "working for" the company defendant and used a business card reflecting that company's name. (*Id.* at pp. 264-265.) "Keeping in mind that Appellants need only establish their trespass claim has minimal merit and it is our responsibility … to accept as true the evidence favorable to the plaintiff, we determine that Appellants have done enough to demonstrate a probability of prevailing on the trespass claim." (*Id.* at p. 265 [citations and quotation marks omitted].)

Golden Gate's evidence likewise meets the applicable low threshold. That evidence included a press release published on DAE's own website publicizing the protest and admitting the trespassers' affiliation with DAE: "The individuals who locked together — Omar Aicardi, Rachel Ziegler, Rocky Chau and Jamie Crom — are affiliated with the global grassroots animal rights network Direct Action Everywhere (DxE)." (AA 099.)

In addition, DAE's own evidence included the "Shut Down Golden Gate Fields" petition displayed on DAE's website and described in the Complaint. (AA 038-045.) In fact, DAE's declarant confirmed that DAE "shares a mission" with those who committed the unlawful March 4 trespass – i.e., to shut down Golden Gate Fields. (AA 035.) This evidence establishes a common interest and purpose shared by DAE and its co-

defendants. (*Novartis Vaccines & Diagnostics, Inc.*, *supra*, 143 Cal.App.4th at p. 1301 ["In addition, on its web site, SHAC USA stated that it 'share[s] the same passion' as the bombers and it then linked that Web site to one sponsored by those who took credit for the bombing. This is sufficient evidence to make out a prima facie claim that SHAC USA conspired to commit the trespass and bombing of Chiron's headquarters in Emeryville."].)

The evidence also established, as alleged in the Complaint, that DAE broadcasted a live video feed of the March 4 trespass on its Facebook page. (AA 036, ¶ 10.) DAE's declarant confirmed that the purpose of doing so was "to use [DAE's] significant social media following to amplify reports of such protest activity." (*Ibid.*) Such evidence provides further proof of a common purpose and interest amongst DAE and the trespassers.

And the fact that DAE was able to broadcast a live video feed of the trespass *as it happened* indicates DAE had foreknowledge of the planned trespass, a required element of conspiracy and aiding-and-abetting liability. (*Berg & Berg Enterprises, LLC*, *supra*, 131 Cal.App.4th at p. 823 [one element of a civil conspiracy is that the "defendant knew of and agreed to the objective and course of action"]; *Fiol v. Doellstedt* (1996) 50 Cal.App.4th 1318, 1325-1326 [elements of aiding-and-abetting liability are: (1) defendant knows the other's conduct constitutes

a breach of duty, and (2) gives substantial assistance or encouragement to the other to so act].)

Collectively, such evidence is sufficient to meet the low "minimal merit" threshold.

In response, DAE can do little more than simply declare that Golden Gate's evidence of vicarious liability is not enough. (AOB, pp. 49-50.) For instance, DAE suggests its press release is insufficient because it did not "identify [the trespassers] as being agents or co-conspirators of DAE…." (*Id.*, p. 49.) But such a "smoking gun" admission of the existence of an agency relationship or a conspiracy is not required. The applicable "minimal merit" standard – which DAE ignores – is far lower.

Moreover, with respect specifically to a surreptitious conspiracy to commit a plainly unlawful act (the existence of which typically is not announced via a press release by the co-conspirators), that low standard can be met by circumstantial evidence regarding "the nature of the acts done, the parties' relations to each other, and the common interest of the alleged conspirators." (*Novartis Vaccines & Diagnostics, Inc.*, *supra*, 143 Cal.App.4th at p. 1300.) The press release is just such circumstantial evidence.

DAE also suggests its press release was not properly authenticated, *see* AOB, p. 49, but DAE has waived any such objection by failing to make it below. (*Ralphs Grocery Co.*, *supra*,

17 Cal.App.5th at p. 265 ["Respondents did not object to this portion of the declaration, and thus, this evidence is properly before us."]; *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291, fn. 17 [an evidentiary objection relating to an anti-SLAPP motion is forfeited, even if made in the trial court, if the trial court does not rule on it].) Regardless, DAE itself authenticated the press release by attesting that the website on which it was published is indeed DAE's website. (AA 035, ¶ 7.)

4. DAE's Resort to Cases Resolved on Substantive First Amendment Principles Is Meritless

DAE also cites two First Amendment cases, i.e., *Lam*, *supra*, 91 Cal.App.4th 832 and *NAACP v. Claiborne Hardware Co.* (1982) 458 U.S. 886, the United States Supreme Court decision on which *Lam* relied. (AOB, pp. 48-53.) Neither case helps DAE.

In *NAACP*, a group of white merchants sued the NAACP and various individuals for damages stemming from an economic boycott organized by the defendants when their demands for equality and racial justice were not met. (*NAACP*, *supra*, 458 U.S. at pp. 889-890.) Significantly, the defendants did not commit any unlawful acts *against the white-owned businesses*. Rather, they merely "withheld their patronage from the white establishment…to challenge a political and economic system that had denied them the basic rights of dignity and equality…." (*Id.* at p. 918.) While the boycott had the *effect* of reducing plaintiffs'

business, the boycott itself was quintessential, protected First Amendment activity, for which tort damages could not be imposed. (*Ibid.*)

Some participants in the boycott nevertheless engaged in violent intimidation measures against black citizens who broke the boycott by patronizing white-owned businesses, such as by throwing a brick through a car windshield and firing shots at a house. (*NAACP*, *supra*, 458 U.S. at p. 904.) While such people certainly could be held liable for their misconduct, the court determined that the NAACP and its Field Secretary, Charles Evers, could not be held liable for those violent acts because there was no evidence demonstrating an agency relationship or that either defendant "authorized, directed, or ratified" any such "specific tortious activity." (*Id.* at p. 927.)

Lam involved a similar scenario. In *Lam*, protesters picketed outside the restaurant of a local politician for what they perceived to be his "lack of interest or concern" for the Vietnamese community's outrage over a local video store's placement of the flag of North Vietnamese communists in its window. (91 Cal.App.4th at p. 837.) While much of the picketing was through lawful means, as in *NAACP* some of the participants went too far, harassing the restaurant's patrons and damaging their cars. (*Id.* at p. 838.)

Here, DAE argues that, as an "organizer of a political protest" – like the NAACP in *NAACP* or the picket organizer in *Lam* – it cannot be held liable for tortious acts committed by others – i.e., the March 4 trespass at Golden Gate Fields – unless it "authorized, directed, or ratified" that specific tortious misconduct. (AOB, pp. 48-49.) This analogy fails.

First, in both *NAACP* and *Lam*, the plaintiffs sought to impose tort liability for the economic consequences of *lawful, First Amendment-protected* boycott activity. In *NAACP*, the plaintiffs did not limit their claims to those who engaged in violent acts or threats of violence. (458 U.S. at pp. 897-898.) And, in *Lam*, the plaintiffs did not even sue the actual tortfeasors at all. (91 Cal.App.4th at p. 851.)

Here, in stark contrast, Golden Gate's claims do not share the same defect. The claims are limited to a single *unlawful* act (the March 4 trespass), and Golden Gate's claimed damages are limited to those directly caused by that trespass. (AA 006-008.)

Second, DAE misreads *NAACP* as standing for the proposition that a protest "organizer" can be held vicariously liable for a protester's tort only if it "authorized, directed or ratified" that specific tort. (AOB, p. 48.) Not so. That was *one* possible theory for imposing liability. (*NAACP*, *supra*, 458 U.S. at p. 927.) But the court also acknowledged the alternative of a principal-agent theory, which is one of the theories alleged in the

Complaint here. (*Id.* at p. 929 ["The NAACP -- like any other organization -- of course may be held responsible for the acts of its agents throughout the country that are undertaken within the scope of their actual or apparent authority."].) In other words, neither *NAACP* nor *Lam* purported to alter well-settled principles of vicarious liability as applied to a protest "organizer," as DAE suggests.

Third, even if DAE's erroneous rule were the exclusive means of imposing vicarious liability, it is satisfied here. DAE ratified the March 4 trespass by publishing a press release praising it. (AA 099-100.) In addition, according to its corporate secretary, DAE broadcasted a video of the trespass on its Facebook page because it "believes it is important to use its significant social media following to amplify reports of such protest activity." (AA 036.)

Fourth, the legal import of *NAACP* and *Lam* – at least according to DAE – is that derivative liability for a tort cannot be imposed on an "organizer" of a protest unless the organizer authorized, directed, or ratified that specific tortious activity. (AOB, pp. 52-53.) Yet, DAE's Secretary declared, in no uncertain terms, that DAE "did not organize this [March 4] protest…." (AA 036.) Accordingly, the basic factual predicate for the application of DAE's erroneous rule is not even present here.

At the second step of the anti-SLAPP analysis, the *defendant* bears the burden of demonstrating the plaintiff's claims lack "minimal merit" if the defendant relies on an affirmative defense like the First Amendment, as DAE does here. (*Animal Legal Defense Fund v. LT Napa Partners LLC* (2015) 234 Cal.App.4th 1270, 1277.) DAE fails to meet that burden.

In sum, DAE's criticism of Golden Gate's evidence is baseless, DAE fails to offer any evidence of its own establishing that it prevails as a matter of law, and its First Amendment defense is based on inapposite case law. Accordingly, to the extent the Court reaches the second step of the anti-SLAPP analysis, it should find that it is satisfied here.

V. CONCLUSION

For all the foregoing reasons, this Court should affirm the trial court's order denying DAE's anti-SLAPP motion.

Dated: February 15, 2022

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

The text of this brief consists of 12,645 words (including footnotes) as counted by the Microsoft Word word-processing program.

Dated: February 15, 2022

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PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of eighteen (18) and am not a party to this action. My business address is Three Embarcadero Center, 12th Floor, San Francisco, CA 94111-4074.

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Executed on February 15, 2022, at San Francisco, California.

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(Type or print name)	(Signature of Declarant)