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Case No. ______________

SUPREME COURT OF CALIFORNIA

RAND RESOURCES, LLC, et al

Plaintiffs and Appellants,

v.

LEONARD BLOOM, et al

Defendants and Respondents.

SUPREME COURT
FILED

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PETITION FOR REVIEW

On Appeal From the California Court of Appeal for the State of California, County of Los Angeles, Case No. B264493, Division 1

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I. ISSUES PRESENTED FOR REVIEW

Review, by this Court, of the published opinion of the Second Appellate District below, is required because:

(1) Causes of action arising from an Exclusive Agency Agreement (an "EAA") to negotiate the designation and development of a National Football League ("NFL") stadium are a "public issue" or "an issue of public interest" subject to California's Anti-SLAPP statute, Code of Civil Procedure § 425.16 (e)(1).[1]

(2) Causes of action alleging statements made by public officials in connection with the EAA to allegedly negotiate the construction of an NFL stadium are "protected speech" within the meaning of the Anti-SLAPP statute.

[1] In the context of this litigation, the EAA at issue here is the functional equivalent of the Exclusive Negotiating Agreement ("ENA") considered by the Fourth Appellate District in *Tuchscher Dev. Enters., Inc. v. S.D. Unified Port Dist.* (2003) 106 Cal. App. 4th 1219. Since, by the time of the EAA was executed and discussions surrounding the same occurred, all redevelopment agencies in the State of California had been abolished by statute. All the City of Carson could enter into with Richard Rand was an agreement to make him the City's exclusive agent for certain narrowly defined purposes of a possible NFL stadium.

II. WHY REVIEW SHOULD BE GRANTED

Review by this Court is required to "secure uniformity of decision" within the appellate districts of California, and to settle an important issue of law with respect to applicability of the anti-SLAPP statute. (Rules of Court, Rule 8.500, sub. (b)(1).)

The published opinion of the Second Appellate District in this case is ***directly at odds*** with the majority view of the Fourth Appellate District as articulated in *Tuchscher Dev. Enters., Inc. v. S.D. Unified Port Dist.* (2003) 106 Cal. App. 4th 1219. In *Tuchscher,* the court held that statements and writings of public officials made in connection with an ENA regarding a large development of bayfront property were protected by California's anti-SLAPP statute because the development of bayfront property was an "issue of public interest." (*Id.* at 1233.)

With respect to the pending petition for review, the Second Appellate District found that an EAA regarding the development of an NFL stadium was ***not*** an issue of public interest. (Slip Op., p. 14-15.) These conflicting public opinions cannot be reconciled and must be reviewed by this Court.

The opinion of Second Appellate District ***utterly fails*** to meaningful distinguish the facts of the pending petition from the facts in *Tuchscher*. Moreover, and as a further conflict in legal positions between sister appellate districts, the Second Appellate District erroneously found that

communications related to selecting the City's exclusive agent were ***not*** protected speech in connection with an issue of public interest. (Slip Op., p. 6-7.)

Review by this Court is, therefore, necessary to resolve this conflict in legal positions and analysis between the published opinion in this case and in the *Tuchscher* case so that uniformity of decision can be achieved. In addition, review by this Court is necessary to settle important issues of law regarding the scope of speech protected by the anti-SLAPP statute and the application of the anti-SLAPP statute to agreements to prepare for and develop projects of widespread public interest. Therefore, the City of Carson and James Dear respectfully request that this Court grant their joint Petition for Review.

III. INTRODUCTION AND SUMMARY OF CASE

This Petition for Review arises from an erroneous decision of the Second Appellate District reversing the granting of the anti-SLAPP motion brought by Petitioners, City of Carson ("City") and James Dear ("Dear", collectively with City, "Petitioners"), concerning the First Amended Complaint ("FAC") filed by Respondents, Rand Resources, LLC and Carson El Camino, LLC's (collectively, "Rand Resources").

A. Exclusive Agency Agreement

Richard Rand, owner of Rand Resources, LLC and Carson El Camino, LLC, "is a real estate developer with a track record of successfully developing properties all over the globe." (AA:I:2:24, 28)[2]. In 2008, Rand Resources and the City's now dissolved-redevelopment agency entered into an alleged exclusive negotiating agreement, whereby Rand Resources was provided with the exclusive right to negotiate a $100 million dollar mixed-use retail project on 91 acres of land in the City of Carson. (AA:I:2:28-29).

Multiple extensions were granted by the redevelopment agency, but the redevelopment agency was dissolved by an act of the California Legislature. (AA:I:2:29). Due to such dissolution, the City and Rand Resources allegedly entered into an Exclusive Agency Agreement ("EAA"). (AA:I:2:29, 43-48).[3]

Under the EAA, Rand Resources "would become the exclusive agent of the City for the purpose of 'coordinating and negotiating with the NFL for the designation and development of an NFL football stadium in the City'." (AA:I:2:29-30). This football stadium would involve a "new, state-of-the-art sports and entertainment complex within the City" where "one or

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[2] Citations are to Appellants' Appendix unless otherwise noted. Citations to the Appellants' Appendix are cited as AA:Volume:Tab:Page.

[3] Petitioners vigorously dispute these factual allegations and note that the lower court's recitation of "facts" it its opinion were based upon its obligation to accept as true, for purposes in ruling on the special motion to strike, Rand's allegations in his FAC. To be clear, those allegations are just that – none of the "facts" have been adjudicated as true or correct. In fact, they are neither true nor correct.

more National Football League ("NFL") franchises" would "play its home games." (AA:I:2:24). The football stadium would be located on a 91 acre parcel that was partially owned by Rand Resources. (AA:I:2:44). Rand Resources alleges that El Camino "is the assignee of Rand Resources with respect to its rights under the EAA." (AA:I:2:25).

B. Allegations Of Fraud Based On Protected Speech And Petitioning Activities.

Rand Resources filed the FAC, the first pleading naming the City or Dear as defendants. (AA:II:6:417). Rand Resources added the second, third, and fourth causes of action, which are based on alleged fraud by the City and Dear (only as to the fourth cause of action) in connection with the City and Dear's communications relating to whether the EAA should be extended. (AA:I:2:33). Rand Resources also named the City in the first cause of action for breach of contract, which is not at issue in this petition.[4]

Rand Resources alleges that Dear, Carson's then mayor, and other unidentified "City officials" held "clandestine meetings," "talk[-ed] by the phone or through text messages," and sent "confidential emails." (AA:I:2:31, 35-36, 37). The purpose of these communications were "to cause[] the City to breach its prior representations and agreement to extend the EAA." (AA:I:2:33). Even though Rand Resources asserts that Dear and the City should have disclosed such communications to Rand

[4] Petitioners' Special Anti-SLAPP Motion to Strike did not include the breach of contract cause of action, which is pending before the lower court.

Resources (AA:I:2:35-36), Rand Resources nowhere identifies what "duty" Dear or the City had to Rand Resources, what statute this duty is based on, or even allege that either had such a duty or plead facts to support that such a duty existed.

C. Petitioners' Special Anti-SLAPP Motion to Strike.

On April 8, 2015, Petitioners and Bloom Petitioners Leonard Bloom and U.S. Capital, LLC ("Bloom Petitioners") filed separate special motions to strike under California's anti-SLAPP statute, which were set for hearing on May 7, 2015. Petitioners' special motion to strike included all causes of action in the FAC naming the City or Dear except for the alleged breach of contract claim against the City.

On May 7, 2015, the lower court, after hearing oral argument from all parties, granted all of these special motions to strike in their entirety. The lower court correctly found that "an action for breach of an exclusive commercial development contract ["EDC"] with a public entity (containing causes of action for inducing breach of contract, intentional and negligent interference and Business and Professions Code section 17200) is subject to [the] Anti-SLAPP [statute] on the basis of rights of petition and free speech in connection with a public issue." (AA:IV:21:1095; see also *Tuchscher Dev. Enters., Inc. v. S.D. Unified Port District* (2003) 106 Cal.App.4th 1219.)

The lower court went onto explain that, under *Tuchscher*, communications involving the proposed development of such commercial property fall into the 'matter of public interest' portion of the [Anti-SLAPP] statute and, as such, they need not be made in connection with an issue under consideration or review by a legislative, executive, or judicial body." (AA:IV:21:1095-1096).

Having established that California's anti-SLAPP statute applies, the lower court next examined Rand Resources' claims of liability against Petitioners. The lower court found that, pursuant to Government Code § 818.8, the City has absolute immunity from any cause of action based on fraud. (AA:IV:21:1096). Further, the lower court found that, pursuant to Civil Code § 47, subdivision (b), the statements in this case were made in connection with a legislative proceeding because they were used in the City's decision to decline to extend the EAA. As such, all such statements were protected by Civil Code § 47, subdivision (b). (*Id.*)

The lower court also found that Dear was immune under Civil Code §§ 820.2 and 47, subdivision (a), which affords immunity for a public official's discharge of an official duty, including discretionary actions of such public official. The lower court dismissed Rand Resources' arguments that there is no showing that Dear was discharging a discretionary duty, finding that evidence was presented, including in Rand Resources' *own allegations*, that "necessarily lead to a determination that

Dear was discharging a discretionary duty: he was making the decision to extend (or not extend) the Exclusivity Agreement." (AA:IV:21:1098). Finally, the lower court found that under Government Code § 815.2, because Dear is immune, the City is similarly immune. (AA:IV:21:1098).

D. Court of Appeal Opinion

Rand Resources appealed to the Court of Appeals for the Second Appellate District. In a published decision, the Second Appellate District reversed on the grounds that "none of the challenged causes of action fall within the scope of the statute" without reaching the question of whether there was probability of prevailing on the merits on the part of Rand Resources. The Second Appellate District attempted to distinguished the allegations of the FAC from the holding of the *Tuchscher* Court, finding the EAA was *not* an issue of public interest.

In doing so, the Second Appellate District offered utterly no meaningful rationale or reason that the EAA alleged in Rand Resources' FAC differs from EDC in *Tuchscher* for purposes of the applicability of California anti-SLAPP statute. That failure now creates a conflict of opinion between two of the sister appellate districts in this State.

E. No Petition For Rehearing Before The Court Of Appeal

The Second Appellate District's decision became final on June 30, 2016. Petitioners did not file a petition for rehearing before the Second

Appellate District and a petition for rehearing is not required since the errors by the Court of Appeal are errors of law.

IV. ARGUMENT

A. Review Should Be Granted To Secure Uniformity Of Decision And To Settle An Important Issue Of Law With Respect To The Application Of The Anti-SLAPP Statute To Agreements to Prepare For and Develop Impactful Projects As Issues Of Public Interest

1. *The Public Interest In The Exclusive Agency Agreement*

The real estate development alleged in the FAC meets the "broad" standard that it is a public issue or issue of public interest. The anti-SLAPP statute encompasses "any other conduct ... in connection with a public issue or an issue of public interest." (Code Civ. Proc., § 425, subd. (e)(4).) "The definition of 'public interest' within the meaning of the Anti-SLAPP statute has been broadly construed to include ... private conduct that impacts a broad segment of society and/or that affects a community in a manner similar to that of a governmental agency." (*Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 479.)

Developmental projects such as a discount mall "with the potential environmental effects such as increased traffic and impact[s] on natural drainage [are] clearly a matter of public interest." (*Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 15; see also *Tuchscher Dev. Enters., Inc. v. S.D. Unified Port Dist., supra,* 106 Cal.App.4th at p. 1234 ["[C]ommercial

and residential development of a substantial parcel of bayfront property, with its potential environmental impacts, is plainly a matter of public interest."].)

Here, the FAC clearly acknowledges the scale and impact of the contemplated developmental project. The EAA allegedly assigned exclusive agency to Respondent Rand Resources "for the purpose of 'coordinating and negotiating with the NFL for the designation and development of an NFL football stadium in the City." (AA:I:2:29-30). This football stadium would involve a "new, state-of-the-art sports and entertainment complex within the City" where "one or more National Football League ("NFL") franchises" would "play its home games." (AA:I:2:24).

The impact of such a billion dollar plus project is one of great national interest, let alone one of public interest for a city the size of Carson with a population under 100,000, and would be unlike anything ever completed in the City. (AA:I:5:79). Indeed, such a project would not only significantly impact the economics, infrastructure, and culture of the City, but because most of the property once operated as a landfill, the potential environmental undertaking would be daunting. (AA:I:5:79-80). These impacts dwarf those of the discount mall discussed in *Ludwig*.

The Second Appellate District's assertion that the communications alleged in the FAC "did not concern bringing an NFL team to Carson" (Slip

Op., p. 14) is contradicted by the FAC. The FAC explicitly states that "[u]nder the EAA . . . [Rand Resources] would become the exclusive agent of the City for the purpose of 'coordinating and negotiating with the NFL . . . ." (AA:I:2:29-30). Moreover, the City's alleged fraud related to undermining the EAA to explore whether the Bloom Petitioners could take over the exclusivity arrangement and negotiate with the NFL.

The FAC alleges "City officials, including Mayor James Dear, began secretly meeting with Leonard Bloom . . . *regarding bringing the NFL to Carson.*" (AA:I:2:24-25 (emphasis added)). How the City could allegedly explore other agency options without actually bringing up the NFL is baffling. An EAA to develop a NFL stadium is a matter of public interest, and as such communication related to it concern a matter of public interest.

2. *The Second Appellate District's Opinion Conflicts With Well-Settled Case Law*

The lower court correctly found that "an action for breach of an exclusive commercial development contract with a public entity (containing causes of action for inducing breach of contract, intentional and negligent interference and Business and Professions Code § 17200) is subject to Anti-SLAPP on the basis of rights of petition and free speech in connection with a public issue." In support of its finding, the lower court relied on *Tuchscher Dev. Enters., Inc. v. S.D. Unified Port District, supra,* 106 Cal.App.4th at p. 1232-35. (AA:IV:21:1095).

Tuchscher involved,

> an exclusive negotiating agreement (the negotiating agreement) [between TDE and] the City of Chula Vista and Chula Vista Redevelopment Agency (collectively the City) under which the City and TDE would take preliminary steps and negotiate towards a development agreement for the creation of a mixed use real estate project (the project or Crystal Bay) on certain bayfront property within the City. The negotiating agreement contained an exclusivity clause providing that during the agreement's term, the City "agree[d] not to negotiate with any other person or entity regarding the acquisition and development of the Project.

Tuchscher Dev. Enters., Inc. v. S.D. Unified Port District, supra, 106 Cal.App.4th at p. 1227. After the "negotiating agreement deadline passed without TDE and the City reaching terms of a development agreement for Crystal Bay" TDE sued the City and a rival developer, alleging the City and the rival developer conspired to "deprive TDE of the benefits of the negotiating agreement" by "(1) communicating with the mayor and other agents and employees of the City of Chula Vista, and (2) facilitating communications and meetings between [the rival developer and a major landowner] and that Rand Resources' objective was to secure the rights to develop . . . the Crystal Bay project." (*Id.* at 1228.)

Similarly, Rand Resources alleges it obtained an Exclusive Agency Agreement "which made Rand Resources the City's exclusive agent for the purpose of bringing, among other things, an NFL franchise to the City. Under the EAA, no one other than Rand Resources (or its agents and assignees, such as El Camino) was permitted to represent the City in negotiations with the NFL." (AA:I:2:24). After the expiration of the EAA, Plaintiffs alleged the "City officials, including Mayor James Dear" had been "secretly meeting with Leonard Bloom, the managing director and Chief Executive Officer of U.S. Capital, LLC, regarding bringing the NFL to Carson." (AA:I:2:24). Rand alleges "Mr. Bloom and Mayor Dear met with NFL executives in Beverly Hills, held meetings at City offices and elsewhere to raise money to bring an NFL team to the City, [and] spoke with representatives of NFL teams . . . about relocating to Carson." (AA:I:2:24-25).

The Second Appellate District ***completely ignored the nearly identical factual patterns*** in *Tuchscher* and the pending petition regarding exclusive agreements to negotiate the development of major projects. Instead, in attempting to distinguish *Tuchscher* and *Ludwig*, the Second Appellate District found that, in contrast to the instant action, "both involved communications pertaining to an actual planned development, not the identity of the agent representing a party in negotiating matters that might lead to a development." (Slip Op., p. 14.)

"In addition, in *Tuchscher*, the plaintiff conceded that the development in controversy was an issue of public interest. . . . Here, there is no such concession and the subject of the FAC is not communications pertaining to the actual development of real estate, but who represented the City in luring an NFL team to move to the City—a condition precedent to development." (Slip Op., p. 14-15.)

First, *Tuchscher* does not simply rely on a "concession" of the parties regarding the public interest in an exclusive negotiating agreement regarding the development of bayfront properties. On the contrary, the *Tuchscher* opinion focuses on the environmental effects of and the public's interest in the proposed development:

> The declaration of TDE's president and chief executive officer contains statements demonstrating the Crystal Bay development was a matter of public concern, having broad effects on the community. He averred Chula Vista's mayor and Chula Vista staff encouraged TDE to pursue the development of a large-scale multi-use, resort-oriented, master-planned project on the mid-bayfront in Chula Vista; that the Chula Vista City Council approved the exclusive negotiating agreement with TDE after being publicly noticed and agendized on four separate occasions; and that, in planning the project, TDE conducted numerous public

> forums with government agencies, local community groups, and individuals, as well as organized meetings with various environmental and habitat organizations, including the United States Fish and Wildlife Service and the California Department of Fish and Game. The prospect of commercial and residential development of a substantial parcel of bayfront property, with its potential environmental impacts, is plainly a matter of public interest. (E.g., *Ludwig, supra*, 37 Cal.App.4th at p. 15 [development of a discount mall "with potential environmental effects such as increased traffic and impact[s] on natural drainage, was clearly a matter of public interest"].)

(*Tuchscher Dev. Enters., Inc. v. S.D. Unified Port District, supra,* 106 Cal.App.4th at p. 1233-34.) Similarly, here the FAC and the Declaration In Support of the City's Anti-SLAPP motion both emphasize the community interest in and the potential environmental effects of an NFL stadium in the City. (AA:I:2:23-44; AA:I:5:78-81).

Second, both the EDC in *Tuchscher* and the EAA here involve the identity of the individual negotiating the development of a large project. Pursuant to the terms of the EDC, "the City 'agree[d] not to negotiate with any other person or entity regarding the acquisition and development of the Project'." (*Tuchscher Dev. Enters., Inc. v. S.D. Unified Port District,*

supra, 106 Cal.App.4th at p. 1227.) Similarly, the EAA allegedly was an *agency* agreement through which Rand Resources was appointed the "sole and exclusive agent . . . for the purpose of: (a) coordinating and negotiating with the NFL . . . [and] (b) facilitating the execution of appropriate agreements between the NFL and the City documenting the designation and development of the Property as an NFL Football Stadium . . ." (AA:I:2:44). Both agreements, by their own terms, allegedly involved the identity of the negotiator of a large development. The alleged communications in each similarly involved the identity of the negotiator.

Finally, the EAA is not limited to the identity of the entity who is tasked with generating interest in the City, but rather is also related to the potential development of a specific parcel of property as an NFL stadium. (AA:I:2:24, 44). This is virtually identical to the exclusive agreement in *Tuchscher*, which involved the identity of the negotiator of a development agreement for the creation of a large mixed-use real estate project. It is clear that the EAA relates to an issue of public interest, namely the development of an NFL stadium.

The Second Appellate District decision in this case is at odds with the well-reasoned authority of *Tuchscher*. Review by the Supreme Court is necessary to settle the inconsistency.

B. Review Should Be Granted to Secure Uniformity Of Decision And To Settle An Important Issue Of Law With Respect To The Application Of The Anti-SLAPP Statute To Comments Made In the Discussion and Negotiation of Agreements Of Public Interest

1. *Alleged Comments Made By The City and Dear Were Protected Speech*

The gravamen of the fraud-based causes of action attacks are the communications between the City and Dear and Bloom Petitioners on the one hand, and between Dear and Rand Resources on the other. However, each of these communications was "made in connection with a public issue." (See Code Civ. Proc., § 425.16, subd. (b)(1).)

The legislative process of determining whether to renew the EAA was not collateral to the allegedly improper communications, it was the very purpose of the alleged communications. Rand Resources acknowledges that the EAA was the subject of legislative deliberation; after all, Rand Resources requested from the City Council to extend the EAA, and Rand Resources complains the City Council did not extend it. (AA:I:2:32-33, 35).

Rand contends that the City engaged in communications with Bloom Petitioners about whether they could take over as agents once the EAA expired. (AA:I:2:31). Even if the City was allegedly prohibited from actually engaging another agent to seek out an NFL stadium deal during the EAA term, nothing in the EAA prevented the City from communicating

with others regarding possible future alternatives to the EAA once the EAA expired. (AA:I:2:43-49). This suit thus is tantamount to an attempt to freeze the City's right to explore these alternatives to fully inform itself prior to a very important decision about who should be the City's NFL agent after the EAA expires.

Accordingly, the alleged wrongful communications were a necessary and essential part of the legislative process, activity that is protected under the anti-SLAPP statute. (See *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115 [observing that communications preparatory to or in anticipation of official proceedings are protected].)

Further, the FAC involves alleged conduct "made in connection with an issue under consideration or review by a legislative ... or any other official proceeding authorized by law." (Code Civ. Proc., § 425, subd. (e)(2).) The FAC concedes that the EAA and the project as a whole were the subject of multiple legislative and other official proceedings. The exclusive negotiating agreement that was the alleged predecessor to the EAA was entered into between the City's redevelopment agency and Respondent Rand Resources. (AA:I:2:28-29). Multiple extensions were granted by the redevelopment agency. (AA:I:2:29).

The EAA itself was entered into by City Council. (AA:I:2:29, 34). Most importantly, the City's Economic Development Commission reviewed and voted on whether to extend the EAA (AA:I:2:32), and the

City voted on whether to extend the EAA. (AA:I:2:32-33, 35). Given each of these circumstances, the property, agreement, and potential development at issue were all issues "under consideration or review by a legislative … or … other official proceeding," and thus properly encompassed by the Anti-SLAPP statute. (See Code Civ. Proc., § 425, subd. (e)(2).)

2. *The Second Appellate District's Opinion Conflicts With Well-Settled Case Law*

The Second Appellate District summarily dismissed the communications alleged in the FAC as not falling within the scope of the Anti-SLAPP statute as follows:

- Regarding the allegations in the Second Cause of Action, the Second Appellate District found that "the particular communications alleged in the [Second] cause of action, i.e., the false representation that the EAA would be renewed, Dear's [alleged] false denial about knowing Bloom, and communications entailed in meetings between the defendants were not made in connection with whether the EAA would be renewed or replaced with some agreement with the Bloom defendants. Indeed, Wynder's [alleged] false representation that the EAA would be renewed was made before the EAA even went into effect." (Slip Op., p. 15.)

- Regarding the allegations in the Third Cause of Action, the Second Appellate District found that "[t]he alleged wrongful conduct in plaintiffs' promissory fraud cause of action is Wynder's [alleged] false representation regarding renewal of the EAA, made in August of 2012, before the City and Rand Resources entered into the EAA . . . for the reasons previously stated, the statement does not fall within the scope of section 425.16, subdivisions (e)(2) or (e)(4)." (Slip Op., p. 16.)
- Regarding the allegations in the Fourth Cause of Action, the Second Appellate District found that "[t]he gravamen of the fourth cause of action with respect to the City is, as with the second and third cause of action, the City's violation of the terms of the EAA by allowing someone other than Rand Resources to act as its agent with respect to efforts to bring an NFL franchise to the City and the manner in which the City conducted itself in relation to the business transaction between it and Rand Resources, not the City's exercise of free speech or petitioning activity. . . . As to Dear, his [alleged] statement that he did not know Bloom was not a matter of public interest and did not constitute free speech or

> petitioning activity protected by section 425.16." (Slip Op., p. 16.)

The alleged speech in *Tuchscher* is nearly identical to that recited by the Second Appellate District in its published opinion. In *Tuchscher*, the plaintiff-developer sued a city, public entity and its then-commissioner, and a rival developer, contending that the defendant public officials and rival developer interfered with the developer's exclusive negotiating agreement relating to the commercial development of certain bayfront property. (106 Cal.App.4th at p. 1227-28.) This interference took place by means of communications with other public officials and the rival developer, such as "closed door meetings, telephone calls and emails" designed to take away the exclusivity rights from the plaintiff-developer to the rival developer. (*Id.* at p. 1228.)

> The gist of [the plaintiff's] complaint was that respondents conspired with [the rival developer] to deprive [the plaintiff-developer] of the benefits of the negotiating agreement by disrupting the City's staff from negotiating the development agreement and inducing the City to cease negotiations. [The plaintiff-developer] alleged respondents furthered conspired by (1) communicating with the mayor and other agents and employees of the City …, and (2) facilitating communications and meetings between [the rival developer] and a [city]

> representative, and that respondents' objective was to secure the rights to develop both the ... project and [the respondents'] own commercial property....

(*Id.*)

Under these circumstances, the alleged fact that the defendants ceased negotiations with a particular developer and sought advice from a rival developer was protected action under the anti-SLAPP statute. (*Id.* at pp. 1228, 1233-34.)

The parallels between the facts alleged *Tuchscher* and the facts alleged by Rand are striking. In both cases an unhappy developer with exclusive agreements (one an ENA and the other an EAA – a distinction without a difference) sues both a city and a rival developer for communications relating to negotiations of whether the current exclusivity arrangement should be extended. (AA:I:2:31). In both cases, the communications that were the target of a special motion to strike were alleged to have been private, behind closed doors, and involved both oral and written communications (in *Tuchscher* the communications alleged were "closed door meetings, telephone calls and emails'" in Rand the FAC alleged communications that consisted of "clandestine meetings," "talk(s) by the phone or through text messages," and "confidential emails.") (AA:I:2:31, 35-36, 37).

Moreover, the "gist" of the communications in both cases were designed to "induc[e] the City to cease negotiations" to end the exclusive negotiation agreement (in *Tuchscher Dev. Enters., Inc. v. S.D. Unified Port District, supra,* 106 Cal.App.4th at p. 1228) just as they were designed here "to cause[] the City to breach its prior representations and agreement to extend the EAA." (AA:I:2:33). Given the striking similarity between the facts alleged in *Tuchscher* and the facts alleged in Rand's FAC, why the difference in the outcome of the special motions to strike? Sadly, the Second Appellate District offers no meaningful answer to this question.

The communications at issue in *Tuchscher* and the communications alleged in Rand's FAC are clearly encompassed by the anti-SLAPP statute regardless of whether they were legitimate, or fraudulent as Rand alleges. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 94 ["Any claimed illegitimacy of the defendant's acts is an issue which the plaintiff must raise and support in the context of the discharge of the plaintiff's secondary burden to provide a prima facie showing of the merits of the plaintiff's case."].) The Second Appellate District's opinion, to the contrary, is plain error and must be reversed by this Court.

The Second Appellate District's published opinion's treatment of speech subject to the anti-SLAPP statute is directly at odds with the Fourth Appellate District's treat of speech under *Tuchscher*. Review by the Supreme Court is necessary to settle the inconsistency.

C. The Second Appellate District Decision Should Be Depublished

Should this Court determine, in the exercise of its sound discretion, not to grant this Petition, Petitioners respectfully request that this Court order the Second Appellate District's opinion be depublished for the following reasons: (1) the opinion is wrong on a significant point of law; (2) the opinion's analysis is too broad and could lead to unanticipated misuse as precedent; and (3) future courts should not be influenced by the decision when addressing the same issue.

The published opinion in this case is directly at odds with the majority view set forth in *Tuchscher Dev. Enters., Inc. v. S.D. Unified Port Dist.* (2003) 106 Cal. App. 4th 1219. In failing to adequately distinguish the facts of this case from the facts in *Tuchscher*, the Second Appellate District created conflicting legal positions between two sister Courts of Appeal. Moreover, and as a further conflict in legal positions between sister appellate districts, the Second Appellate District erroneously found that communications related to selecting the City's exclusive agent for the purposes of developing an NFL stadium were *not* protected speech in connection with an issue of public interest. (Slip Op., p. 6-7.) Depublication by this Court is necessary to establish uniformity of decision and resolve this conflict in legal positions and analysis between the published opinion in this case and that in the *Tuchscher* case.

V. CONCLUSION

For all of the foregoing reasons, the Petitioners respectfully requests that this Court grant review.

DATED: July 7, 2016

ALESHIRE & WYNDER, LLP
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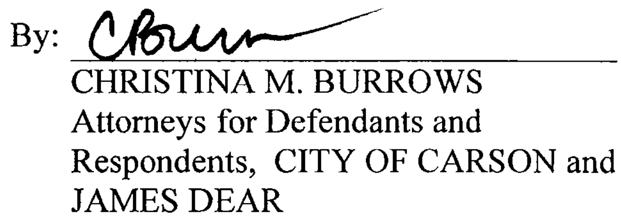
CHRISTINA M. BURROWS



By: ______________________
CHRISTINA M. BURROWS
Attorneys for Defendants and Respondents, CITY OF CARSON and JAMES DEAR

CERTIFICATE OF WORD COUNT

I certify that pursuant to Rule 14(c)(1) of the California Rules of Court, the attached Petition for Review by California Supreme Court produced on a computer and contains 5,283 words as counted by the Microsoft Word 2010 word-processing program used to generate the Petition for Review by California Supreme Court.

Christina M. Burrows

Filed 5/31/16

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

COURT OF APPEAL – SECOND DIST.
FILED
May 31, 2016
JOSEPH A. LANE, Clerk
ccassidy Deputy Clerk

RAND RESOURCES, LLC et al.,

Plaintiffs and Appellants,

v.

CITY OF CARSON et al.,

Defendants and Respondents.

B264493

(Los Angeles County
Super. Ct. No. BC564093)

APPEAL from an order of the Superior Court of Los Angeles County. Michael L. Stern, Judge. Reversed.

Huang Ybarra Singer & May, Joseph J. Ybarra, Aaron M. May and Carlos A. Singer for Plaintiffs and Appellants.

Aleshire & Wynder, Sunny K. Soltani, Anthony R. Taylor and Christina M. Burrows for Defendants and Respondents City of Carson and James Dear.

Tamborelli Law Group and John V. Tamborelli for Defendants and Respondents Leonard Bloom and U.S. Capital LLC.

The trial court granted anti-SLAPP motions against a city's exclusive agent in its action for breach of, and interference with, the agency contract and related causes of action. The agent contends the defendants' actions did not arise from an act in furtherance of their right of free speech or to petition for redress of grievances and were not in connection with an issue of public interest, and therefore fell outside the scope of the anti-SLAPP statute. We agree and reverse.

BACKGROUND

1. Factual background and First Amended Complaint (FAC)

a. Rand's early efforts, federal litigation, and the ENA

Richard Rand (Rand) is the sole member of plaintiff Rand Resources, LLC (Rand Resources) and the managing and controlling member of plaintiff Carson El Camino, LLC, which is the assignee of Rand Resources with respect to its rights under the Exclusive Agency Agreement (EAA) at the center of this action. El Camino is also the owner of 12 acres of land near the intersection of the 405 and 110 freeways that was part of a 91-acre site that the parties, including the City of Carson (City), were interested in developing as a sports and entertainment complex, including a football stadium, with the goal of persuading a National Football League (NFL) franchise to make the site its home.

At an early point in Rand's dealings with the City's Redevelopment Agency, the City's then-mayor demanded a bribe from Rand, but Rand refused to pay. He instead sued the City and the Redevelopment Agency in federal court for civil rights violations and prevailed in a jury trial in December of 2006. (*Rand v. City of Carson et al.* (C.D.Cal., Dec. 11, 2006, No. CV 03-1913 GPS (PJWx)).) The City appealed and Rand cross-appealed on the issue of damages. While the appeal was pending, the parties reached an agreement in which the Redevelopment Agency granted Rand Resources the exclusive right to negotiate with the City and Redevelopment Agency with respect to the development of the sports and entertainment complex. In exchange, Rand agreed to stay his cross-appeal and refrain from enforcing the judgment. The parties' arrangement was reflected in an Exclusive Negotiating Agreement (ENA). The parties thereafter amended

the ENA and extended it pursuant to its terms. In August of 2012 they entered into a new ENA. The FAC in the present case alleges that Rand "worked diligently to develop a sports/entertainment complex on the site, including but not limited to efforts aimed at developing the site as the location for a new NFL stadium."

b. The EAA

On September 4, 2012, after the dissolution of all redevelopment agencies in the state in 2012, the City entered into the EAA with Rand Resources. In the EAA, the City appointed Rand Resources "as its sole and exclusive agent" for a two-year period ending September 4, 2014, for the purposes of "coordinating and negotiating with the NFL for the designation and development of an NFL football stadium . . . in the City," "facilitating the execution of appropriate agreements between the NFL and the City documenting the designation and development of the Property [(the 91-acre site)] as an NFL Football Stadium," and "performing such other services as may be reasonably requested by City in connection with this Agreement." It further provided: "During the Term of this Agreement, City's appointment of [Rand Resources] as its agent for the Authorized Agency shall be exclusive such that (i) [Rand Resources] shall be the sole person designated as the agent of City for the Authorized Agency during the Term, and (ii) City shall not engage, authorize or permit any other person or entity whomsoever to represent City, to negotiate on its behalf, or to otherwise act for City in any capacity with respect to any subject matter falling within the Authorized Agency. In addition, City shall not itself, through its officials, employees or other agents, contact or attempt to communicate with the NFL or any agent or representative of the NFL or accept offers from the NFL or its agents or representatives to communicate directly with the NFL or any of NFL's designated agents or representatives (including, without limitation, its legal counsel) with regard to the Authorized Agency. From and after the date of this Agreement and throughout the Term, City covenants and agrees to refer exclusively to Agent all offers and inquiries received by City from the NFL and its agents or representatives."

The EAA provided it could be "extended by the mutual written consent of the parties for up to two (2) additional periods of one (1) year. The City's City Manager, or designee, may grant such extension upon receipt of an extension request and a report from [Rand Resources] indicating in specific terms the efforts of [Rand Resources] to date and the anticipated steps to be undertaken in the extension period for completion of the applicable planning and negotiation phases of the Project. To the extent that such efforts are reasonably determined by the City to be consistent with the requirements of this Agreement, the City shall grant such extension request. The granting of any extension pursuant to this Section . . . shall be within the sole and unfettered discretion of the City."

Plaintiffs allege that Rand and Rand Resources "worked diligently on bringing an NFL franchise to Carson" and spent "hundreds of thousands of dollars and a significant amount of time" in doing so. They retained numerous advisors, attorneys, engineers, and others to help them "deal with the NFL and issues regarding the potential sites," portions of which were contaminated with hazardous materials and required remediation. They hired architects to draft plans for a stadium, met with NFL executives and team owners, and created "promotional and marketing materials detailing the merits of Carson as the site for an NFL franchise and new stadium." They also met with investors, including in China, and met and communicated with City officials to discuss their efforts. Plaintiffs allege their efforts "raised the NFL's interest in Carson as a potential site for an NFL franchise," as shown by statements by the league regarding their "strong interest" in Carson.

c. City allows Bloom defendants to act as its agent

In April of 2013, Rand and the City reached a settlement regarding the federal court action. Soon thereafter, "the City stopped adhering to the terms of the EAA" and allowed defendants Leonard Bloom and U.S. Capital LLC (collectively the Bloom defendants) to begin "acting as the City's agent and representative" with respect to the NFL and development of the sports and entertainment complex. The FAC alleges the

Bloom defendants did so with knowledge of the EAA and its terms and discussed with Mayor James Dear how to "'get around' the EAA." "[W]ith the knowledge and support of representatives of the City, including Mayor Dear," the Bloom defendants contacted NFL representatives and purported "to be agents of the City with respect to bringing an NFL franchise to Carson." The Bloom defendants, the City, and Dear made efforts to conceal their meetings and communications with one another, including using confidential e-mails to discuss matters related to the prospective stadium. Dear also sent the Bloom defendants private and confidential City of Carson documents relating to development of a stadium, and Bloom and a colleague "routinely ghostwrote letters for Mayor Dear that [he] put on his official letterhead and sent to third parties as part of their efforts to undermine the EAA." Bloom also used "promotional materials that were derivative of those created and used by Rand in connection with meetings with NFL officials and others." In August of 2014, with knowledge that Rand Resources was the named agent in the EAA, Bloom created a new entity for himself that he named Rand Resources, LLC.

After several City employees and a representative of the San Diego Chargers informed Rand of the Bloom defendants' activities, Rand asked Dear about Bloom. Dear falsely denied knowing Bloom or of his activities.

Before the expiration of the original term of the EAA, Rand Resources submitted a written request for its extension along with "a report detailing its efforts to date and the anticipated steps to be undertaken in the extension period." Bloom met with Dear and at least one City councilperson "to discuss and conspire about how to breach the EAA and not extend it." Before the extension was voted on, Rand and his attorney met with City Attorney Bill Wynder and the City manager. Wynder stated the City would not extend the EAA and explained "that the City had been 'walking on eggshells' with Leonard Bloom and 'did not need' Rand anymore." Even though the City's Economic Development Commission voted unanimously to extend the EAA, "the City" voted not to extend the EAA.

Plaintiffs allege the defendants' actions "eviscerated" the exclusivity of the agency under the EAA, which was "necessary for credibility in dealing with NFL officials and provided Plaintiffs with the potential of earning significant payments should an NFL franchise decide to move to Carson and build [a] stadium there." Plaintiffs were damaged through "hundreds of thousands of dollars in expenditures . . . and the lost opportunity to receive a multi-million dollar commission," as well as the loss of "other potential development opportunities" with respect to their real property and damage to their reputation as a real estate developer.

d. FAC

Plaintiffs filed their FAC in February of 2015. Their first cause of action alleged breach of contract against the City. It alleges the City breached the EAA by (1) "not adhering to its promise to make Rand the exclusive agent of the City" by engaging, authorizing, and permitting the Bloom defendants to represent the City and negotiate on its behalf with respect to bringing an NFL team and stadium to the City, and (2) failing to grant the request to extend the EAA.

Plaintiffs' second cause of action, also asserted against the City only, alleges tortious breach of contract: "The City's breach of the EAA was done willfully intentionally, and accompanied by and breached through acts of fraud and deceit." Specifically, they allege the City "took actions to cover up and conceal its breach of the EAA" from plaintiffs and "conspired with and acted in concert with" the Bloom defendants to breach the EAA and cover up the breach. Plaintiffs cite defendants' secretive meetings and communications, Dear's denial of knowledge of Bloom and his actions, and Wynder's false representation before the parties entered into the EAA that "so long as Rand showed reasonable progress with respect to bringing an NFL franchise to Carson, the EAA would be renewed."

Plaintiffs' third cause of action is promissory fraud, also against only the City. It is based upon the aforementioned promise made by Wynder in August of 2012, acting on behalf of the City, "that, even though the EAA only initially provided for a term of two

years, the City would extend the EAA for the two years beyond that period, just as it had with the ENA, so long as Rand showed reasonable progress with respect to bringing an NFL franchise to Carson." Absent this promise, plaintiffs would not have entered into the EAA. The cause of action alleges "Wynder, on behalf of the City, made this promise having no intention at the time to honor it but rather to deceive and induce Rand into entering the EAA."

The fourth cause of action, fraud, is asserted against the City, Dear, and the Bloom defendants. Although it incorporates by reference all prior allegations of the FAC, it specifically realleges the efforts of the City, Dear, and the Bloom defendants to "hide and conceal the City's breach of the EAA and Bloom's interference with the EAA . . . with the intent to deceive Rand and induce Rand to continue to abide by the EAA and not sue them." It further realleges that "Bloom took steps to make it appear that he was affiliated with and controlled Rand Resources," and Dear denied knowledge of Bloom. Plaintiffs allege they relied upon "the fraudulent actions and false representations" by continuing to expend resources in attempting to bring an NFL franchise to the City.

The fifth cause of action is intentional interference with contract, asserted against the Bloom defendants. It alleges the Bloom defendants "knew of the existence of the EAA and intended to interfere with Plaintiffs' rights under the EAA or knew that [their] actions were substantially certain to interfere with" those rights. "As a result of [the Bloom defendants'] interference, the City breached the EAA by, among other things, violating the exclusivity provisions at the heart of the EAA and refusing to extend the term of the agreement."

The sixth cause of action alleges intentional interference with prospective economic advantage by the Bloom defendants. It alleges the Bloom defendants "knew of the EAA and Plaintiffs' reasonable expectation that the term of the EAA would be extended and intended to interfere with Plaintiffs' prospective economic advantage from such extension, including by using as [their] own promotional materials created by Plaintiffs, at great time and expense."

2. Anti-SLAPP motions and trial court's ruling

The City and Dear filed a special motion to strike the second through fourth causes of action pursuant to Code of Civil Procedure section 425.16,[1] also known as an anti-SLAPP motion. Simultaneously, the Bloom defendants filed their own anti-SLAPP motion seeking to strike the fourth through sixth causes of action.[2] Plaintiffs sought leave to conduct discovery to rebut the motions and moved to continue the hearing on the motions, but the trial court denied their ex parte application without explanation. Plaintiffs nonetheless opposed both motions and included evidence in support of the allegations of the complaint, including numerous e-mails between Dear or City employees and Bloom or persons acting on behalf of the Bloom defendants that apparently pertained to matters within the scope of Rand Resources's exclusive agency.

The trial court granted both motions in their entirety. Citing *Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219 (*Tuchscher*), the trial court concluded that section 425.16 was applicable to plaintiffs' case because "communications involving the proposed development of such commercial property fall into the 'matter of public interest' portion of the statute [subdivision (e)(4)] and, as such, they need not be made in connection with an issue under consideration or review by a legislative, executive, or judicial body." The court nevertheless went on to conclude that, with respect to the Bloom defendants, the statements alleged in the fraud cause of action were made in connection with a legislative proceeding. The court further concluded that plaintiffs had not met their burden at the second step of the analysis to demonstrate a probability of prevailing on their claims. The court therefore granted both motions and stated that the defendants were entitled to attorney fees pursuant to section 425.16, subdivision (c). All defendants subsequently

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[1] Undesignated statutory references pertain to the Code of Civil Procedure.

[2] With respect to the applicability of section 425.16, the motions were nearly identical.

filed motions for attorney fees, but the appellate record does not include any ruling upon these motions.

On May 26, 2015, the trial court entered "partial judgment" in favor of Dear, Bloom, and U.S. Capital, and later stayed the action, apparently pending resolution of this appeal.

DISCUSSION

1. Pertinent principles regarding anti-SLAPP motions

a. Statutory framework

The Legislature enacted section 425.16, the anti-SLAPP statute, "out of concern over 'a disturbing increase' " in civil suits "aimed at preventing citizens from exercising their political rights or punishing those who have done so." (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 21 (*Simpson*).) " ' "While SLAPP suits masquerade as ordinary lawsuits such as defamation and interference with prospective economic advantage, they are generally meritless suits brought primarily to chill the exercise of free speech or petition rights by the threat of severe economic sanctions against the defendant, and not to vindicate a legally cognizable right." ' " (*Ibid.*).

The statute provides for "a special motion to strike to expedite the early dismissal of these unmeritorious claims." (*Simpson, supra*, 49 Cal.4th at p. 21.) The motion involves a two-step process. First, the defendant must make a prima facie showing that the plaintiff's cause of action arises from an act by the defendant in furtherance of the defendant's right of petition or free speech in connection with a public issue. (§ 425.16, subd. (b)(1).) If the defendant succeeds in making this showing, the court must then consider whether the plaintiff has demonstrated a probability of prevailing on the claim. (*Ibid.*) If not, the motion should be granted. (*Ibid.*) In ruling on the motion, "the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2).)

Subdivision (e) of section 425.16 provides that an " 'act in furtherance of a person's right of petition or free speech . . . in connection with a public issue' includes:

(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."

b. Determining the applicability of the statute to a cause of action

"Our Supreme Court has recognized the anti-SLAPP statute should be broadly construed [citation] and that a plaintiff cannot avoid operation of the anti-SLAPP statute by attempting, through artifices of pleading, to characterize an action as a garden variety tort or contract claim when in fact the claim is predicated on protected speech or petitioning activity. [Citation.] Accordingly, we disregard the labeling of the claim [citation] and instead 'examine the *principal thrust* or *gravamen* of a plaintiff's cause of action to determine whether the anti-SLAPP statute applies' and whether the trial court correctly ruled on the anti-SLAPP motion. [Citation.] We assess the principal thrust by identifying '[t]he allegedly wrongful and injury-producing conduct . . . that provides the foundation for the claim.' [Citation.] If the core injury-producing conduct upon which the plaintiff's claim is premised does not rest on protected speech or petitioning activity, collateral or incidental allusions to protected activity will not trigger application of the anti-SLAPP statute." (*Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264, 1271–1272.) "[T]he gravamen of an action is the *allegedly wrongful and injury-producing conduct*," i.e., " 'the *acts on which liability is based*,' " "not the damage which flows from said conduct." (*Renewable Resources Coalition, Inc. v. Pebble Mines Corp.* (2013) 218 Cal.App.4th 384, 387, 396 (*Pebble Mines*).)

The trial court must "distinguish between (1) speech or petitioning activity that is mere *evidence* related to liability and (2) liability that is *based on* speech or petitioning

activity. Prelitigation communications or prior litigation may provide evidentiary support for the complaint without being a basis of liability." (*Graffiti Protective Coatings, Inc. v. City of Pico Rivera* (2010) 181 Cal.App.4th 1207, 1214–1215.) "[T]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute. [Citation.] Moreover, that a cause of action arguably may have been 'triggered' by protected activity does not entail that it is one arising from such. [Citation.] In the anti-SLAPP context, the critical consideration is whether the cause of action is *based on* the defendant's protected free speech or petitioning activity." (*Navallier v. Sletten* (2002) 29 Cal.4th 82, 89.) "In other words, 'the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech.'" (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 670.) Thus, the statute does not automatically apply simply because the complaint refers to some protected speech activities. (*Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 187–188.)

c. Determining whether a matter is a public issue or an issue of public interest

"The statute does not provide a definition for 'an issue of public interest,' and it is doubtful an all-encompassing definition could be provided. However, the statute requires that there be some attributes of the issue which make it one of public, rather than merely private, interest. A few guiding principles may be derived from decisional authorities. First, 'public interest' does not equate with mere curiosity. [Citations.] Second, a matter of public interest should be something of concern to a substantial number of people. [Citation.] Thus, a matter of concern to the speaker and a relatively small, specific audience is not a matter of public interest. [Citations.] Third, there should be some degree of closeness between the challenged statements and the asserted public interest [citation]; the assertion of a broad and amorphous public interest is not sufficient [citation]. Fourth, the focus of the speaker's conduct should be the public interest rather

than a mere effort 'to gather ammunition for another round of [private] controversy . . . .' [Citation.] . . . A person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people." (*Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, 1132–1133.)

Three general categories of cases have been held to concern an issue of public interest or a public issue: "(1) The subject of the statement or activity precipitating the claim was a person or entity in the public eye. [Citations.] [¶] (2) The statement or activity precipitating the claim involved conduct that could affect large numbers of people beyond the direct participants. [Citations.] [¶] (3) The statement or activity precipitating the claim involved a topic of widespread public interest." (*Commonwealth Energy Corp. v. Investor Data Exchange, Inc.* (2003) 110 Cal.App.4th 26, 33 (*Commonwealth*).)

d. Standard of review

We review the trial court's ruling on an anti-SLAPP motion de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.)

2. The trial court erred by granting both anti-SLAPP motions.

Plaintiffs contend the trial court erred in granting the defendants' anti-SLAPP motions because the gravamen of their complaint "is the City's breach of the EAA and the Bloom Defendants' interference with that contract, neither of which constitutes an act taken in furtherance of Defendants' constitutional right of petition or free speech." Plaintiffs further note that, to the extent the defendants rely upon the City's decision not to renew the EAA as a governmental proceeding under section 425.16, subdivision (e)(2), that decision occurred "well *after* Bloom had interfered with the Agreement and the City had breached it. The City's after-the-fact decision not to extend the EAA cannot somehow immunize Defendants from liability for acts taken *while the EAA was in place*. If it did, private contracts with municipalities would be virtually unenforceable." Plaintiffs also contend "the mere fact that bringing an NFL franchise to the City may be a matter of 'public interest' does not mean that the anti-SLAPP statute was triggered here.

Defendants still were required to demonstrate that the acts giving rise to the asserted liability constitute *protected activity*. . . . Defendants' liability is predicated on commercial conduct, not speech or petitioning . . . ."

Defendants, in contrast, contend that they made the prima facie showing required at the first stage of the analysis because "[t]he real estate development alleged in the FAC," including development of an NFL stadium in the City, is necessarily a matter of public interest within the scope of section 425.16, subdivision (e)(4). They further argue that the plaintiffs' claims fall within the scope of section 425.16, subdivision (e)(2) because "the EAA and the project as a whole were the subject of multiple legislative and other official proceedings," as shown by votes on the EAA by the City Council and the City's Economic Development Commission.

We agree with the plaintiffs, although with slightly differing rationale. Accordingly, we address only the first "prong" of section 425.16 analysis.

a. Second cause of action (City only, tortious breach of contract)

The alleged wrongful conduct in plaintiffs' tortious breach of contract cause of action is the City's violation of the terms of the EAA by allowing someone other than Rand Resources to act as its agent with respect to efforts to bring an NFL franchise to the City. Thus, the cause of action is not premised upon protected free speech or the right to petition for redress of grievances, but upon the City's conduct in carrying out (or not) its contract with Rand Resources, with an allegation the breach of contract was accompanied by fraud in two forms: covering up the breach (including Dear's false denial about knowing Bloom), and a pre-agreement misrepresentation that the EAA would be renewed if Rand made reasonable progress. The mere fact that some speech occurred in the course of the asserted breach does not mean that the cause of action arises out of protected free speech. To hold otherwise would place the vast majority, if not all, civil complaints alleging business disputes and a large portion of tort litigation within the scope of section 425.16.

As for the City's contention that this cause of action (as well as each of Plaintiffs' other claims) alleges speech or conduct falling within the scope of section 425.16, subdivision (e)(4), we disagree. While having an NFL team, stadium, and associated developments in Carson is no doubt a matter of substantial public interest, plaintiffs' complaint does not concern speech or conduct regarding a large scale real estate development or bringing an NFL team to Carson and building it a stadium. It instead concerns the identity of the person(s) reaching out to the NFL and its teams' owners to curry interest in relocating to Carson. The identity of the City's representative is not a matter of public interest. In this regard, it is noteworthy that the City was not paying Rand Resources for its services or even reimbursing Rand Resources for its expenses. Furthermore, the particular communications alleged in the cause of action, i.e., the false representation that the EAA would be renewed, Dear's false denial about knowing Bloom, and communications entailed in meetings between the defendants, are also not matters of public interest. As the *Commonwealth* court stated, "Just because you are selling something that is intrinsically important does not mean that the public is interested in the fact that you are selling it." (110 Cal.App.4th at p. 34.) "The part is not synonymous with the greater whole." (*Ibid.*) An issue of public interest must "go beyond the parochial particulars of the given parties." (*Ibid.*)

The City's (and the trial court's) reliance upon *Tuchscher, supra*, 106 Cal.App.4th 1219, and *Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8 is misplaced, for several reasons. Most significantly, both involved communications pertaining to an actual planned development, not the identity of the agent representing a party in negotiating matters that might lead to a development. In addition, in *Tuchscher*, the plaintiff conceded that the development in controversy was an issue of public interest. The appellate court stated, "We need not consider whether respondents' communications were made with an issue under consideration or review by a legislative, executive or judicial body, because there appears to be no dispute that the proposed development of Crystal Bay is a matter of public interest, and thus respondent's statements and writings

fall within subdivision (e)(4) of section 425.16." (106 Cal.App.4th at p. 1233.) Here, there is no such concession and the subject of the FAC is not communications pertaining to the actual development of real estate, but who represented the City in luring an NFL team to move to the City—a condition precedent to the development.

Somewhat similarly, the *Ludwig* court summarily concluded, without analysis, that development of an outlet mall, "with potential environmental effects such as increased traffic and impaction on natural drainage, was clearly a matter of public interest." (37 Cal.App.4th at p. 15.) Here, the FAC does not pertain to a real estate development project with such environmental or traffic effects, even though a redevelopment of contaminated land was an ultimate potential consequence of luring an NFL team to Carson. Thus, neither *Tuchscher* nor *Ludwig* supports, much less mandates, a conclusion that the subject matter of any cause of action in the FAC is a protected free speech or petitioning activity within the scope of section 425.16, subdivision (e)(4).

We also disagree with the City's contention that this cause of action (as well as each of Plaintiffs' other claims) alleges speech or conduct falling within the scope of section 425.16, subdivision (e)(2). The FAC alleges that the defendants' breach began soon after April 2013. The expiration, and thus the issue of renewal, of the EAA was more than one year away. Thus, the communications and conduct alleged in the cause of action were made solely in connection with the breach of the EAA, and not in connection with the issue of its renewal or any other issue under consideration or review by the City. Moreover, the particular communications alleged in the cause of action, i.e., the false representation that the EAA would be renewed, Dear's false denial about knowing Bloom, and communications entailed in meetings between the defendants were not made in connection with whether the EAA would be renewed or replaced with some agreement with the Bloom defendants. Indeed, Wynder's false representation that the EAA would be renewed was made before the EAA even went into effect.

For all of these reasons, the trial court erred by concluding the second cause of action fell within the scope of section 425.16.

b. Third cause of action (City only, promissory fraud)

The alleged wrongful conduct in plaintiffs' promissory fraud cause of action is Wynder's false representation regarding renewal of the EAA, made in August of 2012, before the City and Rand Resources entered into the EAA, in order to induce Rand Resources to enter into the agreement. Although the basis of the cause of action is a statement, the gravamen of the cause of action is the manner in which the City conducted itself in relation to the business transaction between it and Rand Resources, not the City's exercise of free speech or petitioning activity. Moreover, for the reasons previously stated, the statement does not fall within the scope of section 425.16, subdivisions (e)(2) or (e)(4).

For all of these reasons, the trial court erred by concluding the third cause of action fell within the scope of section 425.16.

c. Fourth cause of action (all defendants, fraud)

The gravamen of the fourth cause of action with respect to the City is, as with the second and third cause of action, the City's violation of the terms of the EAA by allowing someone other than Rand Resources to act as its agent with respect to efforts to bring an NFL franchise to the City and the manner in which the City conducted itself in relation to the business transaction between it and Rand Resources, not the City's exercise of free speech or petitioning activity. Moreover, the identity of the person representing the City in its efforts to lure an NFL team to the City is not a matter of public interest.

As to Dear, his statement that he did not know Bloom was not a matter of public interest and did not constitute free speech or petitioning activity protected by section 425.16.

As far as the Bloom defendants are concerned, the conduct at the heart of this cause of action is, in essence, their duplicitous attempts to pretend they were the City's official, authorized representative, including pretending they were Rand Resources by creating a new corporation with that name, with the apparent goal of deceiving those they dealt with to believe they were dealing with plaintiff Rand Resources. All of this pertains

to the Bloom defendants' private conduct of their own business, not their free speech or petitioning activities. They were not, for example, voicing criticism of a plan to have an NFL franchise base itself in the City or even a plan to build a stadium and sports-retail complex there. They were simply attempting to usurp, by any available means, the rights and role of plaintiff Rand Resources. Moreover, the identity of the person representing the City in its efforts to lure an NFL team to the City is not a matter of public interest, and the Bloom defendants' conduct commenced long before the consideration of the renewal of the EAA. To the extent the cause of action pertains to any communications, they are separate from any public issue and are instead unrelated private commercial conduct.

To the extent this or any other cause of action may be read as incorporating references to the decision not to renew the EAA, we conclude these are merely a reference to a category of evidence that plaintiffs have to prove the elements of their claims, including interference and damages, not the gravamen of the cause of action. "[W]e look to the allegedly wrongful and injurious conduct of the defendant, *rather than the damage which flows from said conduct*." (*Pebble Mines*, *supra*, 218 Cal.App.4th at pp. 396–397.)

For all of these reasons, the trial court erred by concluding the fourth cause of action fell within the scope of section 425.16.

d. Fifth and sixth causes of action (Bloom defendants, intentional interference with contract and prospective economic advantage)

The alleged wrongful conduct at the heart of plaintiffs' interference with contract and interference with prospective economic advantage causes of action is again the Bloom defendants' efforts to usurp Rand Resources's rights and role under the EAA. As addressed with respect to the fourth cause of action, this conduct arises from the Bloom defendants' private conduct of their own business, not their free speech or petitioning activities. To the extent the cause of action pertains to any communications, they are separate from any public issue and are instead unrelated private commercial conduct. To

the extent this or any other cause of action may be read as incorporating references to the decision not to renew the EAA, we conclude these are merely a reference to a category of evidence that plaintiffs have to prove their claims, not the gravamen of the cause of action.

For all of these reasons, the trial court erred by concluding the fifth and sixth causes of action fell within the scope of section 425.16. Given our conclusion that none of the challenged causes of action fall within the scope of the statute, we need not address the second step, plaintiffs' probability of success.

3. Attorney fees

Although it is unclear from the appellate record whether the trial court actually awarded any of the defendants attorney fees pursuant to section 425.16, subdivision (c), the trial court's determination that defendants were entitled to such fees must be reversed because defendants are no longer prevailing parties on their motions. As the new prevailing parties, the plaintiffs, upon remand, may seek attorney fees incurred in opposing the anti-SLAPP motions.

DISPOSITION

The May 7, 2015 order granting the anti-SLAPP motions is reversed. Any and all orders by the trial court awarding attorney fees to the defendants, or any of them, are also reversed. The May 26, 2015 "partial judgment" is vacated. The action is reinstated against all defendants and remanded for further proceedings. The plaintiffs may move for attorney fees incurred in opposing the anti-SLAPP motions. Appellants are awarded their costs on appeal.

CERTIFIED FOR PUBLICATION.

LUI, J.

We concur:

CHANEY, Acting P. J.

JOHNSON, J.

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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 2361 Rosecrans Ave., Suite 475, El Segundo, CA 90245.

On July 7, 2016, I served true copies of the following document(s) described as **PETITION FOR REVIEW** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY OVERNIGHT DELIVERY: I enclosed said document(s) in an envelope or package provided by the overnight service carrier and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight service carrier or delivered such document(s) to a courier or driver authorized by the overnight service carrier to receive documents.

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

Executed on July 7, 2016, at El Segundo, California.

DIANE N. BRANCHE

SERVICE LIST
Rand Resources, et al v. Leonard Bloom, et al
Court of Appeal Case No. B264493

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