ALESHIRE & WYNDER LLP
ATTORNEYS AT LAW

ORANGE COUNTY | LOS ANGELES | RIVERSIDE | CENTRAL VALLEY

William W. Wynder
wwynder@awattorneys.com
Cell (714) 313-7366

2361 Rosecrans Ave., Suite 475
El Segundo, CA 90245
P (310) 527-6660
D (310) 527-6667
F (310) 532-7395

AWATTORNEYS.COM

October 19, 2017

Honorable Chief Justice,
Tani Gorre Cantil-Sakauye
& Honorable Associate Justices,
Supreme Court of California
350 McAllister Street
San Francisco, California 94102-4797

Re: *Rand Resources, LLC et al. v. City of Carson et al.*, California Supreme Court Case No. S235735

To the Honorable Chief Justice & Associate Justices:

The City of Carson and former-Mayor Dear (collectively the "City") reply to the "Supplemental Letter Brief" of Rand Resources, LLC & Carson El Camino, LLC (collectively, "Rand") addressing the effect, if any, of *Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, on the issues presented in the current appeal. With respect, Rand both misrepresents the opinion of the court below and incorrectly construes this Court's *Park* opinion.

I. THE OPINION BELOW EFFECTIVELY CONCEDES THAT THE SECOND, THIRD, AND FOURTH CAUSES OF ACTION IN THE FIRST AMENDED COMPLAINT "ARISE FROM" THE ALLEGED CONDUCT (IN THE FORM A SPEECH) OF THE CITY

The court below reversed the grant of the City's special motion to strike on the grounds that it found the underlying conduct that formed the basis for the challenged causes of action did not constitute "protected activity." (Slip Op. at 16, 17.)[1]

However, in the section of the lower court's discussion of the law entitled "[d]etermining the applicability of the statute to a cause of action," that opinion can be fairly read to concede that the fraud-based causes of action in the Rand First Amended Complaint ("FAC") "arose from" alleged statements made by Messrs. Dear and/or Wynder. (Slip Op. at 11 ["[i]n 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."]

[1] The Court of Appeal found that the misrepresentations forming the bases of the challenged causes of action were not made in furtherance of a public issue or an issue of public interest, or in connection with an issue under consideration by a legislative body pursuant to Code of Civil Procedure, section 425.16, subd. (e).

According to the Second Appellate District, not only must a cause of action be "based on" some protected activity, but the "'act underlying . . . [a] cause of action must *itself* have been an act in furtherance of the right of petition or free speech.'" (Slip Op. at 11.) This language is roughly equivalent to what will be more carefully articulated in *Park.* According to our reading of your *Park* opinion, a claim "arises from" protected activity "if the protected activity *itself* is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted." (*Park, supra,* 2 Cal.5th at 1060 [emphasis in original].)

The court below found the underlying conduct that formed the basis for Rand's second cause of action was the City's "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" (i.e., Mr. Wynder's "promise(s)"). (Slip Op. at 13.) Also, the lower court's opinion concluded that "[t]he alleged wrongful conduct in [Rand's] [third] cause of action is Wynder's false representation regarding renewal of the EAA . . . ," acknowledging that "the basis of the cause of action is a statement." (Slip Op. at 16.)

The Court of Appeal further found the underlying conduct forming the basis for the fourth cause of action was the same as the second and third causes of action, or, in other words, the alleged misrepresentations of Messrs. Dear and Wynder. (Slip Op. 16.) The court below effectively acknowledged the correctness of the trial court's determination that causes of action two, three, and four were all "base[d] on" the "acts underlying . . . [the] cause[s] of action" alleged in the FAC.[2]

The misrepresentations relied upon by the Second Appellate District each "fall[ ] squarely within the ambit of the anti-SLAPP statute's 'arising from' prong" similar to the misrepresentations cited approvingly in your *Park* opinion from your still earlier *Navellier*

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[2] It bears noting that the Second Appellate District ***did not say***, for example, "we need not address whether the second, third, and fourth causes of action in the FAC are 'based on' protected activity, because we conclude the conduct in question is not protected under the anti-SLAPP statute." Neither did the court below say "we reserve to another day the question of when a cause of action is 'based on' protected activity, and only address whether the conduct alleged in the FAC is protected." Instead, after reviewing the teachings of this Court and sister courts of appeal on when a cause of action triggers application of the anti-SLAPP statutory scheme, the court below immediately turned its attention to the questions of whether the City's conduct (in the form on alleged misrepresentations/false promises/secret conversations) involved (1) a matter of public interest or (2) involved a matter under consideration by the City Council. (Slip Op. at 14, 15.) This failure to address or even reserve the "based on" criteria of an anti-SLAPP motion is telling and amounts to a tacit concession that the City's alleged conduct was, "itself," what Rand's fraud-based causes of action are "based on."

decision. (*Park*, *supra*, 2 Cal.5th at 1063.) The court below did, therefore, articulate an evaluative criteria which is harmonious with this Court's *Park* opinion. However, that court ***never questioned*** whether the conduct of the City (in the form of speech) was what the fraud-based causes of action were "based on" (to use the lower court's articulation of what will become your "arise from" criteria). It simply noted that criteria and immediately moved on to the legal issue of whether that conduct was protected. In short, the Second Appellate District focused its *de novo* review ***entirely*** on whether the City's alleged conduct (in the form of speech) constituted protected activity. (Slip Op. at 11-17.)[3]

Rand's Supplemental Letter Brief also makes a false distinction between "conduct" and "speech." Speech *is* simply a type or form of conduct. The question resolved in *Park* was under which circumstances does a challenged cause of action "arise from" conduct (which includes speech) protected by the anti-SLAPP statute. In the current appeal, the underlying conduct that forms the basis for the challenged causes of action is the speech of the Messrs. Dear and Wynder. According to *Park* (and the lower court for that matter), this means that the "aris[ing] from" criteria has been satisfied.

II. THE OPINION BELOW ERRONEOUSLY CONCLUDED THAT THE CONDUCT, IN THE FORM OF SPEECH, ALLEGED IN THE FRAUD-BASED CAUSES OF ACTION IN THE FAC WAS NOT "PROTECTED ACTIVITY" WITHIN THE MEANING OF THE ANTI-SLAPP STATUTORY SCHEME, AN ISSUE NOT ADDRESSED BY *PARK*

The lower court reversed the granting of the City's anti-SLAPP motion because it found that the conduct of the City (in the form of misrepresentations) did not constitute "protected activity" under Code of Civil Procedure, section 425.16, subd. (e)(2) or (e)(4)[4]. (Slip Op. at 16, 17.) *Park* did not address what conduct constitutes "protected activity" under section 425.16, subd. (e), which remains for resolution by this Court in this appeal.

Rand's reliance on *Park* for the proposition that the current appeal has been mooted is simply misplaced. In analyzing the "arising from" element, *Park* stated the focus should be on the basis of liability, not the conduct that preceded or followed it. (*Park*, *supra*, 2 Cal.5th at 1070.) Specifically, *Park* determined that, in a cause of action for denial of tenure for alleged national origin discrimination, the basis of liability was the denial of tenure, not the speech or writings that preceded or followed it. (*Park*, *supra*, 2 Cal.5th at 1068.)

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[3] In light of opinion of the Second Appellate District below, an argument can be made that Rand has failed to perfect for consideration on appeal the question of whether its fraud-based causes of action are "based on" (or "arise from" to use this Court's *Park* language) "protected activity."

[4] All further unlabeled statutory references are to the Code of Civil Procedure.

Rand, however, quotes *Park* by applying it in the context of whether conduct constituted "protected activity" pursuant to section 425.16, subd. (e). Rand's reliance on *Park* is, therefore, taken out of context. Because *Park* focused on the "arising from" and not the "protected activity" element of the process to determine whether an action is a SLAPP, its application to the present appeal is limited to supporting the determination that the "arose from" requirement has been met.

III. CONCLUSION

Park does not moot this appeal! The *Park* opinion actually supports the City's argument that the "arose from" element has been satisfied with respect to Rand's fraud-based causes of action (two, three, and four). *Park* does narrow the issues to be resolved on appeal to one; is the conduct which is the basis from which the FAC's second, third, and fourth causes of action arise "protected activity" within the meaning of the anti-SLAPP statute.

Respectfully Submitted,

ALESHIRE & WYNDER, LLP
SUNNY K. SOLTANI
WILLIAM W. WYNDER
ANTHONY R. TAYLOR

WILLIAM WYNDER
Attorneys for Defendants, Respondents,
& Petitioners CITY OF CARSON and
JAMES DEAR

PROOF 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 October 19, 2017, I served true copies of the following document(s) described as **REPLY LETTER BRIEF** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Aleshire & Wynder, LLP for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at El Segundo, California.

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 October 19, 2017, at El Segundo, California.

Judy C. Carter

ALESHIRE & WYNDER LLP ATTORNEYS AT LAW

SERVICE LIST
Rand v. Bloom
Case No. S235735

Joseph Ybarra Aaron M. May Kevin H. Scott Huang Ybarra Singer & May LLP 550 South Hope Street, Suite 1850 Los Angeles, CA 90071-1560	Telephone: 213/884-4900 Facsimile: 213/884-4910 Attorneys for Plaintiffs, Appellants, Respondents RAND RESOURCES, LLC and CARSON EL CAMINO. LLC
John V. Tamborelli Tamborelli Law Group 21700 Oxnard Street, Suite 1590 Woodland Hills. CA 91367	Email: Jtamborelli@lawtlg.com Counsel for Defendants/Respondents Leonard Bloom and US Capital LLC
Clerk of the Court COURT OF APPEAL Second Appellate District – Division 1 Ronald Reagan State Building 300 S. Spring Street, 2nd Floor, North Tower Los Angeles. CA 90013	1 Copy
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