Case No. S-235735

SUPREME COURT OF CALIFORNIA

RAND RESOURCES, LLC, et al.

Plaintiffs, Appellants & Respondents,

v.

CITY OF CARSON, et al.

Defendants, Respondents & Petitioners

OPENING BRIEF OF THE CITY OF CARSON & JAMES DEAR

On Review From the Court of Appeal for the State of California,
Second Appellate District, Division One
Appellate Case No. B264493

After An Appeal From The Superior Court For The State Of California,
County Of Los Angeles, Case No. BC564093, Hon. Michael L. Stern

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I. THE ISSUES AS FRAMED BY THIS COURT IN ITS ORDER GRANTING REVIEW

1. Did plaintiffs' causes of action alleging the breach of and interference with an exclusive agency agreement to negotiate the designation and development of a National Football League (NFL) stadium and related claims arise out of a public issue or an issue of public interest within the meaning of Code of Civil Procedure section 425.16?[1]

2. Did plaintiffs' causes of action arise out of communications made in connection with an issue under consideration by a legislative body?

II. INTRODUCTION & SUMMARY OF THE ARGUMENT

Not six months ago, this Court wrote: "The Legislature enacted section 425.16 in 1992, noting 'a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (§ 425.16, subd. (a).) . . . '[T]o encourage continued participation in matters of public

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[1] The Exclusive Agency Agreement ("EAA") at issue in this case specified that it was entered into "solely for the purpose of: (a) coordinating and negotiating with the NFL for the designation and development of an NFL football stadium ("NFL Stadium") in the City; (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 (collectively, the "NFL Agreements"); and (c) performing such other services as may be reasonably requested by City in connection with this Agreement (collectively, with the services specified in subparagraphs (a) and (b) above, the "Services"), and hereby grants to Agent the exclusive right to perform the Services subject to the terms and conditions set forth herein." (Appellants' Appendix, Volume I, Tab 2, Page AA00045.)

significance,' and to ensure 'that this participation should not be chilled through abuse of the judicial process,' the Legislature has specified that the anti-SLAPP statute 'shall be ***construed broadly***.'" (*City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 416 [emphasis added].) This Court went further noting "[t]he Legislature did not limit the scope of the anti-SLAPP statute to activity protected by the constitutional rights of speech and petition. It went on to include 'any act . . . *in furtherance* of' those rights. (§ 425.16, subd. (b)(1), italics added.). . . . The Legislature's directive that the anti-SLAPP statute is to be 'construed broadly' so as to 'encourage continued ***participation in matters of public significance'*** supports the view that statutory protection of acts 'in furtherance' of the constitutional rights incorporated by section 425.16 may extend beyond the contours of the constitutional rights themselves." (*Id.* at 421 [emphasis added].)

Accordingly, so long as the actions of a defendant fall within the parameters of section 425.16(e), the Anti-SLAPP statute is an available tool to challenge litigation brought against public officials (or private citizens for that matter) who are engaged in matters of important public interest. "As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution 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, or (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.***" (Code of Civ. Proc. §425.16, subd. (e) [emphasis added].)

Far from affording the Anti-SLAPP statute the "broad construction" this Court (and the plain words of the statute itself) commands, the Second Appellate District, in the opinion below, engaged in a disturbing "hair splitting" exercise, concluding the selection of an exclusive agent to represent the City of Carson (as contrasted with the actual negotiations of that exclusive agent) was not protected by section 425.16.

This opinion of the Second Appellate District is at odds with *Vasquez,* other seminal Anti-SLAPP decisions by this Court, including *Vargas v. City of Salinas* (2009) 46 Cal.4th 1, not to mention those of its sister appellate districts. It is further inconsistent with the jurisprudential body of law that has developed in construing and applying California's Anti-SLAPP statute and can become a slippery slope eroding away the protections of the Anti-SLAPP statutes. The opinion below constitutes plain error and must be reversed by this Court.

Selection, by the City Council of the City of Carson (and the public or private statements made by its public officials in connection therewith), of an "exclusive agent" to be the "face of the city" in its dealing with the National Football League ("NFL"), and one or more of its professional sports franchises, involving a potential billion dollar stadium project, was just as much a matter of public interest as would be the actual negotiations engaged in by that agent to lure the NFL and a franchise to Carson. By any standard, the EAA which is at the heart of the pending litigation meets the criteria to trigger application of the Anti-SLAPP statute.

Negotiation of this EAA (either at its inception or in connection with its possible extension) involved an "issue under consideration or review by a legislative [or] executive body"— specifically the Mayor and City Council of Carson. Alternatively, the EAA, and any statements allegedly made in connection with the same, involved the "furtherance of a . . . right of free speech" on the part of the Mayor of Carson, City staff or officials, and its City Council. And, saving the best for last, the EAA, its execution and possible extension, unquestionably involved a matter of great public interest in this community.

Reversal of the opinion below from the Second Appellate District is required for ***at least*** the following reasons. *First*, that opinion improperly focuses on protected speech, meetings and alleged "promises" regarding "who" the City was selecting as its exclusive agent to negotiate a possible

billion dollar NFL stadium project. As will be demonstrated, the fact that such alleged speech, meetings, and "promises" dealt with ***who*** would act as the City's exclusive agent to negotiate with the NFL, rather than statements, meetings, or "promises" made during those actual negotiations is, by law and sound public policy, a "distinction without a difference."

Second, all of the speech, meetings, and "promises" alleged in this action concerned a matter of public interest, the possible construction of a professional sports stadium project, and a contract, an EAA, both of which were under both the direct jurisdiction of, and consideration by, the Carson City Council. But, even if (for the sake of argument only), there is a distinction to be made between the "who" of the negotiator and the "what" of those actual "negotiations," selection of the City's exclusive agent is at least as critical to delivering a proposed stadium project as are the negotiations leading up to the project themselves. All such speech is inextricably intertwined (the "who" of the negotiations and the "what" of the negotiations) and must be protected within the meaning of the Anti-SLAPP statute.

Third, this Court's decisions in *Vasquez* and *Vargas* make clear that the Anti-SLAPP statute is to be interpreted broadly. This Court has carefully made reference to the legislative analysis of the 1997 amendments to the Anti-SLAPP statute. Quoting from a law review article that identified "a typical SLAPP suit scenario," this Court embraced the notion

that an abusive lawsuit could be brought against both public officials and private individuals and would still qualify for protection under the Anti-SLAPP statute.

The First Amended Complaint ("FAC") at issue in this appeal is precisely the type of abusive litigation that the Legislature had in mind when enacting amendments to the Anti-SLAPP statute in 1997. If the decision of the Second Appellate District goes uncorrected, that decision will contravene both legislative intent and this Court's recent decisions under the Anti-SLAPP statute.

Lastly, and of greatest concern, however, is the chilling effect the lower court's opinion will have on government officials as they act in the public interest. To say that a government official is exposed to claims of "fraud" because (s)he engages in conversations about whom a public agency should select or continue to use as its exclusive agent (even in the face of an existing and executory agreement designating that exclusive agent for a term of years) is to stifle speech, bully a public official, and force that official to cower in silence for fear of personal liability for speaking out on a matter of public interest.

Even if, speaking hypothetically, that speech or conduct were to give rise to a potentially viable claim for breach of contract, that fact, standing alone, does not defeat the protected nature of that speech and does not alter the fact that the public official is engaging in protected activities involving

a matter of public interest. So conceding, for the sake of review by this Court ***only***, that Rand Resources may potentially be able to plead a garden variety breach of contract claim, that does not defeat the privilege to engage in protected speech nor does it defeat the fact that such protected speech involved an important matter of public interest.

Accordingly, Petitioners respectfully request that the published opinion of the Second Appellate District in this case be reversed and that the trial court's decision granting Petitioners' Anti-SLAPP motion be affirmed and reinstated.

III. SUMMARY OF THE RELEVANT ALLEGED FACTS

A. The "Exclusive Agency Agreement" As Alleged In The FAC

Plaintiffs/Respondents, Richard Rand, owner of Rand Resources, LLC, and Carson El Camino, LLC (collectively "Rand Resources"), claim to be "real estate developer[s] with a track record of successfully developing properties all over the globe." (AA:I:2:24, 28.)[2] In 2008, Rand Resources and Defendant/Petitioner, the City of Carson ("City"), by and through its now-dissolved redevelopment agency, entered into an alleged exclusive negotiating agreement ("ENA"), 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. (AA:I:2:28-29.)

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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.

Multiple extensions to this ENA were alleged to have been 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") in 2012. (AA:I:2:29, 43-48.)

Under the EAA, Rand Resources "would become the exclusive agent of the City" for the purpose of "(a) coordinating and negotiating with the NFL for the designation and development of an NFL football stadium ("NFL Stadium") in the City" and "(b) facilitating the execution of appropriate agreements between the NFL and the City documenting the designation and development of [Rand Resources'] Property as an NFL football stadium". (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 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.)

As the EAA was about to expire in 2014 according to its terms, Rand Resources applied for an eleventh-hour extension of the same.[3] The

[3] Curiously, the FAC fails to allege any meaningful progress on the part of Rand Resources in securing an NFL franchise or building a stadium

City Council, in a public meeting on a duly noticed agenda, unanimously voted to deny the extension request.[4] Rand Resources then filed this action.

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

Rand Resources' FAC is the operative pleading naming the City and/or its then-Mayor, Defendant/Petitioner Mr. James Dear ("Dear"), as defendants (collectively "Petitioners"). (AA:II:6:417.) The FAC attempts to add a new second, third, and fourth cause of action, which are based on ***alleged*** fraud by the City and/or Dear[5] 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 appeal.[6]

Rand Resources alleges that Dear and other unidentified "City officials" held "clandestine meetings," "talk[ed] by the phone or through

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until Mr. Rand asked for his eleventh-hour extension of the EAA. Then, conveniently and for the first time, Mr. Rand alleges all the great things he had done (and which he had never bothered to share with City staff before that time).

[4] Although not explicit from the record, the City was approached by representatives of the San Diego Chargers, of the National Football League ("NFL"), in late 2014, ***after*** the expiration of the EAA, to discuss the potential of an NFL stadium in Carson. Neither Rand Resources nor the Bloom Petitioners were involved in any of these meetings or any later discussions with this franchise. Ultimately, the NFL's governing body voted to allow a stadium to be built in the City of Inglewood rather than in Carson.

[5] The purported fourth cause of action is the only claim asserted against Dear.

[6] Petitioners' Special Motion to Strike did not attack the breach of contract cause of action, which remains pending before the Superior Court.

text messages," and sent "confidential emails." (AA:I:2:31, 35-36, 37.) The purpose of these communications was "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 Resources (AA:I:2:35-36), the FAC nowhere alleges the source of this claimed legal "duty of disclosure" owed on the part of Dear or the City to Rand Resources. Neither does the FAC purport to allege the ultimate "facts" giving rise to such duty.

Specifically, Rand Resources alleges the following protected petitioning and speech under the Anti-SLAPP statute:

- "[B]eginning in at least the summer of 2013, City officials, including Mayor James Dear, began secretly meeting with Leonard Bloom, the managing director and Chief Executive Officer of U.S. Capital, LLC, , [sic] regarding bring the NFL to Carson." (AA:I:2:24.)
- "For example, upon information and belief, Mr. Bloom and Mayor Dear met with NFL executives in Beverly Hills, held meeting [sic] at City offices and elsewhere to raise money to bring an NFL team to the City, spoke with representatives of NFL teams, including the San Diego Chargers, about relocating to Carson, and even used promotional materials for a football

stadium that copied information from materials created by Rand. Upon information and belief, Mr. Bloom did this with the knowledge and approval of Mayor Dear and other City officials." (AA:I:2:24-25.)

- In August 2014, Rand requested that the City approve the first of the two automatic extensions of the EAA. Despite Rand meeting all of the necessary conditions for the extension, the City refused to grant it. As Mayor Dear explained to Mr. Rand, the City 'no longer needed' him because 'we can do it ourselves.'" (AA:I:2:25.)
- "[T]he City—and specifically, City Attorney Bill Wynder—represented to Mr. Rand and his counsel that, so long as Plaintiffs showed reasonable progress with respect to bringing an NFL franchise to Carson, the EAA would be extended, just as the ENA had been several times. To reflect this, the EAA states expressly that, '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.'" (AA:I:2:30.)
- "Leonard Bloom and U.S. Capital, LLC, with the knowledge and support of representatives of the City, including Mayor Dear, were contacting NFL representatives and purporting to be agents

of the City with respect to bringing an NFL franchise to Carson. In so doing, Mayor Dear, Mr. Bloom and U.S. Capital, LLC would send each other 'confidential' emails to discuss matters relating to building a stadium in Carson. Further, Mayor Dear regularly sent Mr. Bloom and U.S. Capital, LLC private and confidential City of Carson documents relating to development of an NFL stadium, and Mr. Bloom and Ms. Paul routinely ghostwrote letters for Mayor Dear that Mayor Dear put on his official letterhead and sent to third parties as part of their efforts to undermine the EAA. . . . Indeed, Messrs. Bloom and Dear were involved in discussions with the City as to how to 'get around' the EAA." (AA:I:2:31.)

- "After hearing rumors about Mr. Bloom's activities with respect to the City and the NFL, Mr. Rand asked the Mayor about Mr. Bloom's involvement. The Mayor falsely told Mr. Rand that he did not know Mr. Bloom and was not aware of what, if anything, Mr. Bloom was doing with respect to the City and the NFL. At a later time, Mr. Rand asked the Mayor to set up a meeting with Mr. Bloom. At that time the Mayor acknowledged he did know Mr. Bloom and told Mr. Rand that Mr. Bloom would not meet with him." (AA:I:2:31-32.)

- "Prior to the expiration of the original term of the EAA, Rand sought to exercise its right to extend the agreement for another one-year period. To that end, Rand provided the City with an extension request and a report detailing its efforts to date and the anticipated steps to be undertaken in the extension period. Even though the EAA states that the City 'shall grant such extension request' under those conditions, the City [Council] did not do so. The City [Council]'s decision was contrary to that of Carson's Economic Development Commission, which voted unanimously (13-0) in favor of extending the EAA with Rand." (AA:I:2:32.)
- "After Rand provided the City with its extension request but before the City voted on the extension, Mr. Bloom and Ms. Paul sent confidential emails to Mayor Dear and other City officials to try to schedule a meeting 'as soon as possible' to discuss the joint agreement. Upon information and belief, Mr. Bloom and Ms. Paul met with Mayor Dear and at least one Carson councilperson prior to the EAA extension vote to discuss and conspire about how to breach the EAA and not extend it." (AA:I:2:32.)
- "Days before the City voted not to extend the EAA, a meeting took place that was attended by Mr. Rand, his counsel, City Attorney Wynder, and City Manager Nelson Hernandez. At this meeting, Mr. Wynder indicated the City was not going to extend

the EAA, notwithstanding the City's prior promises to extend the agreement and the explicit terms of the EAA. Mr. Wynder further stated that the City had been 'walking on eggshells' with Leonard Bloom and 'did not need' Rand anymore." (AA:I:2:33.)

- In specific support of the purported Second Cause of Action for "tortious breach of contract" against the City, Rand Resources alleges "[t]he City took actions to cover-up and conceal its breach of the EAA from Rand. For example, the City met in secret with Mr. Bloom and others to discuss bringing the NFL to Carson and did not inform Rand about those clandestine meetings [again this cause of action is devoid of ultimate facts giving rise to a duty of disclosure]. Further, even though Mayor Dear was aware of the secret meetings with Mr. Bloom and his interactions with the NFL, Mayor Dear falsely told Mr. Rand that he did not know Mr. Bloom and was not aware of what, if anything, Mr. Bloom was doing with respect to the City and the NFL. Moreover, prior to entering the EAA, the City Attorney, Mr. Wynder, falsely told Mr. Rand that, so long as Rand showed reasonable progress with respect to bringing and NFL franchise to Carson, the EAA would be renewed." (AA:I:2:35-36.)
- In specific support of the purported Third Cause of Action for promissory fraud against the City, Rand Resources alleges "[i]n

August 2012 prior to Rand entering into the EAA, City Attorney Bill Wynder, acting on behalf of the City, told Mr. Rand 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. This was a material promise to Rand and Rand would not have entered into the EAA without this promise." (AA:I:2:36.)[7]

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[7] While not directly an issue within the parameters of a Special Motion to Strike, it is "black letter law" that a City Attorney has no authority to bind a City by his oral statements and only an action by a City Council (the legislative body of a city), taken at a duly noticed and public meeting, can have such legal effect. (Government Code §§ 41801-05, 40602; *see also* Carson Municipal Code § 2417 (b) "All ordinances, resolutions and contract documents ***shall, before presentation to the Council***, have been approved ***as to form and legality*** by the City Attorney or his authorized representative, and, where there are substantive matters of administration involved, shall have been examined and approved as to such matters by the City Administrator or his authorized representative"; *South Bay Senior Housing Corp. v. City of Hawthorne* (1997) 56 Cal.App.4th 1231, 1236 ["by the plain language of the statutes, the City's power to make a contract is limited to the prescribed method and, by necessary implication, that ***any other method is prohibited***—which means that, unless it was signed by the Mayor, the contract with South Bay is void and no implied liability can arise under that contract." [emphasis added]; *Montgomery v. Superior Court* (1975) 46 Cal.App.3d 657, 670 "***city councils . . . define and control the duties of their city attorneys***. This result is consistent with the general principle that an attorney's duties are ordinarily defined and controlled by his client."].) There is no allegation in the FAC that Carson's City Council ever afforded the City Attorney ***any*** authority to bind the City Council by his oral statements.

- In specific support of the purported Fourth Cause of Action for fraud against the City, James Dear, U.S. Capital and Bloom, Rand Resources alleges "[a]mong other things, Mr. Bloom and Ms. Paul scheduled their meetings with City officials and employees in secret so that Rand would not learn about them. Mayor Dear, U.S. Capital, LLC, and Mr. Bloom would send each other confidential emails to discuss their plans and efforts to interfere with the EAA. Mr. Bloom also instructed at least one person he was communicating with about the NFL to not communicate by email and instead to only talk by the phone or through text messages." (AA:I:2:37.) "In addition, Mr. Rand asked the Mayor about Mr. Bloom's involvement with the City and the NFL. Consistent with the conspiracy to conceal his activities with Mr. Bloom, the Mayor falsely told Mr. Rand that he did not know Mr. Bloom and was not aware of what, if anything, Mr. Bloom was doing with respect to the City and the NFL. Mayor Dear made these false statements knowing at the time that they were false and with the intent to deceive Rand and induce reliance." (AA:I:2:38.)[8]

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[8] Petitioners vigorously dispute ***each*** of these factual allegations and note that the lower court's recitation of the "facts" in its published opinion was based upon its obligation to accept as true, for purposes of ruling on the special motion to strike, Rand's allegations in his FAC (regrettably the

Petitioners' special motion to strike included all causes of action in the FAC naming the City or Dear, except for the single purported cause of action for breach of contract against the City.

C. The Superior Court Correctly Grants Two Anti-SLAPP Motions

On May 7, 2015, the Superior Court ***granted two special motions*** to strike in their entirety.[9] The trial judge correctly found that the allegations of the FAC were the functional equivalent of "an action for breach of an exclusive commercial development contract ["ENA"] with a public entity (containing causes of action for inducing breach of contract, intentional and negligent interference and Business and Professions Code section 17200) [and] 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; *Tuchscher Dev. Enters., Inc. v. S.D. Unified Port Dist.* (2003) 106 Cal. App. 4th 1219.)

The trial judge went onto explain that, under *Tuchscher*, communications involving the proposed development of such commercial

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lower court did not afford Petitioners, or its legal counsel, the courtesy of acknowledging that it was required by law to accept the alleged facts as being true thereby inadvertently leaving the impression that the alleged facts were true and correct). To be clear, those allegations are just that – none of the "facts" have been adjudicated as true or correct. In point of fact, they are neither true nor correct!

[9] On April 8, 2015, Defendants/Petitioners, Leonard Bloom, and U.S. Capital, LLC ("Bloom Petitioners"), filed a separate special motion to strike under California's Anti-SLAPP statute, which was set for hearing with Petitioners' motion on May 7, 2015.

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 to the allegations of the FAC, the trial judge next examined Rand Resources' claims of liability against all of the defendants (the Petitioners in this appeal). The trial judge found that, pursuant to Government Code § 818.8, the City enjoyed absolute immunity from any cause of action based on fraud. (AA:IV:21:1096.) Further, the trial judge found that, pursuant to Civil Code § 47, subdivision (b), the statements of Petitioners in this case were made in connection with a legislative proceeding because they were a part of the deliberative process utilized by Carson's City Council (the only body with authority to bind the City) in its public action denying Rand Resources' request to extend the EAA. As such, all purported statements of the City, or those of its legal counsel, or Dear, its Mayor and one of five members of its City Council, were protected by Civil Code § 47, subdivision (b).

Finally, the trial judge 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. In so ruling, the trial judge rejected 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.)

Having found that Dear was immune from liability as a matter of law, the trial judge, applying Government Code § 815.2, then extended that immunity to the City. (AA:IV:21:1098.) Having found that the relevant causes of action arose out of protected activity and that Petitioners demonstrated that Rand Resources would not prevail on the merits of its causes of action, the trial judge granted both of the Special Motions to Strike in their entirety.

D. The Second Appellate District Erroneously Reverses The Decision Of The Superior Court

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 [Anti-SLAPP] statute."[10] The lower court rejected the fundamental premise upon which the Superior Court had ruled by attempting to distinguished the allegations of the FAC from the teachings

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[10] The lower court did so *without* reaching the question of whether there was probability of Rand Resources prevailing on the merits of the FAC.

of the *Tuchscher* Court. In its effort to do so, the lower court erroneously concluded that the EAA was *not* an issue of public interest.

In so doing, the lower court committed reversible error. The Second Appellate District offered no meaningful rationale or reasoning to refute the "premise" of the Superior Court's rulings – that the EAA alleged in Rand Resources' FAC is the ***functional equivalent*** of the ENA considered by the Court in *Tuchscher*. That error has now created a "split of authority" between two of the sister appellate districts in this State that requires corrective action by this Court.

IV. THE EAA, AND ANY ALLEGED STATEMENTS AND "PROMISES" MADE IN CONNECTION THEREWITH, INVOLVED, AT A MINIMUM, A MATTER OF SIGNIFICANT PUBLIC INTEREST OVER WHICH THE CARSON CITY COUNCIL HAD DIRECT JURISDICTION

The issues[11] framed by this Court in its order granting review correctly focuses on two core issues: (1) whether the claims in this lawsuit that are subject to Petitioners' Anti-SLAPP motion arise out of a public issue or an issue of public interest and (2) whether the claims in this lawsuit that are subject to Petitioners' Anti-SLAPP motion arise out of communications made in connection with an issue under consideration by a

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[11] While Petitioners focus their arguments on the issues framed by this Court in its order granting review, as noted earlier in the summary of the argument, there are at least three of the criteria under section 425.16 subdivision (e) implicated by the allegations of the FAC and which the Second Appellate District ignored.

legislative body. As discussed in detail below, the answer to both of these questions is an unqualified "yes."

Specifically, the communications at issue here focused on the potential development of a NFL stadium in Carson, a public issue of not only local, but of national interest. The NFL stadium project was proposed on a former "brownfield" site with significant environmental and site remediation elements that are, themselves, public issues and issues of public interest. Who would represent Carson in this massive undertaking is equally a matter of public interest because the better the negotiating party, the more likely that a NFL stadium would be delivered. Each of these arguments are set forth in greater detail in Section IV.B., below.

In response to the second issue presented by this Court, this dispute arises out of communications made in connection with an issue under consideration by a legislative body. The EAA that is the subject of this lawsuit was entered into by the Carson City Council in 2012. Carson's Economic Development Commission reviewed, in a public meeting on a duly noticed agenda, complete with public comments, its recommendation on the extension of the EAA. (AA:I:2:32.) Carson's City Council made the final decision on whether to extend the EAA, also at a public meeting, on a duly noticed agenda, complete with public comments on the same, in 2014. (AA:I:2:25.)

This dispute unquestionably arises out of communications made in connection with an issue under consideration by a legislative body in addition to being a public issue and an issue of public interest. (AA:I:2:32-33, 35.) Petitioners' arguments concerning the communications that were made in connection with an issue under consideration by a legislative body are set forth in greater detail in Section IV.C., below. What follows is the detail of those arguments.

A. This Court Has Repeatedly, And Most Recently, Recognized That The Anti-SLAPP Statute Was Adopted, Then Amended, To Protect The Very Type Of Communications Alleged In The FAC

As this Court wisely recognized in *Vargas v. City of Salinas*, and recently reaffirmed in *City of Montebello v. Vasquez*:

> "Section 425.16 was first enacted in 1992. In 1997, in response to several Court of Appeal decisions that had narrowly construed the scope of the statute, the Legislature amended the measure ***to clarify its intent that the provisions of the statute are to be interpreted broadly***. (Stats.1997, ch. 271, § 1 [amending § 425.16, subd. (a)].) A legislative analysis of this amendment approvingly quoted a passage from a then recent law review article that identified ***as 'a typical SLAPP suit scenario' a situation in which an abusive lawsuit is brought against both public officials and***

private individuals. (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 1296 (1997–1998 Reg. Sess.) as amended June 23, 1997, p. 2, quoting Sills, SLAPPS: How Can the Legal System Eliminate Their Appeal? (1993) 25 Conn. L.Rev. 547 (Sills article); see also Sills article, *supra*, 25 Conn. L.Rev. 547, 550 ['Just as SLAPPs filed against individuals have a 'chilling' effect on their participation in government decision making, SLAPPs filed against public officials, who often serve for little or no compensation, may likely have a similarly 'chilling' effect on their willingness to participate in governmental processes'].)"

Vargas v. City of Salinas, *supra*, 46 Cal.4th 1 at 19 n. 9 [emphasis added]. In *Vargas*, proponents of a local ballot initiative to repeal a Utility User Tax sued the city and the city manager, alleging improper government expenditures for web site postings, a newsletter, and documents distributed from public facilities relating to the ballot measure. The web site postings, newsletter and documents were prepared after the City Council had determined which specific services would be cut if the Utility User Tax were repealed, and specified which services would be affected.

In affirming the successful motions of the city and city manager under the Anti-SLAPP statute, this Court found "it clear, in light of both the language and purpose of California's Anti-SLAPP statute, that the statutory

remedy afforded by section 425.16 extends to ***statements and writings of governmental entities and public officials on matters of public interest and concern that would fall within the scope of the statute if such statements were made by a private individual or entity.***" (*Id.* at 17 [emphasis added].)

Continuing, this Court further ruled that "Section 425.16, subdivision (e) does not purport to draw any distinction between (1) statements by private individuals or entities that are made in the designated contexts or with respect to the specified subjects, and (2) statements by governmental entities or public officials acting in their official capacity that are made in these same contexts or with respect to these same subjects." (*Id.* at 18.) "Moreover, the legislative history indicates that the Legislature's concern regarding the potential chilling effect that abusive lawsuits may have on statements relating to a public issue or a matter of public interest extended to statements by public officials or employees acting in their official capacity as well as to statements by private individuals or organizations." (*Id.* at 18-19.)

In like fashion, the FAC alleges communications and meetings between a public official, Mayor Dear, and a private individual, Dr. Leonard Bloom, related to the consideration of what would be for the City of Carson (or any city for that matter) a potentially historic public contract involving a professional sports facility at which an NFL franchise would

play its home football games. These alleged communications between a public official and a private individual related to an issue of such widespread public importance are exactly the type of activities the Anti-SLAPP statute was designed to protect.

The FAC further alleges that the City engaged in communications with the Bloom Petitioners about whether they could "take over" as agents for the City once the EAA expired. (AA:I:2:31.) Even if (for the sake of argument only) the City was prohibited from engaging another agent to act on its behalf during the life of the EAA, ***nothing*** in the express terms of the EAA (or as alleged in the FAC for that matter) would have prevented the City from engaging in important communications with a third party regarding who should represent the City on a going-forward basis upon the expiration of the existing EAA. (AA:I:2:43-49.)[12]

Clearly, therefore, all communications or "promises" of either the City or Dear with respect to whom should be authorized to act as the agent of the City on a going-forward basis involving negotiations for a potential billion dollar NFL franchise and/or a professional sports facility, are a matter of public interest. These communications ***must*** be protected and every city ***must*** be free to engage in such communications. Most

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[12] In reality, the FAC 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 exclusive agent after the EAA expires, or whether to even have an exclusive agent on a going forward basis.

importantly, communications of the sort alleged in the FAC ***must*** be protected from the very kind of SLAPP litigation represented by the FAC.[13]

1. There Is No Danger That Reversing The Lower Court Will Encourage Allegedly "Illegal Conduct" Or Protect The Same Under The Anti-SLAPP Statute

Neither does application of the Anti-SLAPP statute to the FAC encourage "fraudulent breach of contract by public entities" as argued by Rand Resources to the court below. Extant Anti-SLAPP case law provides ***ample safeguards*** against such claimed illegal behavior. In the ***first step*** of its analysis of any Special Motion to Strike, a trial court determines whether a purported cause of action arises from a protected activity. As

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[13] Indeed, but for the "bare bones" allegations that the City Attorney "promised" Rand that the EAA would be extended (a "promise" that Rand Resources is charged, in law, to know cannot be true, note 7, *supra*) the entire theory of the FAC collapses once the EAA expires according to its own terms. California law is clear that ***persons dealing with a public agency – like Rand Resources – are presumed to know the law with respect to any agency's authority to contract.*** (*Katsura v. City of San Buenaventura* (2007) 155 Cal.App.4th 104, 109; citing, *Burchett v. City of Newport Beach* (1995) 33 Cal.App.4th 1472, 1479 ["One who deals with the public officer stands presumptively charged with a full knowledge of that officer's powers, and is bound at his . . . peril to ascertain the extent of his . . . powers to bind the government for which he . . . is an officer, and any act of an officer to be valid must find express authority in the law or be necessarily incidental to a power expressly granted."].) Moreover, "to be valid, any act of an officer must find express authority in the law or be necessarily incidental to a power expressly granted." (*Id.*); *Mezzetta v. City of American Canyon* (2000) 78 Cal.App.4th 1087, 1089 [voiding an oral contract when relevant statutes prohibited city from entering into oral contracts]; *Foxen v. City of Santa Barbara* (1913) 166 Cal. 77, 81–82, [plaintiff denied recovery for injuries suffered when working on a city project because city had been required to let the contract out to the highest bidder, not employ workers directly].)

this Court has held, "section 425.16 cannot be invoked by a defendant whose assertedly protected activity is ***illegal as a matter of law*** and, for that reason, not protected by constitutional guarantees of free speech and petition." (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 317 [emphasis added].)

For speech to be deemed "illegal as a matter of law to defeat a defendant's showing of protected activity . . . [t]he defendant ***must concede the point, or the evidence conclusively demonstrate it***, for a claim of illegality to defeat an anti-SLAPP motion at the first step." (*City of Montebello v. Vasquez, supra,* 1 Cal.5th at 424 [emphasis added].)

Notably, Petitioners have never conceded that any of the protected activities in which they allegedly engaged were illegal and Rand Resources did not offer one scintilla of evidence to the trial court that the alleged speech, meetings or "promises" were "illegal as a matter of law."[14]

In the ***second step*** analysis of any Anti-SLAPP motion, a trial court determines whether the plaintiff (Rand Resources) has provided *prima facie* evidence showing the merits of its purported cause of action. "[A]ny 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." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 94, quoting *Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, 1367.) As noted,

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[14] Indeed they were not. *See also,* notes 7 & 13, *supra.*

Rand Resources offers no evidence as to the claimed facial illegality of any speech, meetings, or promises alleged in the FAC. Accordingly Rand Resources utterly failed to allege or demonstrate the facial illegality of anything alleged in the FAC.

At both steps of analysis, any purported cause of action based on alleged illegal activity is scrutinized by the court. Under this Court's standard of review of an Anti-SLAPP motion, the alleged actions and communications of the City and Mayor Dear are protected communications, as a matter of law, that the Anti-SLAPP statute was intended to protect.

B. All Purported Causes Of Action Alleging the Fraudulent Breach Of And Interference With An Exclusive Agency Agreement Arise Out Of A "Public Issue" *Or* An "Issue Of Public Interest" Within The Meaning Of Code Of Civil Procedure Section 425.16

The real estate development alleged in the FAC, by any standard, meets the "broad" definition of what constitutes a "public issue" or an "issue of public interest." (Code Civ. Proc. § 425.16, subd. (e)(4) [the Anti-SLAPP statute encompasses "any other conduct . . . in connection with a public issue or an issue of public interest."].) "The definition of 'public interest' within the meaning of the Anti-SLAPP statute has been broadly construed to include not only governmental matters, but also 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 import of the contemplated development project in the City of Carson. The EAA confers "exclusive agency" on Rand Resources "for the [singular] 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 potentially billion dollar plus project is a matter of national interest by the public and the media, let alone one of "public interest" for a city the size of Carson with a population under

100,000. As already noted, the hotly contested and highly desirable construction of a major sports stadium and the hosting of an NFL franchise would have been monumental 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 by the *Ludwig* Court.

1. The Second Appellate District Failed To Correctly Characterize The Allegations Of Fraud In The FAC As Involving A Matter Of Public Interest & The Opinion Of The Lower Court To The Contrary Must Be Reversed

The lower court's characterization of the communications alleged in the FAC as "not concern[ing] bringing an NFL team to Carson" (*Rand Resources, LLC v. City of Carson* (2016) 247 Cal.App.4th 1080, 1093) is directly contradicted by the allegations of FAC. Rand Resources expressly alleges 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 [emphasis added].) Moreover, the City's alleged acts of fraud all relate to an exploration of whether the Bloom Petitioners could take over the exclusivity arrangement and negotiate ***with the NFL*** at the expiration of the EAA.

Rand Resources alleges that "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].) Without question, an EAA to develop a NFL stadium is a "matter of public interest" as a matter of law. As such, communication *related to the EAA* concerns a matter of utmost public interest.

Even if, for the sake of argument only, the characterization of the allegations of the FAC as not dealing with bringing an NFL team to Carson, but rather as alleging speech, meetings and "promises" about who should represent the City in bringing an NFL team to Carson are correct, such a distinction should not be used to defeat the application of the Anti-SLAPP statute to such communications. "Who" is to represent the City in luring a NFL franchise to Carson, or in development of a major sports facility in the City, is just as much a matter of public interest as the "what" of those actual negotiations with the NFL and/or a billion dollar professional football franchise itself. This Court should reject the hair-splitting distinction made by the lower court in its erroneous decision.

2. The Second Appellate District's Attempt To Distinguish The Allegations Of The FAC From The Teachings Of *Tuchscher* Should Be Rejected By This Court & Its Opinion Must Be Reversed

The well-reasoned opinion in *Tuchscher* is fully complimentary to, and consistent with, the doctrinaire already articulated by this Court in its

interpretation of the scope and meaning of California's Anti-SLAPP statutory scheme. (*Tuchscher Dev. Enters., Inc. v. S.D. Unified Port District, supra,* 106 Cal.App.4th at 1232-35; *see also,* AA:IV:21:1095 ["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."].)

Indeed, the *Tuchscher* decision is almost "on all fours" with the Rand Resources FAC and involved "an exclusive negotiating agreement . . . [an "ENA" 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 [emphasis added].)

After the ENA "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 [the rival developer's] objective was to secure the rights to develop . . . the Crystal Bay project." (*Id.* at 1228.)

Rand Resources' FAC alleges an Exclusive Agency Agreement ("EAA") "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, Rand Resources alleges 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 Resources further 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.)

(a) The Second Appellate District Relied On A "Concession" Made By The *Tuchscher* Plaintiff, A Second Distinction, in Law and Public Policy, "Without a Difference" In The Application Of The Anti-SLAPP Statute

The lower court went further arguing that "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." (*Rand Resources, LLC v. City of Carson*, *supra*, 247 Cal.App.4th at 1094; [emphasis added].)

The lower court ignored that Rand Resources' parcel of land allegedly to be developed was specifically identified in the EAA. Conceding, for the sake of argument only, that this singular factual dissimilarity is appropriate to sustain the "distinction" the lower court seeks to make, there is no analysis in the opinion of the lower court that would support a conclusion that such "distinction" means that the teaching of the *Tuchscher* Court should not be applied to the allegations in the FAC.

With respect, the issue of whether the discussions alleged in the FAC which focused on "who" would represent the City in dealing with the NFL, rather than the "what" of those negotiations for a professional sports facility and/or the landing of a NFL team, is insufficient to sustain the

conclusion that this alleged speech is no longer subject to the protections of the Anti-SLAPP statute.

The identity of the City's "exclusive agent" in dealing with the NFL is as much a matter of public concern and interest as would be the actual negotiations for the development of the sports facility and the luring of an NFL franchise to Carson. To put it bluntly, the "better" the exclusive agent, the more likely that agent is to successfully negotiate with the NFL, or one of its professional football teams, to build a sports complex and then be given permission to relocate to Carson.

The distinction of alleged speech, meetings, and "promises" about the "agent" versus alleged speech, meetings, and "promises" about the "actual development" is, with respect, a second "distinction without a difference" in the law governing the protections afforded by the Anti-SLAPP statute.

(b) The Second Appellate District Was Unfair In Its Characterization Of The *Tuchscher* Opinion In An Effort To Avoid Applying Its Plain Teachings To The FAC & Its Opinion To The Contrary Must be Reversed

Moreover, the lower court was unfair in its characterization of the *Tuchscher* opinion. The *Tuchscher* Court ***did not simply rely*** on a "concession" of the parties regarding the public interest in the ENA at issue in that case. On the contrary, the *Tuchscher* Court's opinion focuses on the environmental effects of and the public's interest in the proposed

development, "***[t]he 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. 1234 [emphasis added].)[15] In the present case, both the FAC and the Declaration of Saied Nasseh In Support of the City's Anti-SLAPP motion emphasize the community interest in and the potential environmental, fiscal, cultural, and recreational impacts of an NFL stadium in the City. (AA:I:2:23-44; AA:I:5:78-81.)

Moreover, both the ENA in *Tuchscher* and the EAA alleged in the FAC involve the identity of the individual negotiating the development of a large project. Pursuant to the terms of the ENA, "the City 'agree[d] not to negotiate with any other person or entity regarding the acquisition and

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[15] Equally important, the determination of what constitutes a "matter of public interest" is a question of law to be decided by the courts in the first instance, and not simply a matter of "concession" between litigants. (*Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, 1130 ["Section 425.16 requires that a court engage in a simple, two-step process in ruling on a special motion to strike. *First*, the court must decide whether the defendant has made a sufficient threshold showing that the challenged cause of action is subject to a special motion to strike. *Second*, if the threshold showing has been made, the court must determine whether the plaintiff has demonstrated sufficient minimal merit to be allowed to proceed . . . Nothing outside of this two-step process is relevant." (emphasis added)].)

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 alleged in the FAC is 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 alleged in the FAC 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 ENA alleged 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.

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(c) Allowing The Second Appellate District's Opinion To Remain As Precedent Would Unwisely Narrow The Scope Of The Anti-SLAPP Statute

In 1997, the Legislature amended the Anti-SLAPP statute to add a preamble to require that the Anti-SLAPP statute "be construed broadly." (Code of Civ. Proc. § 425.16, subd. (a); *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 60; Stats.1997, ch. 271, § 1.) The full preamble now reads,

> The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

(Code of Civ. Proc. § 425.16, subd. (a).)

If not reversed, the opinion of the Second Appellate District would improperly narrow the definition of what constitutes a "public issue or an issue of public interest." (Code of Civ. Proc. § 425.16, subd. (e)(4).) As discussed above, the opinion of the lower court is at odds with decisions of

its sister courts of appeal construing what constitutes an "issue of public interest" to include an exclusive negotiation agreement for the acquisition and development of a bayfront property and the development of large, environmentally impactful projects.

The Second Appellate District attempted to distinguish the EAA from the ENA in *Tuchscher* by characterizing it as being simply an agreement to determine the City's agent as opposed to an agreement to actually develop property. Even assuming, for the sake of argument only, that this properly characterizes the EAA (which it does not) an EAA for the City's agent to negotiate the potential development of a large-scale project should, by the broad standards of the Anti-SLAPP statute, fall squarely within the definition of an issue of public interest not only because an agent could be paid a substantial amount of public funds for a project of great public significance, but also because the underlying negotiation is of such important public significance. Petitioners respectfully urge this Court to reject any effort to engage in hair-splitting distinctions in order to narrow the definition of what constitutes a matter of public interest.

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C. This Court Has Repeatedly, And Most Recently, Recognized That The Causes Of Action Which Were The Subject Of The Special Motion To Strike All Arose Out Of Communications Made In Connection With An Issue Under Consideration By A Legislative Body & The Opinion Of The Second Appellate District To The Contrary Must Be Reversed

1. The EAA Was Under Consideration By A Legislative Body In 2012 And 2014

The fraud-based causes of action in the FAC arise from 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., § 425.16, subd. (e)(2).) Rand Resources concedes, in the FAC, that the EAA and the project as a whole were the subject of multiple legislative and other official proceedings. The ENA that was the alleged predecessor to the EAA was entered into between the City's redevelopment agency and 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 in 2012. (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 Carson's City Council voted on whether to extend the EAA in 2014. (AA:I:2:32-33, 35.) Given each of these circumstances, the property, agency 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. (Code Civ. Proc., § 425.16, subd. (e)(2).)[16]

2. Statements Allegedly Made By The Then-City Attorney And The Then-Mayor Were Made In Connection With An Issue Under Consideration By A Legislative Body And Are "Protected Speech" Within The Meaning Of The Anti-SLAPP Statute

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 that the City Council extend the EAA, and Rand Resources complained when the City Council did not extend it. (AA:I:2:32-33, 35.)

Rand Resources alleges 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

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[16] *See, also,* notes 7 & 13, *supra,* regarding the requirement of City Council action on contracts like the EAA at issue in this appeal.

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, should the City Council vote not to grant an extension. (AA:I:2:43-49.)

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 alleges 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 fact pattern alleged in the FAC is consistent with the recent Anti-SLAPP opinion from this Court. In *City of Montebello v. Vasquez, supra,* 1 Cal.5th 409, a City Manager and three City councilmembers were sued for a conflict of interest relating to the approval of a waste hauling agreement. The City Manager and City Attorney were the primary negotiators of the contract. (*Id.* at 424.) The City Manager and three councilmembers then filed a Special Motion to Strike.

This Court found that the statements and writings of the City Manager and votes and statements of the councilmembers were protected

activity, and remanded the case to the Court of Appeal to analyze "the second-step issue of whether the City could establish a likelihood of success." (*Id.* at 425.) In making its determination that the City Manager and councilmembers' activities were protected, this Court found "the councilmembers' votes, as well as statements made in the course of their deliberations at the city council meeting where the votes were taken, qualify as 'any written or oral statement or writing made before a legislative . . . proceeding.' (§425.26, subd. (e)(1).) Anything they or [the City Manager] said or wrote in negotiating the contract qualifies as 'any written or oral statement or writing made in connection with an issue under consideration or review by a legislative . . . body. . . .'" (*Id.* at 422-423.)

In strikingly similar allegations, Rand Resources alleges statements by City Attorney Bill Wynder in the negotiations for the EAA and just days before the City Council considered the extension of the EAA, to support its fraud-based causes of action. Specifically, Rand Resources states in the FAC:

- "[T]he City—and specifically, City Attorney Bill Wynder—represented to Mr. Rand and his counsel that, so long as Plaintiffs showered reasonable progress with respect to bringing an NFL franchise to Carson, the EAA would be extended, just as the ENA had been several times. To reflect this, the EAA states expressly that, '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.'" (AA:I:2:30.)

- "Days before the City voted not to extend the EAA, a meeting took place that was attended by Mr. Rand, his counsel, City Attorney Wynder, and City Manager Nelson Hernandez. At this meeting, Mr. Wynder indicated the City was not going to extend the EAA, notwithstanding the City's prior promises to extend the agreement and the explicit terms of the EAA. Mr. Wynder further stated that the City had been 'walking on eggshells' with Leonard Bloom and 'did not need' Rand anymore." (AA:I:2:33.)
- In support of the Second Cause of Action, Rand Resources alleges "[m]oreover, prior to entering the EAA, the City Attorney, Mr. Wynder, falsely told Mr. Rand that, so long as Rand showed reasonable progress with respect to bringing and NFL franchise to Carson, the EAA would be renewed." (AA:I:2:35-36.)
- As the only support of its Third Cause of Action for promissory fraud against the City, Rand Resources alleges "[i]n August 2012 prior to Rand entering into the EAA, City Attorney Bill Wynder, acting on behalf of the City, told Mr. Rand 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. This was a material promise to Rand and Rand would not have entered into the EAA without this promise." (AA:I:2:36.)

Each of the alleged "promises" made by the then-City Attorney were made during the negotiation of the EAA just prior to its approval in 2012 by the City Council.[17] Similarly to the statements or writings by the city manager in *Vasquez*, the statements allegedly made by City Attorney Bill Wynder qualify as "any written or oral statement or writing made in connection with an issue under consideration or review by a legislative . . . body . . . ." (Code Civ. Proc. § 425.16, subd. (e)(2).)

In the same vein, the statement allegedly made by Mayor Dear that the City "no longer needed" Rand Resources because "we can do it ourselves," is protected speech. Rand Resources alleges that "[i]n August 2014, Rand requested that the City approve the first of the two automatic extensions of the EAA." (AA:I:2:25.) This alleged statement, regardless of whether made before or during the City Council's consideration of the

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[17] *See, also,* notes 7 & 13, *supra.* Curiously, none of then-City Attorney's alleged "oral promises" made ***before*** the EAA was presented to and then acted on by the 2012 City Council (in a duly noticed public meeting) were ever recited in and included in any of the actual terms and conditions of the EAA as approved by the City Council (nor does the FAC so allege) raising a serious "parol evidence rule" problem for Rand Resources in its only potentially viable breach of contract cause of action.

extension of the EAA, directly relates to the City Council's decision not to extend the EAA. This alleged statement, therefore, is protected speech under the Anti-SLAPP statute, specifically Code of Civil Procedure section 425.16, subdivisions (e)(1) or (e)(2).

D. The Second, Third And Fourth Causes Of Action Must Be Stricken From the FAC Under Petitioners' Anti-SLAPP Motion

Regarding the allegations in the purported Second Cause of Action, the lower court 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." (*Rand Resources, LLC v. City of Carson*, *supra*, 247 Cal.App.4th at 1095.)

Regarding the allegations in the purported Third Cause of Action, the lower court 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)." (*Rand Resources, LLC v. City of Carson, supra*, 247 Cal.App.4th at 1095.)

Regarding the allegations in the purported Fourth Cause of Action, the lower court 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." *(Rand Resources, LLC, supra,* 247 Cal.App.4th at 1095-96.)

The lower court characterized the Second, Third and Fourth causes of action as arising from Dear's alleged false denial, Wynder's alleged false representation during negotiation of the EAA, and the alleged meetings between City officials and the Bloom Petitioners. Taking as true, for the sake of argument, the lower court's characterization of the gravamen of each of these causes of action, the underlying communications and activity fall squarely within the bounds of protected speech and petitioning activity described in *City of Montebello v. Vasquez* and *Tuchscher Dev. Enters.*,

Inc. v. S.D. Unified Port Dist. Further, the communications alleged in the FAC are clearly encompassed by the Anti-SLAPP statute regardless of whether they were legitimate, or fraudulent as Rand alleges. (*Navellier v. Sletten, supra,* 29 Cal.4th at 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 lower court's opinion, to the contrary, is plain error and must be reversed by this Court, such that the determination of the trial judge striking the purported Second, Third, and Fourth Causes of action in the FAC is reinstated.

E. In The Alternative, The Alleged Statements And Activity By City Officials Should Be Stricken From The FAC

The lower court further found that any speech was incidental to the asserted breach of contract, and that it was not protected. (*Rand Resources, LLC v. City of Carson*, *supra*, 247 Cal.App.4th at 1093.) As previously argued, this holding mischaracterizes the alleged speech and conduct underlying each cause of action. However, even assuming, for the sake of argument only, the three fraud-based causes of action arose from both protected and unprotected activity, at a minimum Petitioners' Anti-SLAPP motion to strike should serve to strike the specific allegations in the cause of action that arise from protected activity. (*Baral v. Schnitt*, (2016) 1 Cal.5th 376 (decided August 1, 2016) [holding that an Anti-SLAPP motion

to strike may be used to strike allegations of protected activity even without defeating a pleaded cause of action or primary right].) These specifically alleged statements are set forth in full above.

V. CONCLUSION

For the reasons set forth above, Petitioners respectfully request the Second Appellate Court of Appeal decision be reversed and the trial court's ruling granting Petitioners' Anti-SLAPP motion be affirmed and reinstated.

Respectfully Submitted,

DATED: November 21, 2016

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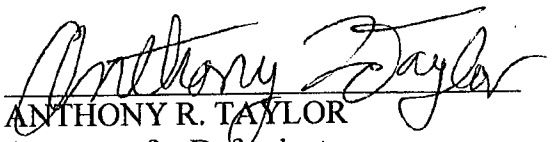
By: 
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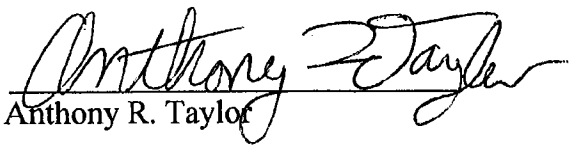
CERTIFICATE OF WORD COUNT

I certify that pursuant to Rule 8.504 (d)(1) of the California Rules of Court, the attached PETITIONERS' OPENING BRIEF was produced on a computer and contains 11,822 words as counted by the Microsoft Word 2010 word-processing program used to generate the PETITIONERS' OPENING BRIEF.

Dated: November 21, 2016



Anthony R. Taylor

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 **November 21, 2016**, I served true copies of the following document(s) described as **OPENING BRIEF OF THE CITY OF CARSON & JAMES DEAR** 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 **November 21, 2016**, at El Segundo, California.

DIANE N. BRANCHE

SERVICE LIST
Rand Resources, et al v. Leonard Bloom, et al
California Supreme Court Case No. S-235735

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