EXHIBIT C

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION ONE

DAN YAMINI, ROBIN STAN, ELIAS DONAY, and ANDERSON VALLEY PROPERTIES, LLC, Plaintiffs and Respondents v. SCOTT ZARNES, CHRISTINE ZARNES, CALMEDX CARE, and CALMEDX, LLC, Defendants and Appellants	Court of Appeal No. A154588 Super. Ct. No. SCUK-CVG 18-70473

Appeal from Order of the Superior Court, Mendocino County
Honorable Jeanine B. Nadel, Judge

APPELLANTS' OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Defendant CalMedX Care holds a state license to cultivate cannabis from the California Department of Food and Agriculture and an associated local authorization from Mendocino County. Plaintiff Anderson Valley Properties LLC ("AVP") acquired the property where CalMedX Care operated, and the other plaintiffs are individuals affiliated with AVP. Plaintiffs allege that they, not CalMedX Care, are the rightful owners of that state license and local authorization, as well as the cannabis harvest covered by it. Among other things, Plaintiffs allege that it was a breach of a joint venture agreement to list CalMedX Care as the applicant and license-holder on the cannabis applications instead of listing the Plaintiffs as the applicants and license-holders. AA0045 (Am. Compl. ¶ 41(a) & (c)).

Defendants filed a special motion to strike under Code of Civ. Proc. § 425.16, commonly called an anti-SLAPP motion. The motion argued that the preparation and submission of CalMedX Care's licensing applications is a "written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law," under Code Civ. Proc. § 425.16, subd. (e). In reviewing that motion, the Superior Court applied the wrong legal standard and consequently denied the motion in error.

In deciding an anti-SLAPP motion, the first step of the analysis is to determine whether the challenged claims arise from protected activity. In doing so, the Superior Court attempted to boil down the entire case to a single "gravamen," namely, "whether the parties

entered into a joint venture to cultivate marijuana and whether that agreement was breached." AA1760-61. That was error. Rather than search for the philosophical centerpiece of the case, the correct legal standard requires the Court to "consider the elements of the challenged claim and what actions by defendant supply those elements and consequently form the basis for liability." *Park v. Bd. of Trustees of California State Univ.* (2017) 2 Cal.5th 1057, 1063. Here, the Amended Complaint expressly alleges that the "breach" element of the breach of contract cause of action was satisfied by the licensing applications submitted to Mendocino County and to the California Department of Food and Agriculture, and thus under *Park*, protected activity gives rise to that claim (as well as others).

The Superior Court also erred by concluding the motion should be denied because "Defendants liability does not arise solely" from protected activity. AA1761. Instead, the Supreme Court has directed that, "[w]hen relief is sought based on allegations of both protected and unprotected activity, the unprotected activity is disregarded at this stage." *Baral v. Schnitt* (2016) 1 Cal.5th 376, 396. Thus, even if there was other, non-protected conduct alleged to also be a breach of contract, it was error to consider those allegations in the first step of the anti-SLAPP analysis.

Finally, the Superior Court erred in rejecting a separate category of protected activity, namely pre-litigation settlement conversations that Plaintiffs alleged were an extortionate threat to disclose to Plaintiffs' mortgage lender that there was cannabis cultivation on the property. The Superior Court concluded that, "the

Court does not find that the alleged threat by Zarnes to AVP's lender to be a pre-litigation demand for the reasons set forth in Plaintiffs' opposing papers." AA1761. But the Plaintiffs never argued the alleged threat was not a pre-litigation demand or settlement communication; their own lawyer swore in a declaration that the alleged threat occurred during settlement discussions. AA0902-03. That same declaration showed that the alleged conduct at issue was, in fact, protected by the litigation privilege and therefore an independent basis for the anti-SLAPP motion.

Defendants respectfully submit that the Superior Court's order should be reversed with instructions to grant the anti-SLAPP motion.

STATEMENT OF THE CASE

Plaintiffs AVP, Dan Yamini, Elias Donay, and Robin Stan filed the complaint in Mendocino County Superior Court on March 2, 2018, alleging eleven causes of action against defendants Scott Zarnes, Christine Zarnes, CalMedX Care, and CalMedX LLC. AA0001-32.

On March 28, 2018, Plaintiffs filed an Amended Complaint adding several new defendants (none relevant to this appeal), and a twelfth cause of action. AA0033-61. The Amended Complaint seeks two million dollars in damages (first, second, third, fourth, fifth, sixth, eighth causes of action), AA0057-60 (Prayer for Relief), and equitable relief requiring the Defendants to convey property, most significantly "the Cannabis Inventory," which Plaintiffs allege is worth nearly one million dollars, AA0045, and the other alleged

"assets of CalmedX and Joint Venture," (tenth and eleventh causes of action), AA0057-60. Plaintiffs did not serve the Amended Complaint when it was filed or otherwise notify defendants of its filing.

On March 2, 2018, unaware of the Amended Complaint, Scott and Christine Zarnes filed, and the CalMedX defendants joined, an anti-SLAPP special motion to strike the original complaint. AA0062-AA0083; AA0139-43. Plaintiffs then served the Amended Complaint.

On April 2, 2018, Scott and Christine Zarnes filed, and the CalMedX defendants joined, an anti-SLAPP special motion to strike the Amended Complaint. AA0063.

On May 24, 2018, the Superior Court issued a tentative ruling denying the special motion to strike. No party contested the tentative. On May 31, 2018, the Superior Court issued a written order adopting the tentative ruling. AA1850, AA1854-55.

Notice of entry of order of the Superior Court's denial of the special motion to strike was served on June 7, 2018. AA1752-AA1761.

The Zarnes and the CalMedX entities timely filed a notice of appeal on June 14, 2018. AA1763-64.

STATEMENT OF APPEALABILITY

The Superior Court's order denying the special motion to strike is immediately appealable pursuant to Code. Civ. Proc. §§ 425.16(i) and 904.1.

STANDARD OF REVIEW

"Review of an order granting or denying a motion to strike under section 425.16 is de novo." *Flatley v. Mauro* (2006) 39 Cal.4th 299, 325–26.

SUMMARY OF ALLEGATIONS AND STATEMENT OF FACTS

Christine and Scott Zarnes, a married couple, resided on Anderson Valley Way outside of Boonville and were involved in a medical cannabis cultivation operation there. AA0035, AA0040, AA042 (Am. Compl ¶¶ 5, 36, p. 9 ¶ 40). [1]

In 2017, AVP acquired the Anderson Valley Way property where the Zarnes lived and where the cannabis cultivation operation was conducted. AA0035, AA0039-40 (Am. Compl. ¶¶ 5, 31, 33). AVP had been formed by Dan Yamini, a Beverly Hills plastic surgeon, his attorney sister Donna Yamini and her husband Elias Donay, and their surgeon friend Robin Stan. AA0035 (Am. Compl. ¶ 4).

The parties discussed a potential business arrangement involving the cannabis cultivation operation, which the parties intended to reduce to signed writings involving a newly created legal entity. As Dan Yamini's declaration explained, "a for profit entity or the 'Hold Co' we had always envisioned" was to hold the business. AA0462 (Yamini Decl. ¶ 63). In early 2017, the parties retained a law

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[1]The Amended Complaint has two sets of paragraphs 37-40, so citations to those paragraphs include page and paragraph numbers.

firm specializing in cannabis-related businesses, Rogoway Law Group, and in March of 2017, Donna Yamini instructed the firm to prepare written documentation of the potential transaction, either "a separate agreement or part of CalMedX's operating agreement." AA0586 (Yamini Decl. Ex. M). In April, Dan Yamini asked the Rogoway firm to forward draft agreements in editable Word documents to allow "markups," AA0609 (Yamini Decl. Ex. Ex. P). Donay's and Yamini's declarations both state that the failure to execute documents in this time period was an "oversight," confirming their intention that any agreements be reduced to a signed writing. AA0915 (Donay Decl. ¶ 21); AA1077 (Yamini Decl. ¶ 63). In August, Dan Yamini's proposed agenda for a teleconference among the parties included "Forming Holding company and various agreements." AA0758 (Yamini Decl. Ex. X).

As the parties were negotiating one or more written agreements, the cannabis cultivation operation continued. Scott Zarnes also moved forward with local and state licensing for the cannabis cultivation. AA0216. Plaintiffs advanced some funding to the operation. AA1071.

The parties also executed a written residential lease agreement for the Zarnes' home on the property. AA0172.

By October 2017, other than the residential lease, no final written documents had been agreed upon, and Plaintiffs pressured Scott Zarnes to sign one-sided documents that gave Zarnes no rights to anything, instead of a complete agreement along the lines the parties had been negotiating. AA0462 (Yamini Decl. ¶ 63).

Specifically, Yamini's declaration asserts that Zarnes "wanted to negotiate other terms" before giving in to Plaintiffs demands. *Id.* Plaintiffs, through counsel, threatened to evict the Zarnes from the property unless they agreed to Plaintiffs' demands. AA0902 (Miller Decl. ¶ 5)

Counsel for Plaintiffs and Defendants had a series of conversations aimed to settle the dispute. AA0902 (Miller Decl. ¶¶ 3-9). According to the declaration from counsel for Plaintiffs, during one such conversation, Plaintiffs' counsel conveyed that Plaintiffs were considering initiating eviction proceedings and withdrawing consent for cultivation on the property, and, in the same conversation, Defendants' counsel informed Plaintiffs' counsel that the mortgage-holder of the Anderson Valley Way property was unaware of cannabis cultivation there. AA0902 (Miller Decl. ¶¶ 5-6). Plaintiffs' counsel's declaration says nothing of any express threat, but only that he inferred this statement to be "*implying* that Mr. Zarnes *might* contact AVP's lender with such information if my clients pursued remedies." *Id.* (emphasis added). Subsequently Defendants made a settlement offer that included a $1.5 million figure. AA0086 (Ringgenberg Decl. ¶ 7).

Discussions broke down and Plaintiffs' three lawsuits followed.

The Unlawful Detainer Action

First, AVP filed an unlawful detainer action to evict the Zarnes, their adult daughter, and her partner from the property. Zarnes argued that an arrangement regarding the cannabis cultivation

operation had allowed him and his family to live there without payment of money rent. AVP argued in the trial brief that any such claim was barred by "the lack of any binding business agreement." AA00172. AVP further argued, "any circulation of draft agreements is irrelevant. . . . Here, defendants concede in their affirmative defense that despite an intention to formalize any arrangement, no formalization occurred." AA0174. AVP won, the Zarnes were evicted, and judgment for back rent was entered. AA0178.

The Los Angeles Action

Second, on March 2, 2018 Dan Yamini filed a lawsuit in Los Angeles County Superior Court against Scott Zarnes. AA0168; AA0202. It was styled as a derivative action focused on an alleged "CalMedX Agreement" whereby Dan Yamini claimed he is 50% owner of defendant CalMedX LLC. AA0185-86. On May 8, 2018, the Los Angeles County Superior Court transferred that action to Mendocino County Superior Court and entered a sanctions award against Yamini of $11,057. AA1539.

This Action

Third, also on March 2, 2018, Plaintiffs filed this action.

The Complaint in this action alleges that in or around November 2016, Yamini, Donay, and Stan, called the "Investors", entered into a "Joint Venture Agreement." AA0010 (Compl. ¶ 37). As alleged in the Complaint, under the terms of this alleged agreement, among other things, for "the benefit of the Joint Venture, AVP would allow the Joint Venture to cultivate cannabis" at the property, and on "behalf of and for the benefit of the Joint Venture, [Scott] Zarnes

would prepare an application for a local permit from the County of Mendocino Department of Agriculture for the cultivation of medical cannabis ('Permit Application') which County Application would identify the Joint Venture as an applicant." *Id.* ¶ 37(f). The Complaint further alleged that on "behalf of and for the benefit of the Joint Venture, [Scott] Zarnes would prepare an application for a California State license for the cultivation of cannabis ('State Application') which State Application would identify each and every Joint Venturer as a licensee." *Id.*

The Complaint alleged that defendant Scott Zarnes breached the "Joint Venture Agreement" by, among other things, "Failing and refusing to file the County Application for a local permit on behalf of and for the benefit of the Joint Venture," "Failing and refusing to identify the Joint Venture or any of the Investors as applicants on the County Application," "naming only himself and CalMedX Care as the applicants on the County Application," and "Failing and Refusing to include the Plaintiffs, or any of them, as applicants or licensees, on the Sate Application for temporary or other state licenses to cultivate cannabis." AA0013 (Compl. ¶ 43).

The Complaint also alleged that defendant Scott Zarnes breached fiduciary duties to Plaintiffs by "Threatening to undermine AVP's loan on the Property in order to extort from Plaintiffs $1.5 million to which Zarnes had no right or entitlement." AA0015 (Compl. ¶ 56).

On March 28, 2018, Plaintiffs filed an Amended Complaint. The Amended Complaint sought to conceal the central role of the

county and state permit applications to Plaintiffs' claims and omitted the previously express allegations that the alleged "Joint Venture Agreement" required Zarnes to "identify the Joint Venture as an applicant" on the County Application and required Zarnes "identify each and every Joint Venturer as a licensee" on the state license application. It also added the allegation that "Plaintiffs claims are not intended to prevent Zarnes from pursuing local and state cannabis licensing. Plaintiffs' claims arise out of Zarnes' misrepresentations regarding the services he promised to provide and breach of the Joint Venture Agreement by among other conduct, stealing the entire cannabis cultivated on the Property and all the farm material used for cultivation on the Property." AA0044 (Am. Compl. at 11 ¶ 37).

Nonetheless, the Amended Complaint continued to allege that Zarnes breached the "Joint Venture Agreement" by "Failing and refusing to file the County Application for a local permit on behalf of and for the benefit of the Joint Venture" and "Failing and refusing to include the Plaintiffs, or any of them, as applicants or licensees, on the State Application for temporary or other state licenses to cultivate cannabis." AA0045 (Am. Compl. ¶ 41). This alleged breach of contract – Zarnes' failure to name the Plaintiffs as applicants on the licenses – is re-alleged as a breach of the covenant of good faith in fair dealing and as a breach of fiduciary duty, which Plaintiffs base on being "den[ied] the benefits of the contract" and "under the Joint Venture Agreement." AA0047 (Am. Compl. ¶¶ 46, 49, 51, 53). Other causes of action, including unjust enrichment and accounting, are

also based on allegations that Zarnes did not perform his contractual obligations pursuant to the "Joint Venture Agreement," including his act of omitting Plaintiffs from the license applications. AA0051-53.

In Plaintiffs' cause of action for conversion, they re-allege that Zarnes breached the agreement by failing to name Plaintiffs' as applicants on the licenses and on that basis allege "Plaintiffs were the rightful owners of... the assets of the Joint Venture and CalMedX," and "the Cannabis Inventory." AA0048 (Am. Compl. ¶¶ 55, 57). This same contention supplies the basis of Plaintiffs' causes of action for money had and received, constructive trust, and an injunction, which all concern "Plaintiffs' Assets," including the assets of the Joint Venture and the Cannabis Inventory, and are all of course premised on Plaintiffs being the rightful owners of those assets. AA0049, AA0054-55 (Am. Compl. ¶¶ 63, 64, 93, 95, 96, 97).

In Plaintiffs' cause of action for fraud, they re-allege that Zarnes breached the agreement by failing to name Plaintiffs as applicants and on that basis allege Zarnes' representations he would "obtain for the benefit of the Joint Venture, all permits and licenses for legal cultivation on the property," and that Plaintiffs would be on the Board of any "entity owning or holding any and all permits or licenses" were false. They further allege Zarnes "acted contrary" to those representations by "submitting [the County and State Applications] thereby depriving Plaintiffs of their opportunity to protect their interests and the interests of the Joint Venture." AA0049 (Am. Compl. ¶¶ 66, 67(b)-(d), 68(a)) This same contention supplies

the basis for Plaintiffs' cause of action for unfair business competition based on fraud. AA0052 (seeking injunctive relief requiring "Defendants' to turn over the Cannabis Inventory").

The Amended Complaint also continued to allege that defendant Scott Zarnes breached fiduciary duties to Plaintiffs by "Threatening to undermine AVP's loan on the Property in order to extort from Plaintiffs $1.5 million to which Zarnes had no right or entitlement." AA0048 (Am. Compl. ¶ 56).

ARGUMENT

The California Legislature enacted Section 425.16, known as California's "anti-SLAPP" (strategic lawsuit against public participation) statute, to provide for the early dismissal of meritless claims filed to interfere with the valid exercise of the constitutional rights of free speech and petition. *See* Code Civ. Proc. § 425.16, subd. (a); *Club Members For An Honest Election v. Sierra Club* (2008) 45 Cal.4th 309, 315. The anti-SLAPP statute provides:

> A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

Code Civ. Proc. § 425.16, subd. (b)(1). The statute is to "be construed broadly." *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1119.

Courts evaluate anti-SLAPP motions in two steps. First, the court determines whether the challenged cause of action arises from statutorily protected activity. *Baral*, 1 Cal.5th at 384. Protected activity 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 [and]
> (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

Code Civ. Proc. § 425.16, subd. (e). This includes all petition-related activity before a governmental body whether or not the statements involve a public issue: "[A]ll that matters is that the First Amendment activity take place in an official proceeding or be made in connection with an issue being reviewed by an official proceeding." *Briggs*, 19 Cal.4th at 1116 (disapproving earlier cases contra).

Second, once the defendant has shown the challenged cause of action arises from protected activity, the court then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733.

I. THE SUPERIOR COURT ERRED IN CONCLUDING THAT ANTI-SLAPP PROTECTION DID NOT APPLY TO ANY CAUSES OF ACTION ARISING FROM STATE AND LOCAL PERMIT APPLICATIONS

The Superior Court erred in applying of the first step of the anti-SLAPP analysis to the allegations concerning the licensing applications, which asks whether the challenged causes of action

arise from protected activity. That first step has two parts: (1) identifying whether the complaint alleges any protected activity and (2) determining whether causes of action arise from that protected activity.

Here, the Superior Court appeared to accept that Defendants' submission of licensing applications to county and state officials as alleged in the Amended Complaint was protected activity, but concluded that "Defendants' liability does not arise solely from Zarnes obtaining his own permit" and that the "the gravamen of the complaint was whether the parties entered into a joint venture to cultivate marijuana and whether that agreement was breached." AA1761. As detailed below, this was error.

A. The Superior Court Correctly Assumed that the Submission of Permit Applications Is Protected Activity

The Superior Court's ruling, in stating that "Defendant's liability does not arise solely from Zarnes obtaining his own permit," found, albeit impliedly, that Defendants' permit applications to the California Department of Food and Agriculture and to Mendocino County are protected petitioning activity under the anti-SLAPP statute. This is correct. The Amended Complaints specifically alleged, among other things, that Defendants breached a joint venture agreement by "[f]ailing and refusing to file the County Application for a local permit on behalf of and for the benefit of the Joint Venture" and by "[f]ailing and refusing to include the Plaintiffs, or any of them, as applicants or licensees, on the State Application for temporary or other state licenses to cultivate cannabis." AA0045

(Am. Compl. ¶ 41). Such applications are written statements "made in connection with an issue under consideration or review by . . . [an] executive . . . body, or any other official proceeding authorized by law." Code. Civ. Proc. § 425.16, subd. (e).

Courts have routinely found that similar statements made in, or in connection with, applications for governmental licenses or permits are petitioning activity under the statute. For example, *in Mindys Cosmetics, Inc. v. Dakar* (9th Cir. 2010) 611 F.3d 590, the plaintiff alleged that a defendant had named the incorrect applicant in a trademark registration. The Ninth Circuit held that a trademark application is a "writing made in connection with an issue under consideration . . . by . . . [an] executive . . . body, or any other official proceeding," *id.* at 596 (quoting Civ. Code. § 425.16(e)(2)), and because the plaintiffs' "claims arose from [defendant's] act of applying to register the trademarks in [defendant's] name, they are properly subject to an anti-SLAPP motion," *id.* at 598. Other examples include *Area 51 Prods., Inc. v. City of Alameda* (2018) 20 Cal.App.5th 581, involving an event license application submitted to a city official, and *Midland Pacific Bldg. Corp. v. King* (2007) 157 Cal.App.4th 264, involving project plans and a tract map submitted to a City Council and a Planning Commission.

Here, the license and permit applications were submitted to the Mendocino County Agriculture Department and the California Department of Agriculture, which are each an "executive" body. And in each case, the cannabis cultivation application review process is an "official proceeding." At the County level, the application for a

cannabis cultivation permit is required to contain extensive details about the proposed operation, and then is "reviewed by the Agricultural Commissioner's office and other agencies," including "the Department of Planning and Building Services," in consultation "with the Mendocino County Air Quality Management District." Mendocino County Code Sec. 10A.17.090. Permits are allowed to be issued only after the Agricultural Commissioner's office makes several determinations, including a "pre-permit site inspection to confirm adherence to the requirements" of the local ordinance. Mendocino County Code Sec. 10A.17.100.

At the state level, an application for a cannabis cultivation license must contain details about the operation, including proof that a local permit issued from the local jurisdiction (i.e., Mendocino County) "enables the applicant entity to conduct commercial cannabis activity at the location requested." Code Regs., tit. 3, § 8100. And the state may only issue a license after determining all requirements are met and must provide a written explanation for any denial. *Id.* § 8115.

At the County and State levels, these processes plainly require "deliberative executive decision-making" and thus are each an "official proceeding." *Area 51,* 20 Cal.App.5th at 581 (claim involving a city manager's issuance of event license to defendants was official proceeding within meaning of anti-SLAPP statute *see also Midland,* 157 Cal.App.4th at 274; *City of Alhambra v. D'Ausilio* (2011) 193 Cal.App.4th 1301, 1309.

B. The Superior Court Erroneously Applied the "Arising From" Portion of the First Step of the Anti-SLAPP Analysis

However, the Superior Court's conclusion that causes of action were not "arising from" protected activity was error in two related ways. First, the Superior Court asked whether Defendants' liability was based "solely" on protected activity. Second, the Superior Court asked whether protected activity was the single, philosophical thrust of the entire complaint. Under *Baral* and *Park*, these are not the correct questions, and therefore the Superior Court did not reach the correct answers.

1. The Superior Court's Ruling Was Contrary to *Baral* in Denying the Anti-SLAPP Motion Because Defendants' Liability Did Not Arise "Solely" from Protected Activity

First, and most simply, the Superior Court's assumption that the anti-SLAPP motion must be denied if "Defendants' liability does not arise solely from" protected activity was wrong. In *Baral*, the Supreme Court specifically held that a "mixed" cause of action, that is, based in part on protected activity and based in part on other conduct, is subject to an anti-SLAPP motion to strike. 1 Cal.5th at 395. "The anti-SLAPP procedures are designed to shield a defendant's constitutionally protected conduct from the undue burden of frivolous litigation. It follows, then, that courts may rule on plaintiffs' specific claims of protected activity, rather than reward artful pleading by ignoring such claims if they are mixed with assertions of unprotected activity." *Id.* at 393. "Thus, in cases

involving allegations of both protected and unprotected activity, the plaintiff is required to establish a probability of prevailing on any claim for relief based on allegations of protected activity. Unless the plaintiff can do so, the claim and its corresponding allegations must be stricken." *Id.* at 395.

2. The Superior Court Erroneously Attempted to Find the Single, Philosophical Thrust of the Entire Complaint Rather Than Examining the Conduct Establishing the Elements of Claims

Second, the Superior Court also erred in attempting to find the "gravamen of the complaint," which it defined as "the 'material part of a grievance, charge, etc.'" AA1761. The Superior Court ultimately concluded, "In reviewing Plaintiffs' claims it is abundantly clear that the gravamen of Plaintiffs' complaint is whether the parties entered into a joint venture to cultivate marijuana and whether that agreement was breached." *Id.* In doing so, the Superior Court failed to heed the Supreme Court's directive that "in ruling on an anti-SLAPP motion, courts should consider the elements of the chailenged claim and what actions by defendant supply those elements and consequently form the basis for liability." *Park*, 2 Cal.5th at 1063 (protected activity supplied elements of challenged claim in case where it "constituted the alleged breach of contract").

The Superior Court's error is understandable. The so-called "gravamen" test, which has been applied in anti-SLAPP cases to determine whether causes of action arise from protected activity, has generated considerable confusion. Some have read *Baral* and

Park to abandon the "gravamen" test altogether. In *Sheley v. Harrop* (2017) 9 Cal.App.5th 1147, the court held that, "After *Baral*, when deciding whether claims based on protected activity arise out of protected activity we do not look for an overall or gestalt 'primary thrust' or 'gravamen' of the complaint or even a cause of action as pleaded." 9 Cal.App.5th at 623. Division Four of the First Appellate District, by contrast, held that *Baral* and *Park* merely represent the "continuing evolution of the law on this point" rather than a "fundamental shift in the nature of the 'gravamen' test." *Area 51*, 20 Cal.App.5th at 595 n.7.

But even those courts continuing to apply the "gravamen" test do so faithfully to *Baral* and *Park* by holding that the "gravamen is defined by the acts on which liability is based, not some philosophical thrust or legal essence of the cause of action." *Optional Capital, Inc. v. Akin Gump Strauss, Hauer & Feld LLP* (2017) 18 Cal. App. 5th 95, 111 & n.5; *see also Area 51*, 20 Cal.App.5th at 595, 598 (carefully examining the "liability-producing conduct" alleged in the complaint and quoting *Park* for requirement that "'courts should consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability'").

Thus, regardless of whether the gravamen test survives or not, the Superior Court's approach in this case was error because it focused on the "philosophical thrust or legal essence" – which it determined was "whether the parties entered into a joint venture to

cultivate marijuana and whether that agreement was breached" AA1761, rather than the specific elements of the claims and the conduct alleged to supply them.

Applying the appropriate standard, it is clear that causes of action do arise from protected activity. The Amended Complaint alleges that Zarnes breached the "Joint Venture Agreement" when he did not "obtain permits and licenses for the legal cultivation of cannabis on the Property for the benefit of the Joint Venture" and by "[f]ailing and refusing to include Plaintiffs, or any of them as applicants or licensees on the State Application for temporary or other state licenses to cultivate cannabis." AA0045 (Am. Comp. ¶ 41(a-c)). Plaintiff Yamini's declaration likewise asserts that Zarnes breached the agreement when he did not "apply for a local permit on behalf of CalMedX, LLC as he had always represented. . . . He named himself and CalMedX Care, MBC as the Applicants for the permit." AA1077 (Yamini Decl. ¶¶ 66, 67). "Breach" is an essential element of the breach of contract cause of action, and the Amended Complaint specifically alleges that protected activity supplies that "breach" element. Thus, the claim arises from protected activity. *See Park*, 2 Cal.5th at 1064 (where protected activity "constituted the alleged breach of contract," it supplied an element of challenged claim and was properly subject to anti-SLAPP motion).

Midland, 157 Cal.App.4th 264, is instructive. In *Midland* the plaintiffs sued for breach of contract after the defendants agreed to obtain government approval for project plans and a tract map of

land. *Id.* at 268-269. The plaintiffs alleged that the defendants breached the agreement by submitting a higher density tract map to the City instead of the lower density map required by the contract. *Id.* The court held that the anti-SLAPP statute applied because the breach of contract claim arose "directly out of statements made and plans submitted to the planning commission and city council," and thus the conduct giving rise to the claim "necessarily and essentially constitute[s] petitioning activity; that is activity protected under the anti-SLAPP statute." *Id.* at 274. The same is true here. The Plaintiffs here allege Zarnes' breached the agreement when he submitted permit applications in his and CalMedX Care's names, AA0045 (Am. Comp. ¶ 41(a-c), just as in *Midland* the plaintiffs alleged the defendants breach the contract when they submitted a tract map that did not meet the specifications of the agreement.

In contrast, in *Wang v. Wal-Mart Real Estate Business Trust* (2007) 153 Cal.App.4th 790, the court held the anti-SLAPP statute did not apply to government permit applications that were "only incidental or collateral" to the Plaintiffs claims. The court concluded that, while the development project at issue naturally involved various land approvals, the "alleged improper conduct [did] not arise from the defendants' petitioning activities in pursuing the permits [i.e., submitting permit applications] but rather from its conduct in carrying out its contractual duties," i.e., failure to provide plaintiffs with street access to their building as promised. *Id.* at 793, 804, 807-808. As the court in *Midland* explained, *Wang* has no

application where, as here "the actions that allegedly breached the contract necessarily and essentially constitute petitioning activity." 157 Cal.App.4th at 273. In addition, *Wang* preceded the Supreme Court's rulings in *Baral* and *Park*, which clarified that the "arising from" requirement is to be determined not by the philosophical thrust of a claim, but by the acts upon which liability is based, and whether the act supplying an essential element of the claim is protected. 2 Cal.5th at 1064. To the extent *Wang* is based on anything other than what conduct is alleged to satisfy the essential elements of the plaintiff's claim, it is no longer good law.

3. Plaintiffs' Other Claims Are Also Premised on the Same Petitioning Activity

The Plaintiffs' claims based on the permit applications are not limited to the cause of action for breach of contract, but also supply the basis of liability for the other causes of action.

At least two causes of action are based directly on the alleged breach of the joint venture agreement. The second and third causes of action, for breach of the covenant of good faith and fair dealing and breach of fiduciary duty, are expressly based on the same conduct as the breach of contract claim. AA0047, AA0051-53 (Am. Compl. ¶¶ 46, 49, ¶¶ 51, 53). Thus, just as with the breach of contract action, Plaintiffs allege the "breach" elements of both claims is satisfied by the same protected activity.

Plaintiffs other claims are also based on Zarnes' filing applications in his and CalMedX Care's name rather than Plaintiffs'

because that establishes who holds the rights that flow from the permit including, in particular, the ownership of the cannabis harvest. Governing law requires the cannabis cultivation licensee to own the resulting cannabis harvest, so in the circumstances alleged in the Complaint, the cannabis is and must be owned by the license holder. *E.g.*, Bus. & Prof. Code § 26001(k) ("commercial cannabis activity" includes "cultivation" and "possession"); *id.* 26053 ("All commercial cannabis activity shall be conducted between licensees"); *id.* 26038 (describing penalties for a "person engaging in commercial cannabis activity without a license"). Take, for example, Plaintiffs assertion that Defendants are liable for "stealing the entire cannabis cultivated on the Property," AA0044 (Am. Compl. at 11 ¶ 37). That claim depends on the essential element of ownership of what was "stolen," which in turn is entirely dependent upon the claim that Plaintiffs and/or the Joint Venture were supposed to be the license applicant. If CalMedX Care is the proper licensee, then it is necessarily the lawful owner of the cannabis harvest, and cannot have stolen its own property.

Mindys, 611 F.3d 590, is instructive.[2] In *Mindys*, the plaintiff alleged trademark infringement, legal malpractice, and fiduciary duty claims based on a lawyer's filing a trademark application using the wrong family member's name as the registrant. *Id.* at 594. The

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[2] California courts follow *Mindys* as persuasive authority. *See, e.g., Thayer v. Kabateck Brown Kellner LLP* (2012) 207 Cal.App.4th 141, 154.

trial court held the claims did not arise from the trademark application, and the Ninth Circuit reversed. "Each of [plaintiff's] causes of action arises not out of a general breach of duty, but of [the attorney's] act of filing the trademark application in Sonya's name." *Id.* at 598. The claims in *Mindys* arose from the act of filing the trademark application in one name rather than the plaintiff's name; the application established who held the rights that flow from the trademark. *See id.* at 597 (filing application is attempt to establish property right and determination of "the presumptive owner of a protectable mark."). Just as the causes of action in *Mindys* arose out of the defendant's act of filing a trademark in the wrong person's name, the causes of action pertaining to ownership of the cannabis cultivation operation and cannabis arise from Zarnes' act of filing the trademark in his and CalMedX Care's name rather than the Plaintiffs, which determined the lawful owner of the cannabis harvest and related material.

This is true of each of the causes of action in the Complaint because they each rest on the premise that the cannabis harvest and related material produced by the cannabis operation was an asset of the "Joint Venture" and that its transportation and/or disposal was wrongful because it was property of Plaintiffs and/or the "Joint Venture." AA0045-56 (Am. Compl. ¶¶ 41(e)-(h) (first); 49 (second); 53 (third); 57 (fourth); 64 (fifth); 68(e) (sixth); 76 (seventh); 80(b),(c) (eighth); 87-88 (ninth); 95 (tenth); 97 (eleventh), and 103-04, 107

(twelfth)). Thus, the Court should reverse and hold that step one of the anti-SLAPP analysis is satisfied as to each cause of action.

II. THE COURT SHOULD REACH STEP TWO AND ORDER THAT THE MOTION BE GRANTED AS TO THE LICENSE APPLICATIONS

Where, as here, the trial court erroneously does not reach the second step of the anti-SLAPP analysis, this Court has "discretion to decide the issue ourselves, since it is subject to independent review." *Schwarzburd v. Kensington Police Prot. & Cmty. Servs. Dist. Bd.* (2014) 225 Cal.App.4th 1345, 1355 (reversing as to first step and reaching second step as it "would be more efficient for us to resolve the matter in this opinion"); *accord Roberts v. Los Angeles Cty. Bar Assn.* (2003) 105 Cal.App.4th 604, 615–16 ("we can address that question as it is subject to independent review"; reversing with instructions to grant the motion).

At the second step of the anti-SLAPP analysis, "the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success." *Baral*, 1 Cal.5th at 376. This requires the plaintiffs to "'demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.'" *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821 (quoting *Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 548). "In making this assessment, the court must consider both the legal sufficiency of and evidentiary support for the pleaded

claims and must also examine whether there are any constitutional or nonconstitutional defenses to the pleaded claims and, if so, whether there is evidence to negate any such defenses." *McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 108.

A. Plaintiffs Failed to Prove an Enforceable Joint Venture Agreement

Plaintiffs' primary claim, for breach of contract, fails for two reasons. First, Plaintiffs' failed to produce admissible evidence supporting the alleged joint venture agreement. Second, the agreement alleged has an unlawful agreement and therefore would be unenforceable.

1. Plaintiffs' Conclusory Assertion that the Parties "Agreed" Is Insufficient as a Matter of Law

"An essential element of any contract is 'consent.'" *Weddington Prods., Inc. v. Flick* (1998) 60 Cal.App.4th 793, 811 (quoting Civ. Code § 1550). "The 'consent' must be 'mutual.'" *Id.* (quoting Civ. Code § 1565). "'Consent is not mutual, unless the parties all agree upon the same thing in the same sense.'" *Id.* (quoting Civ. Code § 1580). Thus, "there is no contract until there has been a meeting of the minds on all material points." *Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 358. The "failure to reach a meeting of the minds on all material points prevents the formation of a contract *even though the parties have orally agreed upon some of the terms, or have taken some action*

related to the contract." Id. at 358-59 (emphasis in original); *accord Am. Employers Grp., Inc. v. Employment Dev. Dep't* (2007) 154 Cal.App.4th 836, 846–47.

Here, there is a total absence of admissible evidence that any Defendant consented to the material contract terms alleged by Plaintiffs. Sorting through the voluminous chaff in Plaintiffs' submissions in opposition to the anti-SLAPP motion, there is only one tiny bit of possible grain. In a single conclusory paragraph of one declaration, Plaintiff Dan Yamini asserts the following: "Based on Zarnes representations and assurances, the Investors and Zarnes agreed to a joint venture for the cultivation of medical cannabis on the following material terms," followed by eight separate sub-paragraphs of alleged agreement terms, and the conclusion that the "Investors and Zarnes all agreed to these terms." AA1158-60 (Yamini Declaration).[3]

Even if this conclusory assertion were admissible, and it is not,[4] it would be insufficient as a matter of settled law because it fails to provide any evidentiary fact showing that any Defendant agreed

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[3] A separate declaration from Elias Donay merely states his alleged understanding of the alleged terms of the agreement, and does not even assert that any Defendant agreed to all those terms. AA1006-07 (Donay Declaration).

[4] Defendants objected to this paragraph of the declaration as without foundation and personal knowledge, improper opinion, and hearsay. AA1555. The Superior Court never reached the objections. AA1185.

to these material terms.[5] It is hornbook law that that mere legal conclusions will not suffice. *E.g.*, 6 Witkin, Cal. Proc. 5th Proceedings Without Trial § 227 (2008) ("A common defect of affidavits or declarations is the recital of legal conclusions or ultimate facts, instead of statements of evidentiary facts. These statements are insufficient in opposing, or supporting, affidavits and declarations."). That rule has been uniformly applied in California courts for decades. *E.g., Knox v. Dean* (2012) 205 Cal.App.4th 417, 432 ("To defeat a motion for summary judgment, a party cannot rely on legal conclusions or assertions of ultimate facts. Rather, the party must provide admissible evidence, for example, in the form of declarations that cite evidentiary facts."); *Hoover Cmty. Hotel Dev. Corp. v. Thomson* (1985) 167 Cal.App.3d 1130, 1137 (collecting cases and explaining that "A bare conclusion of law is simply not sufficient even though uncontradicted to support a motion for summary judgment nor to create a triable issue of fact when filed in opposition

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[5] Even if the Court were to find evidence the parties agreed on *some* terms, "California law is clear there is no contract until there has been a meeting of the minds on *all* material points." *Banner Entertainment,* 62 Cal.App.4th at 357-58 (emphasis added). A joint venture requires agreement on "the sharing of profits and losses" and "a right of joint control." *Connor v. Great W. Sav. Loan Ass'n* (1969) 69 Cal.2d 850, 683. There is simply no competent evidence, in writing or otherwise, that the parties agreed on how the net profits would be divided among the parties, what assets or profits would belong to the alleged joint venture, or how the joint venture would be governed among its alleged members. Thus, there was not agreement. *See Goodworth Holdings,* 239 F.Supp.2d at 952, 956-58 (no joint venture where no agreement on "division of profits").

to such a motion.... The rule of liberal construction which is applied to papers opposing motions for summary judgment has never been stretched so far as to hold that a triable issue of fact is created by a declaration that contains no evidentiary facts at all.").

Moreover, in the specific context of a dispute regarding contract formation, it is also settled that the bare legal conclusion in a declaration that the "parties agreed" is insufficient to establish a prima facie case. In *C.L. Smith Co. v. Roger Ducharme, Inc.* (1997) 65 Cal.App.3d 735, the parties disputed whether a contract had been formed. The plaintiff Smith's declaration contained the same conclusory assertion of "agreement" as Yamini's declaration, which was held insufficient as a matter of law:

> As earlier noted, the factual content of Smith's declaration is essentially the same as the Ducharme declaration filed in support of the motion except that Smith's included the assertion that plaintiff and defendant had "orally agreed" upon the terms and conditions of performance. For purposes of pleading, such a statement of ultimate fact although conclusionary in nature, is acceptable. However, when used in a declaration filed in opposition to a motion for summary judgment, conclusions are insufficient to raise triable issues of fact.

C.L. Smith, 5 Cal.App.3d at 743. For the same reasons, Yamini's declaration fails.

Independently, there is also no admissible, competent evidence that Robin Stan, an alleged member of the "Joint Venture," AA0042 (Am. Compl. ¶ 40), consented to these terms. Dr. Stan did

not submit a declaration. No declaration cites any evidentiary facts about his supposed consent to the material terms of the alleged joint venture agreement. "Consent is not mutual, unless *the parties all agree* upon the same thing in the same sense." Civ. Code § 1580 (emphasis added). Here, in addition to the lack of evidence of consent by Defendants, there is a total absence of evidence of consent by one of the Plaintiffs, which is fatal.

Thus, Plaintiffs failed to meet their burden to "demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.'" *Wilson,* 28 Cal.4th at 821.

2. Plaintiffs' Admissions and Contemporaneous Evidence Show that the Parties Intended to Reduce Any Agreement to Writing

That conclusion is confirmed by admissions from Plaintiffs showing that no agreement was reached and that the parties intended any agreement to be reduced to writing.

Plaintiff AVP filed an unlawful detainer action to evict defendants Christine and Scott Zarnes from the Anderson Valley Way property. Represented by the same counsel as represents AVP and the other Plaintiffs in this proceeding, AVP argued in its trial brief that there was no business agreement with the Zarnes and that, at best, Zarnes was a terminated employee. Specifically, AVP characterized Defendants' position as that "defendants would be

able to live rent free on the rental unit in exchange for overseeing a marijuana cultivation operation" and that the "parties were circulating draft proposals of a business agreement." AA0089. In response, AVP said it "generally denies defendants' material allegations" and specifically asserted that defendants' defense was "barred" by "the lack of any binding business agreement." *Id.* AVP further argued that "any circulation of draft agreements is irrelevant" without a "'further manifestation of assent,'" AA0091 (quoting *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 59), and that there "'is no contract where the objective manifestations of intent demonstrate that the parties chose not to bind themselves until a subsequent agreement was made.'" AA0092 (quoting *Bustamonte v. Intuit, Inc.* (2006) 141 Cal.App.4th 199, 213). AVP continued, "Here, defendants concede in their affirmative defense that despite an intention to formalize an agreement, no such formalization occurred. In fact, defendants only occupied the property based on the rights of a subsequently terminated employee." *Id.*

These are clear admissions that the joint venture agreement alleged in the Amended Complaint never existed and that the parties' negotiations never reached the written formalization that both sides intended before an agreement was reached. Given that AVP prevailed in that action, the application of judicial estoppel would be appropriate,[6] but it is not necessary. In light of the admissions in

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[6] Where, as here, a party advances a position in a judicial proceeding and prevails, it is "bound by [its] judicial admissions" in

the unlawful detainer proceeding, Plaintiffs' may not by their own declaration contradict the admissions to establish a prima facie case. *See D'Amico v. Bd. of Med. Examiners* (1974) 11 Cal.3d 1, 22; *see also Arruda v. Arruda* (1963) 218 Cal.App.2d 410, 417 ("an assertion in a brief may be treated as an admission of a factual or legal point, controlling in the disposition of the issue").

Even if the admissions in the unlawful detailer brief were not binding, they are still evidence showing that the parties intended to reduce any agreement to writing. "[W]hen it is clear that both parties contemplate that acceptance of a contract's terms would be signified in writing, the failure to sign the agreement means that no binding contract is created." *Goodworth Holdings Inc. v. Suh* (N.D.

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subsequent proceedings. *Uhrich v. State Farm Fire & Cas. Co.* (2003) 109 Cal.App.4th 598, 613; *see also Furia v. Helm* (2003) 111 Cal.App.4th 945, 958–59 (finding party who "successfully asserted [his argument] in the prior proceedings... may not reverse his position in order to support the claims he asserts in this action."); *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 182 ("Judicial estoppel is designed to maintain the purity and integrity of the judicial process by preventing inconsistent positions from being asserted."). Judicial estoppel applies to all parties in privity with the litigant, as the other Plaintiffs (AVP's owners and managers) are to AVP. *See Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC* (9th Cir. 2012) 692 F.3d 983, 996 (applying judicial estoppel based on privity); *Lia v. Saporito* (E.D.N.Y. 2012) 909 F.Supp.2d 149, 178–79 (applying judicial estoppel to LLC member based on litigation by LLC); *see also Evans v. Celotex Corp.* (1987) 194 Cal.App.3d 741, 747 ("Privity is satisfied so long as the plaintiffs' legal interests are adequately represented in the prior action"); *Levin v. Ligon* (2006) 140 Cal.App.4th 1456, 1468 (following federal law on judicial estoppel).

Cal. 2002) 239 F.Supp.2d 947, 958, *aff'd* (9th Cir. 2004) 99 Fed.Appx. 806 (citing *Banner Entertainment,* 62 Cal.App.4th at 358); *see also C.L. Smith,* 65 Cal.App.3d at 42 (no binding agreement where "the intent of the parties was that the terms of their agreement were to be reduced to writing").

And other evidence supports the same conclusion. The declarations of Elias Donay and Dan Yamini admit that they intended to put any agreements in signed writings and formalize the creation of a separate legal entity referred to as "Hold Co." AA1009 (Donay Decl. ¶ 20, "Dr. Yamini and I not signing the CalMedX Care documents in April 2017 was an oversight"); AA0462 (Yamini Decl. ¶ 63, stating that he "considered the permits and assets held by the MBC eventually being transferred to a for profit entity or the 'Hold Co' we had always envisioned.") In March of 2017, attorney Donna Yamini instructed Rogoway Law Group to "document" the Plaintiffs' "relationship" with Zarnes in either "a separate agreement or part of CalMedX's operating agreement." AA0587 (Yamini Decl. Ex. M). In April, Dan Yamini asked Rogoway to forward draft agreements in editable Word documents to allow "markups," AA0609 (*id.* Ex. P), and in August, Dan Yamini's proposed agenda for a teleconference among the parties included "Forming Holding company and various agreements." AA0758 (*id.* Ex. X). But no agreement was ever signed and "Hold Co" was never formed.

The facts here are in line with *C.L. Smith,* 65 Cal.App.3d 735, where the parties exchanged writings "which led to preparation of

the document" that was sent to the plaintiff, signed, and returned to the defendant, who never signed it. *Id.* at 742. On summary judgment, the court found no oral contract was formed because the parties intended to reduce the terms to a binding written agreement. *Id.*; *see also Goodworth Holdings* 239 F.Supp.2d at 958 (holding no oral joint venture agreement formed where attorney hired by parties drafted letter agreement and term sheet, but after disagreement over terms "discussions broke down and the term sheet was never executed"). Here the parties also plainly intended to finalize their agreement in writing, exchanged drafts of various agreements, and retained lawyers to draft others, AA1104-09 (Yamini Decl. Ex. E (exchanging draft advisory agreement), AA1199-207(*id.* Ex. M) (hiring Rogoway to draft agreements), AA1222-37(*id.* Ex. P) (exchanging draft agreements), AA1372 (*id.* Ex. X) (Yamini email includes "agenda: Forming holding company and various agreements"), but no written document was ever signed, and thus no binding agreement formed, AA1076 (Yamini Decl. ¶ 63) (acknowledging documents never signed).

That some Plaintiffs may have advanced funds does not change this result. "The advancement of funds while negotiations are pending in reliance upon the future acceptance and confirmation in writing of a proposal, does not evidence the existence of a binding contract." *Louis Lesser Enters., Ltd. v. Roeder* (1962) 209 Cal.App.2d 401, 407.

3. The Alleged Agreement Has an Illegal Object, Barring Plaintiffs' Claims

Even if the alleged agreement giving rise to the entire action existed, it would be void because its (alleged) object is contrary to law. *See* Civ. Code § 1550 (essential element of contract is "lawful object"); Civ. Code § 1441 (condition void if fulfillment "is impossible or unlawful"); Civ. Code § 1667 ("unlawful" includes "contrary to an express provision of law; contrary to the policy of express law, though not expressly prohibited..."); *Kashani v. Tsann Kuen China Enterprise Co., Ltd.* (2004) 118 Cal.App.4th 531, 541 ("[A]n illegal contract 'may not serve as the foundation of any action'"). Under the agreement Plaintiffs allege, Plaintiffs should have been listed as the license applicant and Plaintiffs would own the cannabis harvest. AA1077, AA1081 (Yamini Decl. ¶¶ 66-67, 81-82); AA0045 (Am. Comp. ¶ 41(c)). This result would be unlawful.

First, in 2017, when the cannabis was cultivated, Plaintiffs could not lawfully hold an ownership interest in the cannabis or a position in the cannabis collective *unless* the Plaintiffs were qualified cannabis medical patients with a physician's recommendation. *See* Health and Saf. Code § 11362.775 (requiring certain cannabis cultivation occur in connection with medical collective).[7] Plaintiffs were not qualified cannabis medical patients. AA0216 (Zarnes Decl. ¶ 3).

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[7] *See also* California Department of Justice, Guidelines For The Security And Non-Diversion Of Marijuana Grown For Medical Use (August 2008), at 9 (requiring participants in collective be qualified

Second, Plaintiffs could not be applicants on the county or state applications because Mendocino County's cannabis cultivation ordinance will only license those who can show "they were cultivating cannabis on the cultivation site prior to January 1, 2016." Mendocino County Code § 10A.17.080(B)(1). Plaintiffs admittedly did not become involved in the cultivation until much later. AA0040-42 (Am. Compl. at 7-9, ¶¶ 37, 38). Because state licensing requires a local license and demonstrated compliance with "any local ordinance or regulation," compliance with the Mendocino County ordinance is also a prerequisite for state licensing, Cal. Code Regs., tit 3, § 8100, 8102(bb), and thus ownership of the cannabis, Bus. & Prof. Code § 26001(k) ("commercial cannabis activity" includes "cultivation" and "possession"); *id.* 26053 ("All commercial cannabis activity shall be conducted between licensees"). This is fatal to Plaintiffs' claims based on ownership of the license or the cannabis and voids any alleged contract with these unlawful objects.

For the foregoing reasons, the breach of contract claim should be stricken or, alternatively, the allegation of breach based on the licensing application should be stricken.

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cannabis medical patients). The guidelines are available at https://oag.ca.gov/news/press-releases/atty-general-brown-issues-medical-marijuana-guidelines-law-enforcement-and and are subject to judicial notice. Evid. Code § 452(c).

B. The Lack of an Agreement Bars Other Claims

Because the claim to an agreement fails as a matter of law, Plaintiffs' other claims consequently fail. Plaintiffs allege in the facts common to all causes of action portion of the Complaint that that "Yamini would be a licensee of any State license to cultivate cannabis on the Property," AA0041 (Am. Compl. at 8 ¶ 37(e)), and that "for the benefit of the Joint Venture," Zarnes would "prepare application(s) for the California State license(s), temporary or longterm, necessary for the legal cultivation of cannabis on the Property," AA0043 (*id.* at 10 ¶ 40(f)). Plaintiffs also allege that Defendants are liable to Plaintiffs for "stealing the entire cannabis cultivated on the Property," which, of course, presupposes that Plaintiffs owned it. AA0044(*id.* at 11 ¶ 37).

Plaintiffs allege in the first cause of action, for breach of contract, that Zarnes breached the Joint Venture Agreement by "[f]ailing and refusing to obtain permits and licenses for the legal cultivation of cannabis on the Property for the benefit of the Joint Venture" and by "[f]ailing and refusing to include Plaintiffs, or any of them, as applicants or licensees," on the cannabis applications. A0045 (Am Compl. ¶ 41(c)). These in turn are re-alleged and form the basis of the Plaintiffs' second cause of action for breach of covenant of good faith and fair dealing, AA0047 (Am. Compl. ¶¶ 46, 49) (alleging breach under the second cause of action by "denying plaintiffs of rights and benefits" under the Joint Venture Agreement"), and the third cause of action for breach of fiduciary duty, AA0047 (Am. Compl. ¶¶ 51, 53) (alleging breach by "acts and

omissions alleged herein"). The sixth cause of action, for fraud, alleges that Zarnes acted "contrary to" the representation that he would "obtain for the benefit of the Joint Venture, all permits and licenses for the legal cultivation of cannabis on the Property." AA049-50 (Am. Compl. ¶¶ 67(b), 68). These same acts are re-alleged and provide the basis for the Plaintiffs' eighth and tenth causes of action, for unfair business competition and constructive trust, respectively. AA0051-52 (Am. Compl. ¶¶ 75-76, 78, 80).

Furthermore, as a matter of substance, all causes of action arise from the claim that Plaintiffs are the proper owners of the cannabis cultivation operation and cannabis harvest, which, in turn, depends on the identity of the license holder. For example, each cause of action also is also premised on the allegation that the cannabis and related material produced by the cannabis operation was an asset of the "Joint Venture" and that its transportation and/or disposal was wrongful because it was property of Plaintiffs and/or the "Joint Venture." AA0045-56 (Am. Compl. ¶¶ 41(e)-(h) (first); 49 (second); 53 (third); 57 (fourth); 64 (fifth); 68(e) (sixth); 76 (seventh); 80(b), (c) (eighth); 87-88 (ninth); 95 (tenth); 97 (eleventh), and 103-04, 107 (twelfth)). In the circumstances alleged in the Complaint, the cannabis is and must be owned by the license holder. *E.g.*, Bus. & Prof. Code § 26001(k) ("commercial cannabis activity" includes "cultivation" and "possession"); *id.* 26053 ("All commercial cannabis activity shall be conducted between licensees"); *id.* 26038 (describing penalties for a "person engaging in commercial cannabis activity without a license"). Thus, the allegations of

ownership of the cannabis and cannabis operation all simply restate the claim that Plaintiffs and/or the Joint Venture were supposed to be the license applicant, and thus those claims are based on the same allegations regarding the content of the license applications.

For the foregoing reasons, each cause of action should be stricken. Alternatively, each allegation of ownership of the cannabis harvest and cannabis operation should be stricken, and each allegation based on them should be stricken.

III. THE SUPERIOR COURT ERRED IN FAILING TO STRIKE THE ALLEGATION OF PRE-LITIGATION DEMAND AND SETTLEMENT COMMUNICATIONS

Independently, the Superior Court erred in denying the anti-SLAPP motion as to a separate category of conduct: an alleged threat that occurred in pre-suit settlement discussions. "Statements made before an 'official proceeding' or in connection with an issue under consideration or review by a legislative, executive, or judicial body, or in any other 'official proceeding,' as described in clauses (1) and (2) of section 425.16, subdivision (e), are not limited to statements made after the commencement of such a proceeding. Instead, statements made in anticipation of a court action or other official proceeding may be entitled to protection under the anti-SLAPP statute. '[J]ust as communications preparatory to or in anticipation of the bringing of an action or other official proceeding are within the protection of the litigation privilege of Civil Code section 47, subdivision (b) [citation], . . . such statements are equally entitled to the benefits of section 425.16.'" *Digerati Holdings, LLC v. Young*

Money Entm't, LLC (2011) 194 Cal.App.4th 873, 886–87 (quoting *Briggs*, 19 Cal.4th at 1115) (alterations in *Digerati*).

Plaintiffs' Complaint alleges that Zarnes breached a fiduciary duty and damaged Plaintiffs by "threatening to undermine AVP's loan on the Property in order to extort from Plaintiffs $1.5 million." AA0048 (Am. Compl. ¶ 56). The allegation of "extort[ion]" is based on pre-litigation settlement demand and communications, and the $1.5 million figure is based on a settlement offer involving that amount. AA0086 (Ringgenberg Decl. ¶ 7). Plaintiffs' counsel in those conversations, Drew Miller, submitted a declaration showing this to be the case. Miller's declaration admits that the alleged threat occurred during an "effort to resolve the dispute amicably" and a "conversation about the dispute and the prospects of a negotiated resolution." AA00096.

Plaintiffs' characterization of the pre-litigation demand and settlement communication is false, but that does not change the fact that their claim is based on a pre-litigation demand and settlement communication. As a result, Plaintiffs' claims are based on material covered by the litigation privilege and therefore protected by section 425.16. *See Asia Investment Co. v. Borowski* (1982) 133 Cal.App.3d 832, 843 (holding that settlement proposals, even if "made in a manner which might be considered a veiled 'threat,'" are privileged under Civil Code § 47(2)); *Sosa v. DIRECTV, Inc.* (9th Cir. 2006) 437 F.3d 923, 936 ("many states, including California, protect prelitigation communications under statutorily granted litigation privileges. . . [and] extending immunity to private pursuit demand

letters protects the same interests the Supreme Court has identified as implicated in the Petition Clause's protection of private litigation); *Blanchard v. DIRECTV, Inc.* (2004) 123 Cal.App.4th 903, 921–22 (stating that "[t]he litigation privilege is simply a test of connectedness or logical relationship to litigation," and noting that a party cannot avoid application of the privilege by arguing that statements were published to coerce a settlement); *Home Ins. Co. v. Zurich Ins. Co.* (2002) 96 Cal.App.4th 17, 24 ("The privilege . . applies to statements made by counsel during settlement negotiations"); *see also Digerati Holdings,* 194 Cal.App.4th at 886–87 (actions protected by litigation privilege are petitioning activity within protection of section 425.16).

The Superior Court's order on this point merely said, "the Court does not find that the alleged threat by Zarnes to AVP's lender to be a pre-litigation demand for the reasons set forth in Plaintiffs' opposing papers." AA1761. Plaintiffs never made such an argument. The only argument in their opposing papers was that the alleged threat was extortionate and therefore not protected activity, citing *Flatley v. Mauro* (2006) 39 Cal.4th 299. AA0255-56. And that argument was simply wrong. The only competent evidence of the alleged threat was from Plaintiffs' counsel Drew Miller, the actual party to the conversation. His declaration only said that he was told, "AVP had financed its purchase of the property on which the cultivation operation exists and that the lender was not aware that cannabis was being cultivated there." AA0902 (Miller Decl. ¶ 6). Undoubtedly pressed by his clients to go further, Mr. Miller declined

to swear to any actual threat, and instead merely speculated that the information conveyed was "*implying* Mr. Zarnes *might* contact AVP's lender with such information in the event [Plaintiffs] pursued remedies." *Id.* (emphasis added).

Mr. Miller's declaration evidences no threat, nor any demand for money or property— a far cry from *Flatley*, which the court "emphasize[d]" was "based on the specific and extreme circumstances" of express "threats to publicly accuse [plaintiff] of rape" unless a settlement was paid. 39 Cal.4th at 329, n.16 (instructing "opinion should not be read to imply that rude, aggressive, or even belligerent prelitigation negotiations, that may include threats to... report criminal behavior to authorities or publicize allegations of wrongdoing, necessarily constitute extortion"). The "narrow exception articulated in *Flatley* is for a letter so extreme in its demands that it constituted criminal extortion as a matter of law," involving "express threats and others that had no reasonable connection to the underlying dispute." *Malin v. Singer* (2013) 217 Cal.App.4th 1283, 1299. There is simply no evidence of anything like that there.

Moreover, in the event of litigation between the parties, cannabis cultivation on the property would inevitably be made public in court filings – as it has been, by Plaintiffs very filing of their lawsuits. A threat to make cannabis cultivation on the property known in event of litigation when that fact necessarily would be public in the event of litigation makes no sense and could not be extortion as a matter of law. *Id.* at 1299 (rejecting extortion claim

based on threat to disclose fact that would be disclosed during litigation). Therefore, the pre-litigation conduct was protected activity and subject to the litigation privilege, meaning that both the first and the second step of the anti-SLAPP analysis is satisfied. *See id.* at 1301-02. For this separate reason, the Superior Court's order should be reversed with instructions to grant the anti-SLAPP motion as to the alleged threat.

IV. DEFENDANTS WERE NOT REQUIRED TO CONTEST THE TENATIVE RULING TO PRESERVE THEIR APPEAL

Plaintiffs argued in the Superior Court, and will presumably argue again to this Court, that Defendants waived their right to appeal by not contesting the Superior Court's tentative ruling. That argument is meritless.

The Superior Court's tentative ruling showed that the Court had considered the extensive briefing on the anti-SLAPP motion and reached a decision. The Superior Court had concluded that the resolution of the motion was "abundantly clear." AA1761. There was no reason to waste the Superior Court's time with a futile hearing to contest that decision. *See, e.g., Mundy v. Lenc* (2012) 203 Cal.App.4th 1401, 1406 (rejecting argument that failure to contest tentative waived appeal from anti-SLAPP order; "Submission on a tentative ruling is neutral; it conveys neither agreement nor disagreement with the analysis. . . . . Finally, even if litigants are required to object to tentative rulings, [defendant] would be excused from doing so because it would have been futile."); *DiPirro v. Bondo Corp.* (2007)

153 Cal.App.4th 150, 178 ("After the tentative decision was issued, a repetition of the same opposition at the hearing on the motion was not required to preserve the issue on appeal.") To hold otherwise would needlessly consume the resources of the Superior Courts and of litigants, who would be forced to contest tentative rulings not because they have a realistic chance to convince the Superior Court of a different outcome, but instead simply to preserve issues for appeal.

CONCLUSION

For the foregoing reasons, Defendants-Appellants respectfully request the Court reverse the Superior Court's order with instructions that the special motion to strike be granted in its entirety, or, alternatively, as to the allegations of protected activity and the claims based upon them.

Dated: November 16, 2018

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