

## Yamini v. Zarnes

Court of Appeal of California, First Appellate District, Division One

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A154588

### Reporter

2020 Cal. App. Unpub. LEXIS 1868 \*; 2020 WL 1452948

DAN YAMINI et al., Plaintiffs and Respondents, v.  
SCOTT ZARNES et al., Defendants and Appellants.

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**Prior History:** [\*1] Mendocino County Super. Ct. No. SCUK-CVG-18-70473.

**Judges:** Banke, J.; Margulies, Acting P. J., Sanchez, J. concurred.

**Opinion by:** Banke, J.

## Opinion

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### INTRODUCTION

Plaintiffs and defendants allegedly entered into a joint venture to grow medical marijuana on a rural property in Boonville. A year later, as the first (and bountiful) harvest drew near, the joint venture fell apart, and plaintiffs eventually sued defendants, asserting a number of causes of action, including breach of contract, fraud, conversion, unjust enrichment, unfair business practices, and trespass.

Plaintiffs have alleged a laundry list of acts by the principal defendant, Scott Zarnes, which they claim constitute breaches of the joint venture agreement—one of which is that Zarnes promised to prepare and submit applications for regulatory approvals on behalf of the

joint venture, but did not do so.

Plaintiffs have also alleged multiple acts by Zarnes which they claim constitute breaches of the fiduciary duties he owed his fellow joint venturers—one of which is that during ostensible settlement discussions, Zarnes (through his attorney) threatened to tell the plaintiffs' lender that provided the funds for the purchase of the Boonville property, that the [\*2] property was being used for cultivation, anticipating that would trigger a call of, and default on, the loan, unless plaintiffs paid him \$1.5 million.

Seizing on these assertions, defendants responded with a special motion to strike under the anti-SLAPP statute ([Code Civ. Proc., § 425.16](#)),<sup>1</sup> claiming the case "arises" from protected "petitioning" activity—before governmental bodies (referencing the allegations Zarnes failed to prepare and submit regulatory applications for the joint venture) and the courts (referencing the allegation of Zarnes' threat during settlement discussions).

The trial court concluded none of the plaintiffs' claims "arise" from protected activity within the meaning of the anti-SLAPP statute and denied the motion on that ground. We affirm.

### BACKGROUND

We provide only a summary of the dispute here, based largely on the plaintiffs' declarations submitted in opposition to the special motion to strike. We discuss the pivotal allegations of the complaint in detail in our discussion of the issues.

Plaintiffs Dan Yamini and Robin Stan are doctors and long-time friends from medical school. Both reside in

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<sup>1</sup> All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

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Los Angeles. Plaintiff Elias Donay is Yamini's brother-in-law and also resides in Los Angeles.<sup>2</sup>

Yamini [\*3] met Zarnes at a Beverly Hills health club in 2015, and according to plaintiffs, Zarnes ingratiated himself with Yamini and, through numerous misrepresentations about the extent of his experience in the medical marijuana business, enticed Yamini into entering into a cultivation business venture. Yamini would contribute the capital and recruit additional investors; Zarnes would provide cultivation expertise. They called the company CalmedX, LLC ("CalmedX"), of which Yamini and Zarnes were supposed to be co-members and co-managers.

Apparently, after several potential investors did not pan out, Zarnes, without telling Yamini, induced a different investor to purchase the Boonville property and bankroll a small cultivation operation for the 2016 grow year.

In the fall of that year, Zarnes re-approached Yamini, told him his deal with the other investor was not working out, and commenced discussions with the plaintiffs. According to plaintiffs, they knew next to nothing about cultivating and Zarnes portrayed himself as a veritable expert in that endeavor. He allegedly proposed an arrangement whereby plaintiffs would provide all the capital and purchase the property (on which Zarnes was already [\*4] residing and tending a small cultivation operation), and Yamini and another plaintiff would replace the incorporator and sole director of the existing operational entity, Calmedx Care, MBC ("Cal Care"), thus maintaining control of all assets.<sup>3</sup> Zarnes would apply for regulatory approvals for the benefit of the joint venture, and oversee grow operations. The plaintiffs anteed up, providing funds, procuring the property (through plaintiff Andersen Valley Properties, LLC ("Andersen Valley")), and executing legal documents Zarnes had a lawyer prepare in connection with the parties' new joint venture. Although documents pertaining to plaintiffs assuming control of Cal Care were also prepared, they were not signed, according to plaintiffs, due to oversight. The defendants' perspective is that no deal was ever struck, let alone reduced to writing.

In April 2017, plaintiffs met with Zarnes at the property.

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<sup>2</sup>For ease of reference, we will generally refer to "the plaintiffs," regardless of whether only some, or all, of them engaged in alleged acts.

<sup>3</sup>This entity, a non-profit mutual benefit corporation, had been formed by Zarnes and the prior owner/investor.

Zarnes assured plaintiffs he was in the process of preparing regulatory applications for the joint venture and he would send plaintiffs drafts and have them reviewed by the lawyer who had drafted the joint venture documents. Two months later, in June, plaintiffs learned Zarnes had submitted [\*5] an application without anyone's review (and, as they would later learn, not on behalf of the joint venture). When they questioned Zarnes about submitting an application without review, he took umbrage they were questioning his capabilities to run the operation.

Thinking it would be a good idea to have their anticipated crop certified by "Clean Green," plaintiffs contacted Zarnes in September and suggested that an inspector look at the cultivation operation. Zarnes objected. Later in the month, plaintiffs contacted Zarnes about risk management practices they had paid for and which Zarnes had agreed to put in place, including proper payroll records, insurance, and security. Zarnes never responded.

Plaintiffs continued to provide money, and in October, they contacted Zarnes about the documents required to transition Cal Care to a for-profit enterprise. At this point, according to plaintiffs, Zarnes insisted on negotiating "other terms" before he signed the previously prepared documentation placing Yamini and Donay in Cal Care control positions. Shortly thereafter, Zarnes told plaintiffs he had retained counsel. According to defendants, Zarnes was being "pressured . . . to sign one-sided [\*6] documents that gave [him] no rights to anything" and that did not reflect the deal the parties "had been negotiating."

During this same period of time, Zarnes finally agreed to an inspection by "Clean Green," and the company asked to see the regulatory application. Yamini received a partial copy, but enough to discover that Zarnes had not applied for a permit on behalf of CalmedX, as he had promised to do. Rather, he had named himself and Cal Care as the applicants. The inspection indicated the operation was headed towards an 800 pound crop of high grade medical cannabis.

By mid-November, Zarnes was refusing to communicate directly with plaintiffs and communicated only through his personal attorney. Zarnes also cut off Yamini's ability to review CalmedX records, including bank records.

At this point, it was clear to plaintiffs that Zarnes was actively undermining the joint venture. Yamini attempted on his own to engage in "good faith settlement communications" with Zarnes (through his attorney), but

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Zarnes never made a proposal. In plaintiffs' view, Zarnes and his attorney were actively stonewalling plaintiffs to buy time for Zarnes to harvest and process the crop for his own benefit. [\*7]

In December, plaintiffs retained counsel, who communicated with Zarnes' lawyer in an attempt to persuade Zarnes to comply with the joint venture agreement, including by executing the documents placing Yamini and Donay in control positions of Cal Care. He told Zarnes' attorney that if things did not get back on track, plaintiffs (and specifically Anderson Valley) would withdraw its property-owner consent to cultivation, required for regulatory approval. He also told Zarnes' lawyer that no one residing on the property had been paying the rent due under the residential leases, and asked if an unlawful detainer action was going to be necessary. Thus, defendants claim they were being "threatened" with eviction if they did not accede to plaintiffs' demand that Zarnes sign the documents.

During the course of this conversation, Zarnes' attorney said the lender financing Anderson Valley's purchase of the property was not aware it was being used for marijuana cultivation and several days later made a \$1.5 million settlement demand. Plaintiffs understood the statement and demand to be a threat to trigger a call on the loan and their default if plaintiffs rejected the demand. When plaintiffs had [\*8] applied for the loan, Zarnes told them to rush the inspection and approval process so the loan would be approved before cultivation commenced to avoid denial of financing.

At the end of December, plaintiffs (specifically, Anderson Valley) issued 3-day notices to Zarnes and the other occupants to pay rent or quit. Zarnes threatened the locksmith, changed the lock code on the entry gate, and blocked access to the property with vehicles.

Prior to the unlawful detainer hearing, Yamini and Donay went to the property. At this point, they discovered Zarnes had removed and secreted all the cannabis. Plaintiffs prevailed in the unlawful detainer case, the trial court discrediting Zarnes' claim that the written leases were meaningless, and neither he nor anyone else residing on the property had actually been expected to pay rent.

Yamini and Donay returned to the property at the beginning of March for the Sheriff's lockout. They discovered Zarnes had not only purloined the entire marijuana crop, but was now in the process of removing all of the infrastructure required for the grow operation,

including specialized soil that had been imported, "smart" pots, grow cages, fences, irrigation and other [\*9] materials they had paid for. The removal crew threatened to run Yamini and Donay off the road, but the two were able to follow several of the trucks, and they watched the crew offload the materials at two locations, one of which was Goodness Grows Nursery, which they were told was being sold to Zarnes.

Plaintiffs promptly filed suit claiming Zarnes had defrauded them, breached the joint venture agreement in numerous respects, and stolen both the production materials and fruit of the operation.<sup>4</sup>

Defendants responded with a special motion to strike. According to them, this lawsuit is the latest chapter in a campaign "of intimidation, bullying, greed, and deception . . . driven by a wealthy family from Beverly Hills . . . to steal control and ownership of a medical cannabis cultivation operation from local entrepreneur Scott Zarnes and his wife, Christine." They claimed they were entitled to bring a special motion to strike because "[t]he central allegation of the complaint is that Scott Zarnes was required to include the Plaintiffs in the Mendocino County and state cannabis license applications" and "[t]he content of the licensing allegations filed with county and state executive officials [\*10] is protected petitioning activity." They further claimed "[t]he complaint" is "based on the content of protected pre-litigation demands and settlement negotiations," which also constitutes protected activity under the anti-SLAPP statute.

The trial court did not agree and ruled defendants failed to carry their burden under the first prong of the anti-SLAPP analysis to demonstrate the plaintiffs' claims "arise" from protected activity. The court, therefore, did not reach the second prong of the analysis—whether plaintiffs made a colorable showing that their complaint has merit.

## DISCUSSION

### *Anti-SLAPP Overview*

Division Two of this Court ably summarized the basics

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<sup>4</sup>Yamini also filed a "derivative" action in the name of CalmedX against Zarnes in the Los Angeles superior court. Pursuant to Zarnes' motion to change venue, the case was transferred to Mendocino County. Zarnes notes he was awarded fees and costs incurred in bringing the motion.

of the anti-SLAPP statute in [Central Valley Hospitalists v. Dignity Health \(2018\) 19 Cal.App.5th 203, 216, 227 Cal. Rptr. 3d 848](#) (Central Valley): "[Subdivision \(b\)\(1\) of section 425.16](#) provides that "[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." [Subdivision \(e\) of section 425.16](#) elaborates the four types of acts within the [\*11] ambit of a SLAPP. . . . [¶]

"A two-step process is used for determining whether an action is a SLAPP. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity, that is, by demonstrating that the facts underlying the plaintiff's complaint fit one of the categories spelled out in [section 425.16, subdivision \(e\)](#). If the court finds that such a showing has been made, it must then determine the second step, whether the plaintiff has demonstrated a probability of prevailing on the claim. [Citation.] [¶]

"The Legislature enacted [section 425.16](#) to prevent and deter 'lawsuits [referred to as SLAPP's] 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).) Because these meritless lawsuits seek to deplete 'the defendant's energy' and drain 'his or her resources' [citation], the Legislature sought 'to prevent SLAPPs by ending them early and without great cost to the SLAPP target' [citation]. [Section 425.16](#) therefore establishes a procedure where the trial court evaluates the merits of the lawsuit using a summary-judgment-like procedure at an early stage of the litigation." [\*12] [Citation.] [¶]

"Finally, and as [subdivision \(a\) of section 425.16](#) expressly mandates, the section "shall be construed broadly." (Central Valley, supra, 19 Cal.App.5th at p. 216.)

Our standard in reviewing a ruling on an anti-SLAPP motion is de novo. (Central Valley, supra, 19 Cal.App.5th at p. 216.)

### **"Arising" From Protected Activity**

### **The Fundamentals**

Under the first step of the anti-SLAPP analysis—determining whether a plaintiff's claims "arise" from protected activity—"the moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them." ([Baral v. Schnitt \(2016\) 1 Cal.5th 376, 396, 205 Cal. Rptr. 3d 475, 376 P.3d 604](#) (Baral).) The question, at this juncture, is what is pled—not what is, or may be, proven. And we accept as true the plaintiff's well-pleaded facts. ([Central Valley, supra, 19 Cal.App.5th at p. 217](#); [Comstock v. Aber \(2012\) 212 Cal.App.4th 931, 942, 151 Cal. Rptr. 3d 589](#) ["allegation that Aber complained to the police" brought "cross-complaint within the SLAPP statute," and Comstock could not "defeat that allegation by claiming that Aber did not do what he alleges she did," italics omitted]; [Haight Ashbury Free Clinics, Inc. v. Happening House Ventures \(2010\) 184 Cal.App.4th 1539, 1548, 110 Cal. Rptr. 3d 129](#) ["purported oral statements" constituted "statements made in connection with an issue under consideration by a judicial body"; accordingly, "[t]he alleged activity" fell within "the scope of the SLAPP statute"].) In other words, in connection with the first prong of the anti-SLAPP analysis, the court makes no assessment as to the merits [\*13] of the alleged claim.

"A claim arises from protected activity when that activity underlies or forms the basis for the claim. ([City of Cotati v. Cashman \(2002\) 29 Cal.4th 69, 78, 124 Cal. Rptr. 2d 519, 52 P.3d 695](#) . . . [(City of Cotati)]. . . .) Critically, 'the defendant's act underlying the plaintiff's cause of action must itself have been an act in furtherance of the right of petition or free speech.' ([City of Cotati, at p. 78](#) . . . .) '[T]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute.' ([Navellier v. Sletten \[\(2002\)\] 29 Cal.4th \[82,\] 89, 124 Cal. Rptr. 2d 530, 52 P.3d 703](#) [(Navellier)]; see [City of Cotati, at p. 78](#) [suit may be in 'response to, or in retaliation for,' protected activity without necessarily arising from it].) Instead, the focus is on determining what 'the defendant's activity [is] that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning.' ([Navellier, at p. 92](#) . . . .) 'The only means specified in [section 425.16](#) by which a moving defendant can satisfy the ["arising from"] requirement is to demonstrate that the defendant's conduct by which plaintiff claims to have been injured falls within one of the four categories described in subdivision (e). . . .' ([Equilon Enterprises \[v.](#)

Consumer Cause, Inc. (2002) 29 Cal.4th 53,] 66, 124 Cal. Rptr. 2d 507, 52 P.3d 685 . . .) In short, in ruling on an anti-SLAPP motion, courts [\*14] should consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability." (Park v. Board of Trustees of California State University (2017) 2 Cal.5th 1057, 1062-1063, 217 Cal. Rptr. 3d 130, 393 P.3d 905 (Park), italics omitted.)

Thus, "[a]ssertions that are 'merely incidental' or 'collateral' are not subject to section 425.16." (Baral, supra, 1 Cal.5th at p. 394.) "Allegations of protected activity that merely provide context, without supporting a claim for recovery," also do not demonstrate that the claim "arises" from protected activity. (*Ibid.*) In other words, there is a "distinction between activities that form the basis for a claim and those that merely lead to the liability-creating activity or provide evidentiary support for the claim." (Park, supra, 2 Cal.5th at p. 1064; see Gallimore v. State Farm Fire & Casualty Ins. Co. (2002) 102 Cal.App.4th 1388, 1399, 126 Cal. Rptr. 2d 560 [emphasizing that courts should not confuse a party's "allegedly wrongful acts with the evidence that plaintiff will need to prove such misconduct" and denying an anti-SLAPP motion where the plaintiff sought no relief for the defendant's communicative acts, italics omitted].)

The courts have long stated that in determining whether a claim "arises" from protected activity, one must "'look to the 'principal thrust or gravamen of the plaintiff's cause of action.'"" (Central Valley, supra, 19 Cal.App.5th at p. 217, quoting Moriarty v. Laramar Management Corp. (2014) 224 Cal.App.4th 125, 133-134, 168 Cal. Rptr. 3d 461.) Under this rubric, the courts "'examine the principal [\*15] thrust or gravamen of a plaintiff's cause of action to determine whether the anti-SLAPP statute applies.'" (Trilogy at Glen Ivy Maintenance Assn. v. Shea Homes, Inc. (2015) 235 Cal.App.4th 361, 368, 185 Cal. Rptr. 3d 8, italics omitted.) "We assess the principal thrust by identifying '[t]he allegedly wrongful and injury-causing conduct . . . that provides the foundation for the claim.' [Citation.] If the core injury-causing conduct on which the plaintiff's claim is premised does not rest on protected speech, collateral or incidental allusions to protected activity will not trigger application of the anti-SLAPP statute." (*Ibid.*; accord, Mission Beverage Co. v. Pabst Brewing Co., LLC (2017) 15 Cal.App.5th 686, 698, 223 Cal. Rptr. 3d 547 (Mission Beverage).)

In *Baral*, the Supreme Court refined this analysis in what are termed "'mixed"' cases—that is, where causes of action are based on both protected and unprotected

activity. As the court explained, "[t]ypically, a pleaded cause of action states a legal ground for recovery supported by specific allegations of conduct by the defendant on which the plaintiff relies to establish a right to relief. If the supporting allegations include conduct furthering the defendant's exercise of the constitutional rights of free speech or petition, the pleaded cause of action 'aris[es] from' protected activity, at least in part, and is subject to the special [\*16] motion to strike authorized by section 425.16(b)(1)." (Baral, supra, 1 Cal.5th at pp. 381-382.) Some appellate courts, including the court in *Baral*, had concluded "the motion lies only to strike an entire count as pleaded in the complaint." (Id. at p. 382, italics omitted.) But "this rule," said the court, "leads to anomalous results when the count is supported by allegations of unprotected activity as well as protected activity." (*Ibid.*)

The high court clarified that a special motion to strike can take aim at those "parts of a count as pleaded" that are based on protected activity. (Baral, supra, 1 Cal.5th at p. 393.) Stated another way, a motion can target "allegations of protected activity that are asserted as grounds for relief. The targeted claim must amount to a 'cause of action' in the sense that it is alleged to justify a remedy. By referring to a 'cause of action' against a person arising from any act of that person' . . . the Legislature indicated that particular alleged acts giving rise to a claim for relief may be the object of an anti-SLAPP motion." (Id. at p. 395, italics omitted.) The moving defendant thus has the burden, in connection with making a prong one showing, "of identifying all allegations of protected activity, and the claims for relief supported by them." (Id. at p. 396.)

With these fundamentals [\*17] in mind, we turn to the allegations defendants maintain bring this case within the anti-SLAPP statute.

### ***Failure to Prepare and Apply For Permits and Licenses***

In the "facts common to all causes of action," plaintiffs recount the terms of the alleged oral agreement between Yamini and Zarnes to form CalmedX. (Capitalization omitted.) Plaintiffs enumerate eight material terms. One of these is that Zarnes would provide five "cultivation services," one of which, in turn, is "obtaining permitting and licensing for the legal cultivation of medical marijuana." Yamini "would be on the board of any entity that held the local permit to cultivate cannabis on the Property or other property



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managed by CalmedX and Yamini would be a licensee of any State license to cultivate cannabis on the Property or other property managed by CalmedX."

Similarly, in recounting the alleged terms of the oral joint venture agreement between plaintiffs and Zarnes, plaintiffs enumerate nine material terms. One of these is that Zarnes would provide six "cultivation services," one of which, in turn, is "preparing the necessary application(s) for a local permit . . . for the cultivation of medical cannabis . . . which County [\*18] Application would be submitted to the county only upon review and express approval of the [plaintiffs]," and another of which is to "prepare applications(s) for California State license(s), temporary or long term, necessary for the legal cultivation of cannabis . . . which State Application would be submitted to the state only upon review and express approval of the [plaintiffs]."

Plaintiffs also allege as common facts that their "claims herein 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 the cultivation on the Property."

In their first cause of action for breach of contract—asserted only against Zarnes—plaintiffs allege Zarnes breached the oral joint venture agreement in 12 different ways, including 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 "[f]ailing and refusing to include [\*19] the Plaintiffs, or any of them, as applicants or licensees, on the State Application for temporary [sic] or other state licenses to cultivate cannabis on" the property.<sup>5</sup> Plaintiffs make no

other allegations pertaining to regulatory applications in this, or any other, cause of action.

At the outset of each subsequent cause of action, plaintiffs summarily "re-allege" all preceding allegations, but do not otherwise refer to any of the specific breach of contract allegations as the basis of any other claim. Rather, in each subsequent cause of action, plaintiffs allege other specific acts as the basis for those claims. Accordingly, we attach no significance to the prefatory incorporation of these allegations in subsequent causes of action. (See [Newport Harbor Offices & Marina, LLC v. Morris Cerullo World Evangelism \(2018\) 23 Cal.App.5th 28, 45, 232 Cal. Rptr. 3d 540](#) (Newport Harbor) [general allegations incorporated into subsequent causes of actions were "collateral to the claims for relief" and "'merely provide[d] context' to the causes of action alleged"].)

As this recitation of the allegations demonstrates, defendants' assertion in their moving papers that "[t]he central allegation of the complaint" is the "content of the licensing applications" filed with the county and state is not accurate. Rather, defendants [\*20] have tried mightily to transmute plaintiffs' complaint into something it is not. (See [Bel Air Internet, LLC v. Morales et. al. \(2018\) 20 Cal.App.5th 924, 936, 230 Cal. Rptr. 3d 71](#) (Morales) ["courts have rejected efforts by moving parties to redefine the factual basis for a plaintiff's claims as described in the complaint to manufacture a ground to argue that the plaintiff's claims arise from protected conduct"].)

It is abundantly clear from the 28-page amended complaint that its central allegation is not the "content" of whatever regulatory submissions Zarnes actually made. Rather, the allegations concerning preparation and submission of regulatory applications pertain only to the breach of contract cause of action, and plaintiffs' complaint is that Zarnes promised to prepare applications on behalf of, and for the benefit of, the joint venture and did not do so. We fail to see how *not* preparing and submitting the promised applications makes this a case "arising" from protected "petitioning" activity. (See [Mission Beverage, supra, 15 Cal.App.5th at pp. 701, 704](#) [breach of contract claim was based on decision to terminate distribution agreement, not on letter communicating that decision and invoking statutorily required negotiation process]; [Gotterba v. Travolta \(2014\) 228 Cal.App.4th 35, 41-42, 175 Cal.](#)

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<sup>5</sup> Zarnes' additional alleged breaches include: "Refusing to include the Plaintiffs, or any of them, on the board of CalmedX Care;" "Failing and refusing to provide Plaintiffs with a full accounting in connection with the operations, expenses, losses and/or profits of the cultivation;" "Diverting Plaintiffs' funds and Joint Venture assets and funds, including the Cannabis Inventory and Material for the benefit of Defendants;" "On information and belief, diverting and attempting to divert Joint Venture funds to third parties without the authorization of the Joint Venture;" "Failing and refusing to preserve and/or use the Joint Venture's assets, including the Cannabis inventory and Material for the benefit of the Joint Venture, including to pay the debts owed to Plaintiffs;" "Transporting and disposing of the Cannabis Inventory and Material without notice to or authorization from any of the

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Plaintiffs and, on information and belief, in violation of rules and regulations governing the transport and disposition of cannabis;" and "Failing and refusing to pay rent to AVP. . . ."

*Rptr. 3d 47* (*Gotterba*) [declaratory relief action was based on competing termination agreements, not [\*21] on demand letters preceding filing of lawsuit]; *Ulkarim v. Westfield LLC* (2014) 227 Cal.App.4th 1266, 1281, 175 Cal. Rptr. 3d 17 (*Ulkarim*) [breach of commercial lease claim was based on decision to terminate without valid cause, not on landlord's institution of unlawful detainer action]; compare *Navellier, supra*, 29 Cal.4th at p. 87 [claim that release agreement was breached by filing of counterclaim was subject to a special motion to strike]; *Newport Harbor, supra*, 23 Cal.App.5th at p. 47 [allegations that collection assignment and sublease were breached by issuing 30-day notices and other legal notices were subject to a special motion to strike]; *Vivian v. Labrucherie* (2013) 214 Cal.App.4th 267, 272, 153 Cal. Rptr. 3d 707 [claim that contract was breached by statements made to investigators and in family court papers subject to special motion to strike].)

Even assuming the complaint could fairly be read to include allegations about the content of the regulatory applications Zarnes prepared and submitted for himself—which we do not believe it can be—the most that could be said about such allegations would be that they provide context or "mere evidence related to liability." (*Gotterba, supra*, 228 Cal.App.4th at p. 42; see *Newport Harbor, supra*, 23 Cal.App.5th at p. 45 [no claim for relief was based on allegations of protected activity and "apparent function [of such allegations was] to provide context to and evidence of the parties' disputes"]; *Area 51 Productions, Inc. v. City of Alameda* (2018) 20 Cal.App.5th 581, 596, 229 Cal. Rptr. 3d 165 (*Area 51 Productions*) [communications from city "that led [\*22] to and that followed" the alleged breach—the city's refusal to issue a license—were "merely incidental to the asserted claims" against the city for breach, interference, and unfair business practices].)

Defendants cite *Midland Pacific Building Corp. v. King* (2007) 157 Cal.App.4th 264, 68 Cal. Rptr. 3d 499 (*Midland*), in support of their assertion that plaintiffs' claims "arise" from protected petitioning activity before regulatory bodies. *Midland* involved a dispute between a developer and property owners who allegedly failed to abide by the terms of a purchase agreement. Among other things, the owners committed to obtaining approvals of a specific plan and vesting tentative map in substantial compliance with the draft plan and tentative map that had been prepared. (*Id. at p. 267*.) The owners then submitted a tentative map to the city that the developer had approved. But at the hearing, the owners announced they were going to return with a different, higher density map, which they did, with the upshot that

their new map was returned to the planning department for further review. (*Id. at pp. 268-269*.) The Court of Appeal concluded the developer's breach of contract claim "arose" from this petitioning activity, and specifically the owners abandonment of the approved tentative map and pursuit of their own [\*23] higher density map. (*Id. at p. 272*.)

Unlike in *Midland*, the plaintiffs' complaint here is not that Zarnes prepared and submitted applications for regulatory approvals on behalf of the joint venture and then changed course mid-way through the approval process. Rather, plaintiffs allege Zarnes never prepared or submitted an application for the joint venture. Furthermore, the court in *Midland* expressly circumscribed the extent of its holding. As the court explained, "modern real estate development almost always requires governmental permits." (*Midland, supra*, 157 Cal.App.4th at p. 273.) That does not mean that "simply because" a party has "sought governmental permits for the activity that constitutes the breach" that the anti-SLAPP statute applies. (*Ibid.*) Where the dispute involves a development contract, procuring regulatory approvals will often "simply [be] collateral." (*Ibid.*) The anti-SLAPP statute applied in *Midland* because "obtaining governmental approval was not collateral to the contract, it was the essence of the contract"—it was "what" the developer "paid [the owner] to do." (*Ibid.*) As our recitation of the dispute and the allegations of the complaint here demonstrate, while Zarnes' procurement of regulatory approvals for himself [\*24] may be evidence of his alleged breach of the joint venture agreement, that conduct did not go to the "essence" of the agreement, nor did it constitute the alleged act of breach. (See *Area 51 Productions, supra*, 20 Cal.App.5th at p. 598 [distinguishing *Midland*; communicative acts by others preceding or otherwise made in connection with the city's alleged breach of contract "are merely collateral to, or evidence that may be probative of, Area 51's theories of liability"<sup>6</sup>].)

At oral argument, defendants placed great emphasis on *Mindys Cosmetics, Inc. v. Dakar* (9th Cir. 2010) 611 F.3d 590 (*Mindys*), claiming it is directly on point and compels the conclusion plaintiffs' claims "arise from"

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<sup>6</sup> The court reached a different conclusion as to the individual government officials and employees who were also sued, as their communicative acts "are the basis for suing them on an agency theory." (*Area 51 Productions, supra*, 20 Cal.App.5th at p. 599.) The back and forth between the plaintiff and these officials and employees moved the circumstances from merely ministerial, to deliberative. (*Id. at pp. 600-601*.)

protected petitioning activity. According to defendants, *Mindys* holds that where a dispute is about putting the "wrong name" on an application for a license or permit, the case arises from protected petitioning activity and thus is subject to a special motion to strike. *Mindys* involved a family squabble over whether the family business, or one of the family members, owned the rights to two cosmetic trademarks. (*Id.* at p. 594.) As originally registered, Donna Dakar was listed as the owner. When the mark expired, Donna and two other family members instructed the company lawyer that the trademarks be registered with Sonya [\*25] Dakar listed as the owner. (*Ibid.*) Other family members, on behalf of the company, sued for trademark infringement. (*Ibid.*) The company's lawyer made a special motion to strike, which was denied. (*Id.* at pp. 594-595.) The Ninth Circuit affirmed on the ground the plaintiffs carried their burden of showing their claims had minimal merit under prong two of the anti-SLAPP inquiry. (*Id.* at p. 595.) As to prong one, the court ruled that applying for trademark registration is protected petitioning activity (*id.* at p. 597), and, applying the "gravamen" standard, next ruled that each of the company's causes of action (for trademark infringement, fraudulent concealment, and conversion against the other family members, and for malpractice and breach of fiduciary duty by the company's attorney) arose out of the lawyer's filing of the trademark application in Sonya's name. (*Id.* at p. 598.) The principal issue the court discussed was whether legal malpractice claims are categorically beyond the reach of a special motion to strike and concluded they are not. (*Id.* at pp. 597-598.) The court further observed that the alleged *act of infringement* was the claim of ownership made in the registration. (*Id.* at p. 598.) "But for the trademark application," said the court, "Mindys would have [\*26] no reason to sue" the other family members and the company's lawyer. (*Ibid.*)

The same cannot be said here. The alleged breach of the joint venture agreement by Zarnes was his *failure to submit* an application for the joint venture. Or stated another way and paraphrasing *Mindys*, regardless of whether Zarnes filed an application for his own benefit, the plaintiffs had reason to sue him for his failure to prepare and submit an application on behalf of the joint venture.

In short, plaintiffs' breach of contract cause of action does not "arise" from whatever regulatory applications Zarnes may have prepared and submitted for himself, but rather, from his *failure to prepare and submit* applications for the joint venture. Indeed, plaintiffs specifically alleged that their claims were "not intended

to prevent Zarnes from pursuing local and state cannabis licensing," and "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 farm material used for cultivation on the Property." (See [Central Valley, supra, 19 Cal.App.5th at pp. 217-218](#) [in rejecting defendants' assertion that complaint "arose" [\*27] from protected peer review activities, court observed plaintiffs specifically alleged they were not suing about peer review and had offered to clarify the bases of the business torts at issue]; see also [Gotterba, supra, 228 Cal.App.4th at p. 42](#) [declaratory relief action did not seek a declaration regarding demand letters preceding lawsuit nor did it seek to curtail the defendant's right to send demand letters]; [Ulkarim, supra, 227 Cal.App.4th at p. 1282](#) [commercial tenant's claims for interference with economic advantage did not attack landlord's service and filing of unlawful detainer action].)

Nor is there any merit to defendants' assertion, emphasized at oral argument, that all of the plaintiffs' claims require them to establish "ownership" of the allegedly purloined marijuana crop, that "ownership" requires licensing, and therefore all their claims "arise" from Zarnes' regulatory petitioning activity. Even assuming who held the license is relevant to ownership, the state of the licensing is simply *evidence* relevant to the merits of plaintiffs' claims and defendants' defenses.

Our conclusion that plaintiffs have alleged no claim that "arises" from protected petitioning activity before a regulatory body, dispenses with the need to address other arguments pertaining [\*28] to Zarnes' procurement of regulatory approvals for his own benefit, instead of preparing and submitting applications for the joint venture. This includes defendants' principal assertion on appeal that, under *Baral* and *Park*, the trial court erred in speaking in terms of the "principal thrust" or "gravamen" of the plaintiffs' causes of action.<sup>7</sup> In any event, as *Baral* and *Park* counsel, we have focused on the specific allegations defendants claim implicate protected petitioning activity.

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<sup>7</sup> It also includes plaintiffs' contentions that defendants "waived" this assertion by failing to take issue with the trial court's tentative ruling employing gravamen terminology, that the permitting and licensing process was only ministerial, and therefore did not involve "petitioning" activity, and that the "commercial speech" exclusion to the anti-SLAPP statute applies.



### **The "Extortionate" Settlement Demand**

In their third cause of action for breach of fiduciary duty—also asserted only against Zarnes—plaintiffs allege Zarnes breached his fiduciary duty to the joint venturers in several ways, including by "threatening to undermine [Anderson Valley's] loan on the Property in order to extort from Plaintiffs \$1.5 million to which Zarnes had no right or entitlement." Plaintiffs did not make any allegations in this regard in their "common" factual allegations.

At the outset of each subsequent cause of action, as we have discussed, plaintiffs summarily "re-alleged" all preceding allegations. But, as with their specific breach of contract allegations, plaintiffs do not refer to this [\*29] specific breach of fiduciary duty allegation as the basis for any other cause of action, and we therefore do not treat its prefatory incorporation in other causes of action as having any significance.

It is well-established that "communications that are preparatory to or in anticipation of litigation" constitute protected activity under the anti-SLAPP statute, "even though they occur before litigation is actually pending." (*Stenehjem v. Sareen* (2014) 226 Cal.App.4th 1405, 1413, 173 Cal. Rptr. 3d 173 (*Stenehjem*)). However, this protection does not extend to "prelitigation" communications that are, as a matter of law, extortion. (*Id.* at pp. 1416-1419.)

The watershed case in this regard is *Flatley v. Mauro* (2006) 39 Cal.4th 299, 46 Cal. Rptr. 3d 606, 139 P.3d 2 (*Flatley*). Flatley was a well-known entertainer and sued attorney Mauro for conduct arising out of his representation of a client who claimed Flatley raped her in his Las Vegas hotel suite. (*Id.* at p. 305.) Flatley asserted several causes of action, including civil extortion, based on a demand letter from Mauro. (*Ibid.*) Mauro made a special motion to strike, claiming the demand letter "was a prelitigation settlement offer in furtherance of his constitutional right of petition." (*Id.* at p. 311.)

The Supreme Court examined the demand letter to determine whether it was, on its face, extortion. (*Flatley, supra*, 39 Cal.4th at pp. 328-332.) The letter included "threats [\*30] to publicly accuse Flatley of rape and to report and publicly accuse him of other unspecified violations of various laws unless he 'settled' by paying a sum of money to Robertson of which Mauro would receive 40 percent." (*Id.* at p. 329.) In "[t]he key passage

in Mauro's letter . . . Flatley is warned that, unless he settles, 'an in-depth investigation' will be conducted into his personal assets to determine punitive damages and this information will then 'BECOME A MATTER OF PUBLIC RECORD, AS IT MUST BE FILED WITH THE COURT. . . . [¶] Any and all information, including Immigration, Social Security Issuances and Use, and IRS and various State Tax Levies and information will be exposed. We are positive the media worldwide will enjoy what they find.' This warning is repeated in the fifth paragraph: '[A]ll pertinent information and documentation, if in violation of any U.S. Federal, Immigration, I.R.S., S.S. Admin., U.S. State, Local, Commonwealth U.K., or International Laws, shall immediately [be] turned over to any and all appropriate authorities.'" (*Ibid.*, boldface omitted.) Mauro followed with telephone calls to Flatley's attorney, reiterating his demand and threats, and identifying that an acceptable [\*31] settlement figure was ""seven figures."" (*Id.* at pp. 329-330.)

The high court concluded Mauro's conduct, including the demand letter, constituted extortion as a matter of law. (*Flatley, supra*, 39 Cal.4th at p. 330) ["These communications threatened to 'accuse' Flatley of, or 'impute to him,' 'crime[s]' and 'disgrace' (*Pen. Code, § 519, subds. 2, 3*) unless Flatley paid Mauro a minimum of \$1 million of which Mauro was to receive 40 percent."].) Mauro was therefore not entitled to the protection of the anti-SLAPP statute. (*Id.* at p. 333.)

Following *Flatley*, the Court of Appeal in *Stenehjem* also concluded a purported settlement demand constituted extortion. (*Stenehjem, supra*, 226 Cal.App.4th at pp. 1416-1423.) In so doing, the court recounted that "[a]t least five published cases ha[d] followed *Flatley* in concluding that the underlying conduct was illegal as a matter of law and, therefore, the defendant could not strike the complaint under the anti-SLAPP law. In *Cohen v. Brown* (2009) 173 Cal.App.4th 302, 93 Cal. Rptr. 3d 24 . . . the defendant (Attorney Brown) had associated the plaintiff (Cohen, an attorney and physician), to represent a client in a personal injury matter. (*Id.* at pp. 306-307.) After a dispute had arisen between the two attorneys that resulted in Cohen filing an attorney fee lien in the personal injury case, and after that case had settled, Brown made a written demand to Cohen. In his demand, [\*32] Brown threatened to file an administrative complaint against Cohen with the State Bar if Cohen did not sign off on the client's settlement check to allow all fees to be paid to Brown. (*Id.* at pp. 310-311.) Cohen did not comply, and Brown went forward with a State Bar complaint. (*Id.* at p. 311.) The

appellate court held that Cohen's complaint, which included a claim for civil extortion, was not subject to the anti-SLAPP statute because Brown's conduct constituted extortion. (*Id. at pp. 317-318.*) (*Stenehjem, at p. 1419.*)

Similarly, "[i]n *Mendoza v. Hamzeh* (2013) 215 Cal.App.4th 799, 155 Cal. Rptr. 3d 832 . . . (*Mendoza*), Mendoza received a demand letter from Attorney Hamzeh sent on behalf of his client, Mendoza's former employer, indicating: "'We are in the process of uncovering the substantial fraud, conversion and breaches of contract that [*Mendoza*] has committed on my client. . . . To date we have uncovered damages exceeding \$75,000. . . . If [you do] not agree to cooperate with our investigation and provide us with a repayment of such damages caused, we will be forced to proceed with filing a legal action . . . , as well as reporting [you] to the California Attorney General, the Los Angeles District Attorney, [and] the Internal Revenue Service regarding tax fraud. . . .'" (*Id. at p. 802.*) . . . The *Mendoza* court held that the [\*33] trial court had not erred in denying Hamzeh's anti-SLAPP motion because under *Flatley*, the demand letter constituted extortion as a matter of law because it involved a 'threat to report criminal conduct . . . coupled with a demand for money.' (*Mendoza, at p. 806, . . .*)" (*Stenehjem, supra, 226 Cal.App.4th at p. 1419*, italics omitted.)

In *Stenehjem*, the purported settlement demand was authored by the cross-defendant litigant, himself, following unfruitful discussions between the parties' lawyers. (*Stenehjem, supra, 226 Cal.App.4th at p. 1421.*) The import of his lengthy e-mail was that his former employer's CEO had engaged in misconduct that would, if the litigant's wrongful termination case were not settled, be reported to the federal government for exposure in a qui tam false claims action. (*Id. at pp. 1421-1423.*) Even though there was no express threat and no demand for a specific settlement amount (*id. at p. 1424*), the court concluded the e-mail constituted "extortion as a matter of law" because (a) it "threatened to expose [the CEO] to federal authorities for alleged violations of the False Claims Act unless he negotiated a settlement of [the litigant's] private claims"; and (b) "the alleged criminal activity that [the litigant] threatened to expose . . . was 'entirely unrelated to any alleged injury suffered by' [the [\*34] litigant] as alleged in his defamation and wrongful termination claims." (*Id. at p. 1423.*) In short, given the legitimate settlement discussions that had preceded the litigant's missive, the e-mail "was in reality a demand to negotiate and settle

his personal claims or else face the potential exposure of unrelated allegations that [the CEO] had committed criminal acts. [And] [t]he fact that [the litigant's] threats may have been 'veiled' [citation] or 'half-couched in legalese does not disguise their essential character as extortion.'" (*Id. at p. 1425.*)

Plaintiffs assert Zarnes (through his lawyer) also crossed the line, and his threat to report the cannabis operation to their lender to precipitate a call of, and their default on, the loan, unless plaintiffs paid him \$1.5 million, constituted extortion as a matter of law. Defendants contend these communications were legitimate prelitigation settlement efforts and thus protected activity.

As the *Stenehjem* court observed, "[e]xtortion has been characterized as a paradoxical crime in that it criminalizes the making of threats that, in and of themselves, may not be illegal. "[I]n many blackmail cases the threat is to do something in itself perfectly legal, but that [\*35] threat nevertheless becomes illegal when coupled with a demand for money." [Citation.]' (*Flatley, supra, 39 Cal.4th at p. 326*, fn. omitted.) Additionally, 'threats to do the acts that constitute extortion under *Penal Code section 519* are extortionate whether or not the victim committed the crime or indiscretion upon which the threat is based and whether or not the person making the threat could have reported the victim to the authorities or arrested the victim. [Citations.]' (*Id. at p. 327.*)" (*Stenehjem, supra, 226 Cal.App.4th at p. 1418.*)

We agree with the trial court that, like the purported settlement demands in *Flatley* and *Stenehjem*, the alleged threat by Zarnes (through his lawyer) to "undermine" the plaintiffs' loan unless plaintiffs paid him \$1.5 million, amounted to extortion and thus was not protected prelitigation petitioning activity protected under the anti-SLAPP statute.

To paraphrase *Stenehjem*, the asserted statement by Zarnes' attorney "that the lender was not aware that cannabis was being cultivated" on the property, followed within days by a \$1.5 million settlement demand, was a less-than-veiled "threat" to report supposedly improper conduct (or worse) by plaintiffs that was anticipated to result in a call of, and default on, the loan. (See *Pen. Code, § 519* ["[f]ear, such as will constitute extortion, [\*36] may be induced by a threat [¶] . . . [¶] . . . [t]o expose, or to impute to him, her, or them a . . . disgrace, or crime".])

Whether there was any truth to the clear suggestion

plaintiffs had engaged in wrongful conduct vis-à-vis their lender is irrelevant. (*Stenehjem, supra*, 226 Cal.App.4th at p. 1423 [observing there was "no evidence" of the False Claims Act violations the cross-defendant threatened to report]; *Mendoza, supra*, 215 Cal.App.4th at pp. 806-807 [whether the plaintiff actually "committed any crime or wrongdoing," that the defendant threatened to report, was immaterial; threat to make report of criminal conduct to law enforcement, and the plaintiffs customers and vendors, coupled with demand for payment of "damages exceeding \$75,000" constituted extortion].)

Nor does the fact that the statement did not include a demand for money, or that the statement and written demand did not make an express threat, remove them from the ambit of extortion. "Threats can be made by innuendo." (*Stenehjem, supra*, 226 Cal.App.4th at p. 1424.) And "the circumstances under which the threat is uttered and the relations between [the defendant] and the [target of the threats] may be taken into consideration in making a determination" as to whether there was a threat. (*Ibid.*, quoting *People v. Oppenheimer* (1962) 209 Cal.App.2d 413, 422, 26 Cal. Rptr. 18; see *Stenehjem, at p. 1421* [pointing out it was "important [\*37] to consider the context" in which the e-mail at issue was sent in determining that it constituted extortion as a matter of law]<sup>8</sup>.)

The supposedly improper conduct Zarnes threatened to report was also "entirely unrelated to any alleged injury" (*Stenehjem, supra*, 226 Cal.App.4th at p. 1423) suffered by Zarnes. His beef with the plaintiffs was that he was not getting a fair share of the anticipated rewards of the joint venture. It had nothing to do with the plaintiffs' relationship with, and obligations to, their lender. Indeed, Zarnes assertedly pushed plaintiffs to procure financing before the grow season commenced to avoid having to disclose to the lender, or having the lender discover through inspection, that the property was going to be used for cultivation.

In short, Zarnes threatened to expose the plaintiffs to punitive action by their lender for supposedly wrongful

conduct, unless they agreed to settle his private claims. This was extortion. (See *Stenehjem, supra*, 226 Cal.App.4th at pp. 1418-1427; *Mendoza, supra*, 215 Cal.App.4th at p. 806 [defendant's threat to make report of criminal conduct to law enforcement, and to the plaintiff's customers and vendors, "coupled with a demand for money, constitutes 'criminal extortion as a matter of law'"].)

While defendants cite several cases discussing the latitude given [\*38] to prelitigation settlement discussions, not one dictates a different conclusion here.

In *Malin v. Singer* (2013) 217 Cal.App.4th 1283, 159 Cal. Rptr. 3d 292, the case on which defendants principally rely, the defendant's attorney sent a letter to his client's business associates announcing the client's intention to sue them for numerous wrongs, including embezzlement, conversion and breach of fiduciary duty. Enclosed was a copy of the draft complaint, which included allegations that one of these individuals used the purloined funds for illicit purposes, including sexual liaisons, including with a not yet identified judge. (*Id. at p. 1288-1289.*) That individual filed his own lawsuit asserting, among other claims, a claim for extortion. (*Id. at p. 1289.*) The trial court denied the defendant's special motion to strike, reasoning that all the activities targeted by the complaint—wire tapping, computer hacking, and extortion—"were illegal as a matter of law," and under *Flatley*, the complaint was outside the anti-SLAPP statute. (*Id. at p. 1291.*) The Court of Appeal reversed. As to the extortion claim, the court concluded the circumstances did not come within what it called the *Flatley* "exception" to protected prelitigation activity for two reasons. First, the conduct which the defendant threatened to [\*39] disclose was not unrelated to her own claims. To the contrary, the "secret" which allegedly would be revealed and expose the plaintiff and others "to disgrace," "was inextricably tied" to the defendant's own claims. "The demand letter accused [the plaintiff] of embezzling money and simply informed him that [the defendant] knew how he had spent those funds." (*Id. at p. 1299.*) Second, the plaintiff was in error in asserting "the threatened disclosure of secrets affecting a third party, his alleged sexual partner, necessarily constitute[d] extortion." (*Ibid.*) "[T]he threatened disclosure of a secret affecting a third party, who is neither a relative nor a family member, does not constitute extortion." (*Ibid.*) Neither is the case here. The wrongful conduct Zarnes threatened to report to the plaintiffs' lender was wholly unrelated to his claims against the plaintiffs, and his threat was made directly to

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<sup>8</sup> Thus, to this extent we are not confined to the allegations of the complaint. (See *Morales, supra*, 20 Cal.App.5th at pp. 935, 941 [court can consider supporting and opposing affidavits, in addition to allegations, in determining whether litigation was "seriously contemplated" at the time challenged communications were made, so as to bring them within the protection of the anti-SLAPP statute as protected, prelitigation activity].)

the plaintiffs (through counsel), not to a third party.

The other cases defendants cite are even further afield. (E.g., [\*Sosa v. DIRECTV, Inc.\* \(9th Cir. 2006\) 437 F.3d 923, 936-942](#) [sending demand letters asserting legal claims that may be weak, but do not rise to the level of shams, was conduct immunized from RICO liability under the Noerr-Pennington doctrine]; [\*40] [\*Blanchard v. DIRECTV, Inc.\* \(2004\) 123 Cal.App.4th 903, 918-921, 20 Cal. Rptr. 3d 385](#) [plaintiffs "conceded that their lawsuit 'arises from' DIRECTV's 'free speech or petitioning activity,'" namely a demand letter; court rejected, under the second prong of the anti-SLAPP analysis, the claim that DIRECTV had not conclusively shown that the litigation privilege applied because there was a triable issue as to whether it sent the demand letters ""with the good faith belief in a legally viable claim and in serious contemplation of litigation""]; [\*Home Ins. Co. v. Zurich Ins. Co.\* \(2002\) 96 Cal.App.4th 17, 22-25, 116 Cal. Rptr. 2d 583](#) [litigation privilege applied to alleged misrepresentation by counsel for automobile liability insurer concerning policy limits for permissive user, and, thus, the accident victims' underinsured motorist carrier could not reasonably rely on it and could not sue the liability insurer for fraud].)

## DISPOSITION

The order denying defendants' special motion to strike is AFFIRMED. Respondents to recover costs on appeal.

Banke, J.

We concur:

Margulies, Acting P. J.

Sanchez, J.