California Supreme Court Case Number S225090

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

ROBERT BARAL,

Plaintiff and Respondent,

vs.

DAVID SCHNITT,

Defendant and Petitioner.

After a Published Decision of the Court of Appeal
Second Appellate District, Division One (Case No. B253620)
Appeal from the Los Angeles Superior Court
Honorable Maureen Duffy-Lewis (Case No. BC475350)

ANSWERING BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

I. INTRODUCTION.

This case presents an opportunity for the Court to reaffirm well-established procedures utilized by California courts in analyzing the merits of a special motion to strike (an anti-SLAPP motion), pursuant to California *Code of Civil Procedure* § 425.16 (the "SLAPP statute"). The issues to be considered include, among others, the following: First, can an anti-SLAPP motion target the excising of allegations, rather than entire causes of action? Second, in evaluating the merits of "mixed" causes of action, arising from protected and unprotected activity, should California courts continue to apply the rule, established by *Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 15 Cal.Rptr.3d 215 (*Mann*)? Last, should the Court create a judicial exception to section 425.16 requiring California courts to examine all of the allegations in an operative pleading and parse the allegations that touch on protected activity?

With respect to the first issue, the plain language of section 425.16 dictates that a party can move to strike a ***cause of action*** if it arises from an act "in furtherance of the person's right to petition or free speech". Section 425.16 does not mention the striking of ***allegations***, and the Legislature has not taken any steps to broaden the statute's scope beyond the striking of causes of action since its enactment in 1992. In this instance, the anti-SLAPP motion (the "Motion"), filed by Defendant and Appellant David Schnitt ("Schnitt"), is procedurally defective because it seeks to excise allegations, not causes of action, from the Second Amended Complaint (the "SAC"). Schnitt's belated efforts to recast his Motion as seeking to strike causes of action, based on the application of a "primary right" theory analysis, should not be reviewed by the Court because of Schnitt's failure to present this particular argument for consideration by both the trial court and the Court of Appeal.

With respect to the second issue, the *Mann* rule, adopted by the Court in *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 250 P.3d 1115 (*Oasis*), enables a party opposing an anti-SLAPP motion, targeting a "mixed" cause of action, to defeat that motion so long as the party demonstrates the probability of prevailing on any part of the "mixed" cause of action. The *Mann* rule is consistent with the legislative intent of the SLAPP statute in targeting the filing of ***meritless*** lawsuits and causes of action involving protected activity. As a practical matter, the *Mann* rule circumvents the use of anti-SLAPP motions in situations involving the pursuit of meritorious lawsuits and causes of action. The *Mann* rule also enables California courts to conserve their valuable resources by not being forced to engage in the time-consuming task of evaluating the merits of each and every allegation that comprises a cause of action.

With respect to the third issue, the SLAPP statute's explicit language, coupled with the statute's legislative intent, mandates that the Court should not create a judicial exception that would broaden the meaning of "cause of action", as used in section 425.16, to encompass individual allegations. There is no compelling reason to change the scope of the SLAPP statute because a garden-variety motion to strike, pursuant to *Code of Civil Procedure* § 436, can be used to excise improper allegations from a pleading. In this instance, Schnitt's use of an anti-SLAPP motion, rather than a motion to strike, was designed to gain an unfair tactical advantage as a result of the stay placed on ***all*** discovery by section 425.16 during the pendency of the Motion.

Last, but not least, Schnitt's contention that Plaintiff and Respondent Robert C. Baral ("Baral") has engaged in "artful pleading" with respect to utilizing "mixed" causes of action in the SAC to evade the consequences of the SLAPP statute is patently false. The Court of Appeal found that Baral did not engage in any artful pleading in the drafting of the SAC and refuted

Schnitt's contention that any of the SAC's allegations involve the rebranding of the defamation claims appearing in Baral's original complaint. (*Baral v. Schnitt* (2015) 233 Cal.App.4th 1423, 1442, 183 Cal.Rptr.3d 615, rv. granted 186 Cal.Rptr.3d 84 (*Baral*).) To be clear, Schnitt enticed the Court to review this matter based on a blatant mischaracterization of the allegations in the SAC. The Court's examination of the record should lead to the same conclusion reached by the Court of Appeal concerning the absence of any "artful pleading" on the part of Baral and finally bring an end to Schnitt's charade.

As will be demonstrated below, the Court of Appeal's affirmance of the trial court's denial of Schnitt's Motion should be upheld by the Court.

II. STATEMENT OF FACTS.

A. Summary Of Relevant Facts.

1. The Formation And Operation Of IQ.

In August 2003, due to a dispute with his partner in CoEfficient Back Office Solutions LLC ("CoEfficient"), Schnitt approached Baral (a partner with Schnitt in a prior venture) with an opportunity to invest and partner in CoEfficient. (Appellant's Appendix ("AA")361(¶¶7-8); AA891(¶5).) Shortly thereafter, Schnitt and Baral reached an agreement, which was reduced to writing, whereby Baral would become a co-managing member of CoEfficient. (AA361(¶9).) As part of their initial discussions, Schnitt and Baral also considered possibly forming a new entity in order to distance themselves from the other parties involved with CoEfficient. (AA891-892(¶6).)

In September 2003, Schnitt filed documents with the California Secretary of State and formally created IQ. (AA362(¶10).) Schnitt informed Baral of the formation of the new entity and confirmed that Baral would be involved in IQ under the same terms as had been agreed to for

CoEfficient. (*Ibid.*) Thereafter, Schnitt and Baral (who invested over $450,000 in IQ) not only operated IQ as co-managing members, but they also exchanged and executed multiple documents evidencing their participation in IQ as co-managing members. (AA363(¶¶13-14), 364-366(¶¶17-22), 371(¶37), 489-582, 891-894(¶¶6, 8-9, 12-14), 897-978, 980-1018.)

2. Schnitt's Secret Negotiations.

In or about early 2010, Schnitt began secretly negotiating for the sale of IQ. (AA894(¶¶15-17).) Those negotiations led to his execution of a Letter of Intent ("LOI") to sell IQ to LiveIt (AA1027-1041). As part of the deal with LiveIt, Schnitt was to retain a 21.1% ownership interest and an employment position with the new company resulting from IQ's sale. (*Ibid.*) Baral, on the other hand, was completely divested of his ownership and participation in the new company. (*Ibid.*)

Baral did not learn of IQ's sale until about November 17, 2010, after Schnitt had signed the binding LOI. (AA367(¶24), 894(¶17).) When Baral objected to the sale, Schnitt claimed, for the first time, that he was the sole managing member of IQ. (AA894(¶18).) Schnitt then presented Baral with a copy of a 2003 Operating Agreement, signed by only Schnitt, and which Schnitt had never previously referenced or shown to Baral. (*Ibid.*)

3. Moss Adams And The Sale Of IQ.

In connection with IQ's sale to LiveIt, Schnitt retained Moss Adams to conduct an audit of IQ's financial statements. (AA367-368(¶26).) As part of this audit, Schnitt signed a letter confirming Baral's 30% "equity interest" in IQ. (AA602-603.) On December 15, 2010, Moss Adams issued an Independent Auditor's Report that concluded that the relevant financial statements fairly presented IQ's financial position. (AA367-368(¶26).)

On December 17 2010, Schnitt, acting on behalf of IQ, retained

Moss Adams for a second time to conduct an investigation of the suspected misappropriation of funds from IQ (*i.e.*, the fraud audit) by Baral's son, Mitch. (AA368(¶28).) Baral cooperated with the fraud audit with respect to making documents available for review by Moss Adams; however, Schnitt limited the scope of Moss Adams' assignment by precluding Baral from being interviewed and by instructing Moss Adams to refrain from considering certain documents submitted by Baral. (AA161-165(¶¶69-76); AA195-197.)

On February 2, 2011, Moss Adams issued its Investigative Report containing several findings, including inaccurate statements that Baral was an "Investor" in IQ, not a co-managing member, thereby conveniently supporting Schnitt's newly created theory that he was the sole managing member of IQ.[1] (AA368(¶28), 895(¶20).) The Investigative Report also contained findings that unauthorized funds were paid to Baral and RC Baral & Co. (AA11-12(¶27).) Upon receipt of the Investigative Report, Baral attempted to exercise his rights, as a co-managing member of IQ, by asking Schnitt to instruct Moss Adams to withdraw the Investigative Report, reopen its investigation, consider additional information and documents, interview Baral, and/or issue a revised report based on consideration of additional evidence. (AA368-369(¶29), 895(¶20).) Schnitt refused and

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[1] Schnitt makes much ado of the fact that Baral's son, Mitch Baral, was implicated in misappropriating funds from IQ. (Petitioner's Opening Brief ("POB"), 7-8.) While Schnitt acknowledges that Baral did not deny Mitch's misappropriation of funds, Schnitt omits the fact that Baral took it upon himself to completely reimburse IQ for the loss. (AA161-162 (¶¶ 69-70).) Moreover, Mitch's conduct is completely irrelevant to this dispute – IQ has not initiated any legal proceedings against Mitch, and Schnitt has not cross-claimed for any unauthorized payments to Baral. The discussion of Mitch's conduct in Schnitt's Opening Brief is a transparent attempt to prejudice this Court against Baral with completely irrelevant and unsubstantiated facts.

thereby precluded Baral from exercising his rights as a co-managing member of IQ. (*Ibid.*)

IQ was officially sold on April 15, 2011. (AA369-370(¶¶32-25), 895) ¶21).) In connection with the closing, Baral and Schnitt signed numerous documents confirming, among other things, that Baral was a member and manager of IQ since its creation. (AA369-370(¶¶32-25), 610-643, 895(¶21), 1043-1076.)

B. Procedural History.

1. Baral's Original Complaint.

On December 16, 2011, Baral filed his original complaint containing 14 causes of action, including causes of action for slander and libel (the "Defamation Claims"). (AA1-41; AA20-24(¶¶60-74).) The Defamation Claims arise from Schnitt's dissemination of false information to Moss Adams in connection with the fraud audit. (*Ibid.*) Additionally, the Defamation Claims allege that "the words spoken by Defendant Schnitt were false and defamatory toward . . . Baral" and that they were "slanderous per se because they tend to injure . . . Baral in his profession, trade, and business as a certified public accountant and business manager . . . ." (AA22(¶62), 24(¶64).) In connection therewith, Baral sought recovery of damages. (AA23(¶¶65-67), 24(¶¶72-74).)

In response to Baral's original complaint, Schnitt filed an anti-SLAPP motion asserting that Schnitt's communications with Moss Adams, pertaining to the fraud audit and Investigative Report, were protected by the litigation privilege. (AA42-116.) The trial court agreed, and specifically found that the Defamation Claims "are based on communications made by [Schnitt] to [Moss Adams] . . . with respect to alleged misappropriation of funds . . . [S]uch communications fall under CCP 425.16 as they are an act in furtherance of the person's right of petition or free speech as all activities in connection with litigation, including communications preparatory to or in

anticipation of litigation are included in the definition." (AA274-277.)

*2. **Baral's Second Amended Complaint.***

In order to comply with the trial court's order granting Schnitt's anti-SLAPP motion, Baral's SAC[2] excludes all references to the ***communications*** made by Schnitt in connection with the Investigative Report and does not contain claims for slander and/or libel. (*See generally,* AA359-380.) Instead, the SAC focuses on a completely distinct wrong, *i.e.* Schnitt's conduct in stonewalling Baral from IQ's management. Specifically, the SAC alleges that Schnitt breached his fiduciary duties to Baral and constructively defrauded him by engaging in the following misconduct:

a. Excluding Baral from the initial negotiation of the sale of IQ leading to execution of the LOI;

b. Engaging in self-dealing by negotiating for the retention of an ownership interest in the resulting company subsequent to the sale of IQ and preventing Baral from having the opportunity to do so;

c. Engaging in self-dealing by negotiating for an employment position with the

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[2] On June 18, 2012, Baral's former counsel filed a First Amended Complaint (the "FAC"), containing 11 causes of action, and on July 13, 2012, noticed the appeal of the trial court's granting of Schnitt's first anti-SLAPP motion. (AA279-338.) In response, Schnitt filed his second anti-SLAPP motion to the FAC. (AA340-356.) On September 18, 2012, Baral retained new counsel, the law firm of Sauer & Wagner LLP. On January 18, 2013, in order to expedite the proceedings, Baral and Schnitt entered into a stipulation that resulted in the abandonment of Baral's appeal, the withdrawal of the second anti-SLAPP motion and the FAC, and the filing of the SAC. (AA357-358.)

resulting company subsequent to the sale of IQ and preventing Baral from having the opportunity to do so; and

d. Circumventing Baral's rights as a co-managing member by refusing to allow Moss Adams to consider additional information submitted by Baral to determine if the Investigative Report should be withdrawn and a new written report issued. (AA372(¶40), 374(¶46).)

In the SAC, Baral seeks recovery of general and punitive damages based on breach of fiduciary duty and constructive fraud causes of action, as well as injunctive relief requiring Schnitt to authorize Moss Adams to consider additional information from Baral. (AA378-379.)

Additionally, in his fourth cause of action, Baral seeks a declaration that:

a. Baral is and was, at all relevant times, a co-managing member of IQ;

b. Baral is permitted to submit information to Moss Adams to consider in connection with any disputed facts and conclusions set forth in the Investigative Report and to undertake any corrective measures that it deems appropriate under the circumstances (*i.e.*, the issuance of a new written report); and

c. Schnitt is not permitted to prevent Baral from exercising his rights as a co-managing member of IQ including, but

> not limited to, submitting information to Moss Adams to consider in connection with any disputed facts and conclusions set forth in the Investigative Report and to undertake any corrective measures that it deems appropriate under the circumstances (*i.e.*, the issuance of a new written report). (AA378(¶60).)

Notably, Baral does not seek to "compel a re-write" of the Investigative Report, as Schnitt falsely contends, rather Baral seeks to simply enforce his rights as a co-managing member to participate in the fraud audit by submitting information to Moss Adams for consideration. (*Ibid.*)

As previously stated, the SAC does not contain claims for libel and/or slander and does not ascribe any liability on the part of Schnitt arising from his retention, communication and dealings with Moss Adams concerning the fraud audit and the Investigative Report. (AA359-380.) The only relief sought by Baral in the SAC that relates in any way to the fraud audit is his request for the issuance of an injunction precluding Schnitt from stonewalling Baral's rights, as a co-managing member of IQ, to have Moss Adams consider additional information. (AA378-379.)

3. ***Schnitt's Third Anti-SLAPP Motion.***

In response to the SAC, Schnitt filed his ***third*** anti-SLAPP motion, disingenuously contending that the Defamation Claims from Baral's original complaint were re-pled in his SAC and combined with other wrongful conduct in an "artful" attempt to plead around the SLAPP statute. (AA647.) On that basis, Schnitt's Motion identifies ***specific allegations***, not causes of action, to be excised from the SAC. (*Ibid.*) Specifically, Schnitt requests the striking of Paragraphs 28, 29, 31, and 36 from the General Allegations; Paragraphs 40.d and 43 from the First Cause of

Action; Paragraphs 46.d, 49, and 51 from the Second Cause of Action; Paragraphs 59, 60.b, and 60.c from the Fourth Cause of Action; and Paragraphs 3, 5.b, and 5.c from the Prayer for Relief. (*Ibid.*) In his Motion, Schnitt admits that most of the allegations in support of Baral's causes of action for breach of fiduciary duty and constructive fraud -- the exclusion of Baral from the sale of IQ and Schnitt's self-dealing in connection with that transaction (referred to in the Motion and Schnitt's Opening Brief as the "LiveIt Claims") -- do not fall within the scope of the SLAPP statute (*i.e.*, do not touch upon protected activity).[3] (AA649.)

In examining the Motion, the Court will find that it does not seek to strike a "cause of action," nor does it even suggest that the allegations at issue in the SAC should be viewed as comprising a "cause of action." In fact, the Motion specifically states that it "seeks to strike the ***allegations*** reprinted in exhibit 1 hereto." (AA650 (Emphasis added); *see also,* AA650 ("[A] Special Motion to Strike can be used to strike ***individual allegations*** from a 'mixed' cause of action." (Emphasis added)); AA652 ("Baral's only concession to the SLAPP Ruling is to try to immunize the Moss Adams Claims from attack by combining them in ***the same causes of action*** with his LiveIt Claims." (Emphasis added)).) In support of this argument, Schnitt relies on *City of Colton v. Singletary* (2012) 206 Cal.App.4th 751, 142 Cal.Rptr.3d 74 (*City of Colton*), which, according to Schnitt, prevents a plaintiff from "mixing ***into a single cause of action*** allegations of protected and unprotected activity." (AA654 (Emphasis added).)

Schnitt's reply brief, submitted to the trial court in support of his Motion, similarly states that the Motion seeks to strike ***specific allegations***,

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[3] Likewise, the Motion does not target Baral's request for a judicial declaration confirming his status as a co-managing member of IQ. (AA647.)

not a cause of action. (AA1080 ("In *Cho*[4], the Second District Court of Appeal held that an anti-SLAPP motion could attack improper allegations ***without disposing of entire causes of action***." (Emphasis added)), 1080 ("California *Code of Civil Procedure* § 425.16 requires that each of those ***allegations*** be stricken..." (Emphasis added)), 1081 ("The ***allegations*** to be stricken allege that Mr. Schnitt acted improperly..." (Emphasis added)), 1082 ("When David Schnitt filed this motion . . . the Second District Court of Appeal had not addressed whether a plaintiff could evade Section 425.16 by combining ***in the same cause of action*** allegations of protected and nonprotected conduct." (Emphasis added)), 1082-1083 ("[T]he Fourth District held that allegations of protected conduct could be stricken from a complaint ***even if the elimination of those allegations did not strike an entire cause of action***." (Emphasis added)), 1084 ("[T]his is a motion to strike; its purpose is to strike out improper ***allegations***... ." (Emphasis added)).) Nowhere in Schnitt's Motion and reply brief does the phrase "primary right" appear, nor does the Motion and reply brief assert anything having to do with the striking of a "cause of action."

The trial court denied Schnitt's Motion on the procedural ground that it impermissibly sought to strike ***portions of allegations*** supporting three causes of action, rather than ***entire causes of action*** from the SAC. (AA1116.) Moreover, the trial court found that even if the case law permits the striking of "counts" within a cause of action, that issue was not presented for consideration because the Motion specifically sought to strike ***allegations*** rather than "counts". (*Id.*) In its ruling, the trial court noted:

> Anti-SLAPP motion still applies to causes of action or to an entire complaint, not allegations .

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[4] *Cho v. Chang* (2013) 219 Cal.App.4th 521, 161 Cal.Rptr.3d 846 (*Cho*).

> . . Cases cited state that if a cause of action contains portions that are subject to anti-SLAPP and portions that are not, the defendant can move to strike those portions that are subject, i.e. ***the cause of action would be considered to contain two 'counts'; one count subject and one count not. No case allows striking allegations per se under 425.16; that is within the province of a regular motion to strike.*** (AA1116 (Emphasis added).)

4. Schnitt's Appeal.

On December 31, 2013, Schnitt filed his Notice of Appeal. (AA1118-1122.) On appeal, Schnitt, once again, attempted to convince the Court of Appeal that Baral had engaged in artful pleading (and "defied" the trial court's anti-SLAPP ruling concerning Baral's original complaint) by combining allegations that were previously deemed subject to the litigation privilege with other non-privileged conduct. (Appellant's Opening Brief ("AOB"), 25.) Schnitt encouraged the Court of Appeal to follow *City of Colton*, which, in his words, "holds that an anti-SLAPP motion could be brought to attack ***specific allegations*** in 'mixed' causes of action." (AOB, 4.) In fact, nowhere in his briefs submitted to the Court of Appeal did Schnitt ever make any reference to the phrase "primary right" and the striking of ***causes of action*** from the SAC. Instead, Schnitt urged the Court of Appeal to grant his Motion and excise specific allegations.

In upholding the trial court's denial of Schnitt's Motion, the Court of Appeal was not fooled by Schnitt's mischaracterization of the SAC's content, nor was it persuaded to find that that an anti-SLAPP motion can be used to excise allegations from a complaint. With regard to Schnitt's contention that the SAC contains allegations that were previously

adjudicated to be subject to the litigation privilege, the Court of Appeal noted:

> There are no defamation claims in the second amended complaint, and Baral is not seeking damages regarding the Moss Adams allegations in that complaint. The Moss Adams allegations in the second amended complaint regard ***a different wrong*** – breach of fiduciary duty in being frozen out of the management of IQ. (*Baral, supra*, 233 Cal.App.4th at 1437, 183 Cal.Rptr.3d 615 (Emphasis added).)
>
> . . .
>
> ***This is not a case in which the plaintiff merely rebranded a prior defamation claim and thereby implicated concerns about artful pleading***. Instead, the second amended complaint describes several acts of self-dealing and breaches of fiduciary duty aimed at depriving Baral of the financial benefits of his investments of time and labor in IQ, of which the Moss Adams allegations are but a small part. (*Id.* at 1442 (Emphasis added).)

With respect to Schnitt's attempt to excise allegations from "mixed" causes of action in the SAC, the Court of Appeal specifically found that Motion would not eliminate a single cause of action. (*Ibid.* ("It is undisputed that were we to reverse the order denying the instant motion, not a single cause of action would be eliminated from the second amended complaint.").) After engaging in an analysis of "(1) the express words of the statute; (2) its underlying policies; and (3) the extraordinary

consequences of the anti-SLAPP statute that distinguishes it from all other procedural motions," the Court of Appeal declined Schnitt's invitation to adopt *City of Colton's* and *Cho's* suggestion that an anti-SLAPP motion can be used to parse allegations from a complaint. (*Id.* at 1438-1443.) In addition, the Court of Appeal acknowledged that it was not expressing any opinion as to whether Schnitt possesses standing to assert the litigation privilege – an issue to be considered by the trial court upon remand. (*Id.* at 1436-1437.)

*5. **Schnitt's Petition For Review.***

On March 16, 2015, Schnitt petitioned the Court for review, and thereafter, Baral objected[5]. On May 13, 2015, the Court granted Schnitt's petition.

III. STANDARD OF REVIEW.

An order granting or denying a motion to strike under California *Code of Civil Procedure* § 425.16 is reviewed de novo. *Oasis, supra,* 51 Cal.4th at 820, 250 P.3d 1115.

IV. LEGAL ARGUMENT.

A. The Trial Court Ruled Correctly In Denying Schnitt's Procedurally Improper Motion.

Schnitt's Opening Brief is silent as to the existence of a glaring procedural defect – the failure of his Motion to target a "cause of action" as is required by the SLAPP statute. Schnitt fails to address this issue in

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[5] It should be noted that the first time that Schnitt ever raised the issue of conducting a "primary right" theory analysis of the SAC to determine if the Motion targets a cause of action, rather than allegations, was in his Petition for Review. (Petition, p. 16.) Schnitt's Opening Brief also raises this belated argument as well as mischaracterizing the content of the SAC. (POB, 3.)

hopes that the Court's analysis will not focus on whether an anti-SLAPP motion, ***on its face***, can zero in on excising allegations, rather than causes of action. In examining the Motion, the Court will find that it does not mention that any of the allegations in question actually comprise a cause of action. As specifically noted by the trial court's ruling, not even *City of Colton* or *Cho* support this blatant misuse of the SLAPP statute. Moreover, Schnitt's belated introduction of a new argument, at this advanced stage of the appellate proceedings (*i.e.*, the "primary right" theory), cannot magically transform his Motion, designed to parse allegations from the SAC, into something else: an anti-SLAPP motion that targets causes of action.

California *Code of Civil Procedure* § 425.16 specifically provides that a party may move to strike a "cause of action" so long as the cause of action arises from an act "in furtherance of the person's right to petition or free speech", unless the party establishes a probability of prevailing on the claim. The statute was enacted "to provide for the early dismissal of unmeritorious claims filed to interfere with the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (*Club Members for an Honest Election v. Sierra Club* (2008) 45 Cal.4th 309, 315, 86 Cal.Rptr.3d .) There is no applicable authority, nor does Schnitt's Opening Brief cite any authority, that allows a moving party to utilize an anti-SLAPP motion to strike anything less than a cause of action.

All of the cases cited by both parties throughout these proceedings are consistent with the SLAPP statute's requirement that this procedural tool must be used to target a cause of action. In *Mann*, the moving party sought to strike two causes of action – one for defamation and one for trade libel. (*Mann, supra*, 120 Cal.App.4th at 104, 15 Cal.Rptr.3d 215.) Those causes of action were based on two separate acts of wrongdoing: (1)

defendants told plaintiff's customers that plaintiff used illegal carcinogenic chemicals in its cleaning process, and (2) defendants reported these alleged business practices to a government agency, resulting in an investigation. (*Ibid.*) Similarly, in *Oasis*, the moving party targeted the striking of causes of action for breach of fiduciary duty, professional negligence, and breach of contract -- all of which were based on "a number of acts of alleged misconduct." (*Oasis, supra*, 51 Cal.4th at 820-821, 250 P.3d 1115.)

Even the moving parties' anti-SLAPP motions in *City of Colton* and *Cho* targeted the striking of causes of action. In *City of Colton*, the moving party sought to strike the fourth (unfair business practices) and sixth (injunctive relief) causes of action. The trial court granted the motion as to both causes of action, but the appellate court then took it upon itself to grant the motion, in part, by striking the portions of the causes of action that targeted protected activity. (*City of Colton, supra*, 206 Cal.App.4th at 774, 142 Cal.Rptr.3d 74.) In *Cho*, the moving party sought to strike "the cross-complaint in its entirety" (*i.e.,* the entirety of the first, second, and third causes of action for defamation, intentional inflict of emotional distress, and negligent infliction of emotional distress). (*Cho, supra*, 219 Cal.App.4th at 524, 161 Cal.Rptr.3d 846.) The appellate court affirmed the trial court's decision to grant the anti-SLAPP motion in part, leaving those allegations that it felt did not target protected speech or activity. (*Id.* at 525.)

Finally, this Court's holding in *Taus v. Loftus* (2007) 40 Cal.4th 683, 151 P.3d 1185 (*Taus*) also does not support the theory that an anti-SLAPP motion can be used to target anything less than a cause of action. In *Taus*, the anti-SLAPP motion targeted the entirety of the complaint. (*Id.* at 690.) While Schnitt suggests that *Taus* stands for the proposition that an anti-SLAPP motion can target specific allegations, the truth is that *Taus* involved a limited review by this Court of a portion of the causes of action

that were the subject of the anti-SLAPP ruling by the trial court and the opinion issued by the appellate court. (*Id.* at 714 ("The issues before us are limited to those claims as to which the Court of Appeal found that plaintiff adequately had established a *prima facie* case to avoid dismissal under section 425.16.").) As astutely noted by Justice Richli's dissenting opinion in *City of Colton* and Justice Jones's concurring opinion in *Wallace v. McCubbin* (2011) 196 Cal.App.4th 1169, 128 Cal.Rptr.3d 205 (*Wallace*), *Taus* does not stand for the proposition that an anti-SLAPP motion can target anything less than a cause of action. (*City of Colton, supra*, 206 Cal.App.4th at 793, 142 Cal.Rptr.3d 74 ("Had the Supreme Court really intended to change the well-established rule that the SLAPP Act cannot be used to strike particular allegations, surely it would have said it was doing so and explained why. At a minimum, it would have had to justify taking such a step in the face of the plain language of the SLAPP Act."); *Wallace, supra*, 196 Cal.App.4th at 1219, 128 Cal.Rptr.3d 205 ("*Taus* never analyzed the propriety of striking some, but not all alleged wrongful acts supporting a cause of action.").) Simply put, the decision in *Taus* did not address the issue of whether an anti-SLAPP motion can be used to excise specific allegations.

Schnitt's Motion appears to be the first time that a moving party has used the SLAPP statute for the purpose of parsing allegations, rather than striking a cause of action, from the operative pleading[6]. The cases, discussed above, do not provide any support whatsoever for utilizing the SLAPP statute in this manner. In examining Schnitt's Motion, the Court will quickly find that that it should be recharacterized as nothing more than

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[6] As discussed in Section II.B.3., *supra*, Schnitt's Motion contains numerous admissions that the relief sought is the parsing of specific "allegations", not the striking of a "cause of action".

a garden variety motion to strike (subject to the provisions California *Code of Civil Procedure* § 436) that targets specific allegations of the SAC (Paragraphs 28, 29, 31, 36, 40.d, 43, 46.d, 49, 51, 59, 60.b, and 60.c). (AA647.)

In its analysis, the trial court recognized that Schnitt's Motion does not target a "cause of action" or a "count." The trial court refused to allow Schnitt to use the SLAPP statute to parse allegations from the SAC and based its denial of Schnitt's Motion on the grounds that "[n]o case allows striking allegations per se under 425.16; that is within the province of a regular motion to strike." (AA1116.) The trial court's familiarity with the SLAPP statute is evident from its determination that the legal authority presented by Schnitt in support of his Motion permits the striking of a "count" from a cause of action, not the parsing of allegations. (*Ibid.*)

In hopes of curing the procedural shortcomings of his Motion, Schnitt belatedly argues that the allegations to be parsed from the SAC constitute a cause of action under a "primary right" theory analysis. (*See generally*, POB.) The problem with this last minute argument is that Schnitt's Motion does not mention that the allegations to be parsed constitute a cause of action or that a "primary right" theory analysis should be conducted by the trial court. (AA646-685.) To make matters worse, Schnitt never requested that the Court of Appeal conduct a "primary right" theory analysis to determine if the allegations to be parsed constitute a cause of action. To be clear, prior to petitioning this Court for review, Schnitt never uttered a word about employing a "primary right" theory analysis to justify the excising of allegations from the SAC.

As a practical matter, despite the granting of review by the Court, Schnitt should not be permitted to ***re-write*** his Motion to raise issues for the first time (never considered by the trial court and the Court of Appeal) to overcome the procedural deficiencies arising from his misuse of the SLAPP

statute. Put another way, this Court's review should be limited to the issues raised by Schnitt before the trial court and the Court of Appeal concerning the parsing of allegations, not the striking of a cause of action based on the application of a "primary right" theory analysis. "[I]t is fundamental that a reviewing court will ordinarily not consider claims made for the first time on appeal which could have been but were not presented to the trial court." (*Bank of America, N.A. v. Roberts* (2013) 217 Cal.App.4th 1386, 1398-1399, 159 Cal.Rptr.3d 345; *see also* Cal. R. Ct. 8.500(c) ("[T]he Supreme Court will not consider an issue that the petitioner failed to timely raise in the Court of Appeal.") In this instance, Schnitt could have structured his Motion in a manner that would have required the trial court and the Court of Appeal to engage in a "primary right" theory analysis of the SAC's allegations. He chose not to timely raise this issue, and his failure to do so limits the scope of the Court's review.[7]

For these reasons alone, the rulings of the trial court and the Court of Appeal should be affirmed.

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[7] An exception to the general rule may exist for "tardily raised legal issues where the public interest or public policy is involved". (*Bayside Timber Co. v. Board of Supervisors* (1971) 20 Cal.App.3d 1, 3, 97 Cal.Rptr. 431.) In this instance, the exception is inapplicable because California case law already provides for the use of a "primary right" theory analysis in the context of anti-SLAPP motions. (*See, e.g., South Sutter, LLC v. LJ Sutter Partners, L.P.* (2011) 193 Cal.App.4th 634, 659, 123 Cal.Rptr.3d 301 (*South Sutter*) ("For purposes of an anti-SLAPP motion, [a] 'cause of action' is comprised of a 'primary right' of the plaintiff, a corresponding 'primary duty' of the defendant, and a wrongful act by the defendant constituting a breach of that duty.'"); *Marlin v. Aimco Venezia, LLC* (2007) 154 Cal.App.4th 154, 162, 64 Cal.Rptr.3d 488 (*Marlin*) (denying anti-SLAPP motion based on application of primary right analysis to operative complaint).) Schnitt's efforts to mask the procedural deficiencies in the drafting of his Motion should not be tolerated and do not give rise to any issues involving the public interest and public policy with respect to the applicability of a "primary right" theory analysis to anti-SLAPP motions.

B. The Trial Court's Denial Of Schnitt's Motion Should Be Affirmed Under The SLAPP Statute's Two-Pronged Analysis.

Assuming, *arguendo*, that Schnitt's Motion is deemed to be procedurally sufficient, the SLAPP statute requires the Court to conduct a two-step analysis. "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88, 52 P.3d 703.) Once the defendant has made that showing, the burden then falls on the plaintiff to establish that "the complaint is legally sufficient and supported by a *prima facie* showing of facts to sustain a favorable judgment." (*Ibid.*) As applied here, the Court will find that Schnitt's Motion (1) does not target protected activity and (2) even if it does target protected activity, Baral can establish the probability of prevailing, and therefore, the Motion should be denied.

1. Schnitt's Motion Does Not Satisfy The First Prong Of The SLAPP Statute.

a. The SAC's Allegations Do Not Include Protected Activity Stricken From Baral's Original Complaint.

The first step of the Court's analysis, under the SLAPP statute, is to determine whether the allegations at issue in the SAC target protected activity. In a futile attempt at misdirection, Schnitt's Opening Brief (as well as his Motion) erroneously contends that Baral engaged in artful pleading by including claims in the SAC (*i.e.*, the "Moss Adams Claims") that are "identical" to the "already-stricken allegations" in Baral's original complaint that are barred by the protection of the litigation privilege. (POB, 4-5, 12.) As specifically noted by the Court of Appeal, Schnitt's characterization of the operative pleading is not true because the allegations at issue in the SAC are distinct from the allegations comprising the causes

of action that were stricken from Baral's original complaint.[8] (*Baral, supra*, 233 Cal.App.4th at 1437, 183 Cal.Rptr.3d 615.)

In granting Schnitt's first anti-SLAPP motion that targeted defamation and slander causes of action in the original complaint, the trial court found that "***communications*** made by defendant [Schnitt] to accountancy firm and vendors w/ respect to alleged misappropriation of funds" are protected by the litigation privilege. (Emphasis added.) (AA276.) This ruling establishes that Schnitt's ***communications*** with Moss Adams in connection with the fraud audit and Investigative Report cannot be used to form a basis for liability due to the applicability of the litigation privilege. (*Ibid.*)

In examining the SAC, the Court will find that it does not target any communications between Schnitt and Moss Adams or anything having to do with any defamatory statements attributable to the Investigative Report and/or Schnitt. Instead, it targets Schnitt's ***conduct*** in stonewalling Baral's efforts to exercise his rights as a co-managing member to participate in the management of the company based on the following:

> Baral, through his attorneys, attempted to resolve several issues with Schnitt arising out of the potential sale of IQ and the inaccuracies contained in Moss Adams' Investigative Report. Baral's efforts included, but were not limited to,

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[8] In its Opinion, the Court of Appeal states "[t]here are no defamation claims in the second amended complaint, and Baral is not seeking damages regarding the Moss Adams allegations in that complaint. The Moss Adams allegations in the second amended complaint regard a different wrong – breach of fiduciary duty in being frozen out of the management of IQ." (*Baral, supra*, 233 Cal.App.4th at 1437, 183 Cal.Rptr.3d 615.) Clearly, Schnitt's contention that Baral has engaged in any artful pleading in the SAC is false.

> ***requesting Schnitt to instruct Moss Adams*** to withdraw the Investigative Report, reopen its investigation of the misappropriation of IQ's assets, consider additional information and documents, interview Baral and Foster, and issue a revised written report based on its analysis of additional evidence. (AA368-369(¶29).)

The relief sought by Baral in the SAC to circumvent Schnitt's wrongful conduct is narrowly crafted and consists of a request for the issuance of an injunction requiring that (a) Schnitt notify Moss Adams that it is authorized to consider additional information submitted by Baral and "to undertake any corrective measures that ***it deems appropriate***" and (b) Schnitt refrain from objecting to Baral's submission of additional information and any corrective measures that Moss Adams deems appropriate. (Emphasis added.) (AA379.) It bears repeating that Baral is not seeking to compel a mandatory rewrite of the Investigative Report; rather, he is simply seeking the opportunity to submit additional information for consideration by Moss Adams in light of its findings in the Investigative Report. (*Ibid.*) The submission of additional information to Moss Adams, an accountancy firm retained by IQ, is a right that Baral, a co-managing member of IQ, should be entitled to exercise under the circumstances of this case.

In short, the allegations in the SAC, targeting Schnitt's wrongful conduct, do not involve any communications that are subject to litigation privilege protection.

b. The Non-Communicative Conduct Alleged In The SAC Is Not Subject To The Litigation Privilege.

In examining the record, the Court will find that the parties never addressed the issue of whether the allegations in the SAC, involving Schnitt's non-communicative conduct, arise from protected activity. This

issue was raised *sua sponte* by the Court of Appeal in its determination that Schnitt's decision as to "who may participate in the [fraud] audit" is "in furtherance of the right to petition" and satisfies the first prong of the analysis required by the SLAPP statute. (*Baral, supra*, 233 Cal.App.4th at 1435-1436, 183 Cal.Rptr.3d 615.)

In support of its conclusion, the Court of Appeal relied exclusively upon *Hunter v. CBS Broadcasting, Inc.* (2011) 221 Cal.App.4th 1510, 165 Cal.Rptr.3d 123 (*Hunter*), an age and gender discrimination case, in which the appellate court found that the hiring of a young female weather anchor was in furtherance of the free speech rights of a television station and thereby satisfies the first prong analysis under the SLAPP statute. In *Hunter*, the appellate court examined the principal thrust or gravamen of the causes of action in the complaint based on the following:

> We assess the principal thrust by identifying '[t]he allegedly wrongful and injury-producing conduct ... that provides the foundation for the claim.' ... If the ***core injury-producing conduct*** upon which the plaintiff's claim is premised does not rest on protected speech or petitioning activity, ***collateral or incidental allusions to protected activity*** will not trigger application of the anti-SLAPP statute.' . . . "[T]he critical point is whether the plaintiff's cause of action itself was based on an act in furtherance of the defendant's right of petition or free speech." (*Id.* at 1520 (Emphasis added).)

The appellate court's analysis in *Hunter* turns on distinguishing ***conduct*** (*i.e.*, the act of hiring and employee) from ***motive*** (*i.e.*, age and gender discrimination) as well as tying the hiring decisions of a television station

concerning its on-air personnel to free speech rights. (*Id.* at 1521-1522.)

In applying *Hunter* to the facts in this case, the Court of Appeal states:

> [T]he decision [made by Schnitt] as to ***who*** may participate in the audit would also be "in furtherance of the right to petition." To hold otherwise — where the very subjects of the forensic audit were Baral and his son — would indeed chill exercise of "the right to petition for the redress of grievances" (§ 425.16, subd. (b)(1)) given that the audit was evaluating potential claims against them. (*Baral, supra,* 233 Cal.App.4th at 1436, 183 Cal.Rptr.3d 315 (Emphasis added).)

In short, the Court of Appeal found that Schnitt's ability to evaluate potential claims against Baral (*i.e.*, the right to petition), a subject of the fraud audit, would be chilled if Baral was allowed to participate in the audit. As a result of this finding, the Court of Appeal concluded that Schnitt had met his burden as to the first prong analysis.

Unfortunately, the Court of Appeal's analysis fails to closely examine the precise nature of Schnitt's core injury-producing conduct. The SAC is clear that Schnitt circumvented Baral's right to submit "additional information" to Moss Adams ***after*** the Investigative Report had been completed and published. (AA374(¶40), 374(¶46).) At the time that Baral attempted to exercise his rights as a co-managing member, Schnitt had possession of a written report to evaluate IQ's potential claims. It makes no sense that Baral's after-the-fact efforts to submit additional information to Moss Adams could possibly have a chilling effect on Schnitt's right to petition. At best, Schnitt's stonewalling efforts against Baral (after

issuance of the Investigative Report) are ***collateral*** or ***incidental*** to Schnitt's right to petition. Put another way, Schnitt controlled ***who*** could participate in the fraud audit, and he obtained a written report based on that audit to evaluate IQ's claims. Once the Investigative Report was issued, Schnitt's stonewalling of Baral's rights had nothing to do with Schnitt's right to petition.

In light of the foregoing, Schnitt's non-communicative, core injury-producing conduct cannot satisfy the first prong of the anti-SLAPP analysis.

c. Schnitt Does Not Have Standing To Assert The Litigation Privilege.

The issue as to whether Schnitt, in his individual capacity, even has standing to assert the litigation privilege was never addressed by the trial court.[9] This issue is significant because the fraud audit was conducted for the benefit of IQ, not Schnitt. Assuming, *arguendo*, that Schnitt has no standing to assert the litigation privilege, then he has no basis to assert that he engaged in any protected activity in connection with the fraud audit.

The principal purpose of the litigation privilege is to afford litigants and witnesses (*i.e.,* participants) freedom of access to the courts without fear of being harassed subsequently by derivative tort actions. (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 213, 786 P.2d 365.) California courts have adopted a four-prong test in determining whether a communication falls under the litigation privilege: was the communication made (1) in a judicial or quasi-judicial proceeding, (2) by litigants or other participants, (3) to achieve the objects of litigation, and (4) with some connection or logical relation to the action. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1057,

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[9] Pursuant to the Court of Appeal's request after oral argument was completed, the parties submitted letter briefs concerning this issue. (*Baral, supra*, 233 Cal.App.4th at 1431, 183 Cal.Rptr.3d 615.)

128 P.3d 713.) It logically follows that "[n]onparticipants and nonlitigants to judicial proceedings are never protected from liability under section 47(b)." (*Wise v. Thrifty Payless, Inc.* (2000) 83 Cal.App.4th 1296, 1304, 100 Cal.Rptr.2d 437 (*Wise*); *see also, Schoendorf v. U.D. Registry, Inc.* (2002) 97 Cal.App.4th 227, 242-243, 118 Cal.Rptr.2d 313 ("[N]onparticipants and nonlitigants to judicial proceedings are not protected from liability under the litigation privilege.").)

In *Wise,* the appellate court considered a nonlitigant's use of the "litigation privilege" to obtain insulation from liability for statements made during litigation. There, the plaintiff sued Payless for wrongfully disclosing private information to plaintiff's ex-husband. (*Id.* at 1299.) Plaintiff's ex-husband then used that private information against plaintiff during divorce proceedings. (*Id.* at 1300.) When the plaintiff sued Payless for disclosing the private information, Payless attempted to invoke the litigation privilege by asserting that because the private information was used during divorce proceedings, Payless could not be liable for damage caused to plaintiff during those proceedings. (*Id.* at 1301.) The appellate court disagreed, recognizing that Payless's attempt to invoke the litigation privilege was "in reality a plea for refuge from the consequences of its own tortious conduct under the blanket of a privilege enjoyed by a third party." (*Id.* at 1304.) The appellate court held that because Payless was a nonlitigant in the litigation where the communication causing harm occurred, Payless was not entitled to invoke the litigation privilege. (*Ibid.*)

The situation at hand is directly analogous to *Wise*. In this case, IQ engaged in activity that is subject to the litigation privilege (*i.e.,* the retention of Moss Adams to conduct the fraud audit). Schnitt was involved in that conduct solely in his capacity as a representative of IQ. (AA95-

97.)[10] Now, Schnitt is being sued in his individual capacity for other conduct, and yet he is attempting to invoke the privilege enjoyed by IQ as "a plea for refuge from the consequences of [his] own tortious conduct." The Court should not allow Schnitt to insulate his tortious conduct from liability by invoking a privilege belonging to IQ.

Accordingly, it is impossible for Schnitt, in his individual capacity, to assert that the SAC targets activity protected by the litigation privilege.

2. Baral Has Submitted Evidence That Satisfies His Burden Under The Second Prong Of The SLAPP Analysis.

Assuming, *arguendo*, Schnitt has established that the SAC targets protected activity, the trial court's denial of the Motion was correct because Baral has established a probability of prevailing on his claims.

a. The Mann Rule Dictates That Baral Is Entitled To Establish The Probability Of Prevailing On "Any Part" Of The Claims At Issue.

The primary issue that piqued this Court's interest is the applicability of the rule established by *Mann, supra,* 120 Cal.App.4th 90, 15 Cal.Rptr.3d 215, in conducting the second prong of the anti-SLAPP analysis.

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[10] Indeed, it logically follows that IQ is the holder of the litigation privilege, not Schnitt, because to the extent that Baral engaged in any acts of embezzlement, those claims belong to IQ, not Schnitt. (*Schuster v. Gardner* (2005) 127 Cal.App.4th 305, 313, 25 Cal.Rptr.3d 468 ("An individual cause of action exists only if damages to the shareholders were not *incidental* to damages to the corporation." (Emphasis in original).) In fact, Schnitt has repeatedly admitted that he is the sole managing member of IQ and that Baral is an "economic interest holder", rather than a manager or member. (AA688.) Baral's purported status as an "economic interest holder" does not give rise to any fiduciary duties owed by Baral to Schnitt. (*See*, Cal. Corp. Code §§ 17153, 17301.) These admissions demonstrate that Schnitt, in his individual capacity, does not possess any viable claims against Baral attributable to the findings in the Investigative Report.

In *Mann*, defendants filed an anti-SLAPP motion targeting plaintiff's defamation and trade libel causes of action. In partially reversing the trial court's denial of the anti-SLAPP motion, the appellate court held that the causes of action were "mixed" because some of the allegations involved protected activity (*i.e.*, reporting to a government agency) and some did not (*i.e.*, statements to customers). (*Id.* at 104) The appellate court, recognizing that the SLAPP statute was meant to apply only to cases that are completely meritless, held that because the plaintiff had established a probability of prevailing on some of the allegations, the allegations involving protected activity could not be stricken. (*Id.* at 107, 109.) The appellate court noted that unlike a typical motion to strike, an anti-SLAPP motion cannot be used to parse specific allegations within a cause of action:

> Stated differently, the anti-SLAPP procedure ***may not be used like a motion to strike under section 436, eliminating those parts of a cause of action that a plaintiff cannot substantiate.*** Rather, once a plaintiff shows a probability of prevailing on *any part of its claim*, the plaintiff *has established* that its cause of action has some merit and the entire cause of action stands. Thus, a court need not engage in the time-consuming task of determining whether the plaintiff can substantiate all theories presented within a single cause of action and ***need not parse the cause of action*** so as to leave only those portions it has determined have merit.
>
> Moreover, a defendant has other options to eliminate theories within a cause of action that lack merit or cannot be proven. For example, a

> defendant can file a motion to strike a particular claim under section 436 concurrently with its anti-SLAPP motion, or it can move for summary adjudication of any distinct claim within a cause of action. (*Id.* at 106 (Italic emphasis in original, bold emphasis added).)

The legal significance of the *Mann* rule is evidenced by this Court's citation of *Mann* in *Oasis*. Although Schnitt criticizes the *Oasis* opinion for adopting *Mann* "without discussion," in reality, it is clear that the Court was well aware of the impact of its ruling in *Oasis*. In examining the anti-SLAPP motion in *Oasis*, the Court bypassed the first prong of analysis and proceeded directly to the second prong to simplify its efforts. (*Oasis, supra*, 51 Cal.4th at 820, 250 P.3d 1115.) The Court noted that the complaint "identifies a number of acts of alleged misconduct and theories of recovery, but for purposes of reviewing the ruling on an anti-SLAPP motion, ***it is sufficient to focus on just one***." (*Id.* at 821 (Emphasis added).) This statement is not superfluous because it demonstrates that the Court was clearly aware that it need not determine whether a cause of action is "mixed" so long as the plaintiff can establish the probability of prevailing on just one basis for relief under the relevant causes of action. Once the plaintiff satisfies this requirement, the anti-SLAPP motion should be denied. In contrast, the Court in *Taus*, as discussed above, was presented with an extremely narrow issue that had absolutely no bearing on analyzing a "mixed" cause of action.

Wallace, published seven years after *Mann*, was the first decision to criticize *Mann*. However, even the *Wallace* court continued to apply the *Mann* rule. After engaging in a lengthy discussion of the pros and cons of the *Mann* rule, the appellate court acknowledged that *Oasis* affirmed the *Mann* rule, that the appellate court was bound to follow the *Mann* rule, and

that to the extent *Taus* was in conflict with the *Mann* rule, *Oasis* implicitly overruled *Taus*. (*Wallace, supra*, 196 Cal.App.4th at 1212, 128 Cal.Rptr.3d 205.) Interestingly, even the concurring opinion in *Wallace* criticizes the majority's misinterpretation of the ruling in *Taus*. (*Id.* at 1219 ("*Taus* never analyzed the propriety of striking some, but not all alleged wrongful acts supporting a cause of action.").) Subsequent opinions, including two published opinions[11], continued to overwhelmingly adopt and apply the *Mann* rule.

There are only two published appellate court decisions that refuse to acknowledge *Oasis's* adoption of the *Mann* rule. The first was *City of Colton*, a 2-1 decision in which the majority misinterpreted *Taus* to mean it could strike "a portion of a cause of action" if that portion falls within anti-SLAPP protections. (*City of Colton, supra*, 206 Cal.App.4th at 774, 142 Cal.Rptr.3d 74.) The majority opinion did not make any mention of how or whether it was distinguishing the *Mann* rule, did not recognize that this Court in *Oasis* had affirmed the *Mann* rule, nor did it explain why it was deviating from the *Wallace* opinion. In the dissenting opinion, Justice Richli astutely noted that the anti-SLAPP motion should have been denied because an anti-SLAPP motion can only be used to strike an entire cause of action – not to parse portions of a cause of action. (*Id.* at 792.) Justice Richli also identified the majority's mistake in its misinterpretation of *Taus*. (*Id.* at 793.) Finally, Justice Richli correctly recognized that *Oasis* cited and quoted *Mann* with approval and, to the extent there was any conflicting authority (such as *Taus*), it implicitly overruled that conflicting authority. (*Id.* at 794.)

The second case that refuses to acknowledge *Oasis* is *Cho*. In that

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[11] *See, M.F. Farming, Co. v. Couch Distributing Co.* (2012) 207 Cal.App.4th 180, 197-198, 143 Cal.Rptr.3d 160; *Burrill v. Nair* (2013) 217 Cal.App.4th 357, 381-382, 158 Cal.Rptr.3d 332.

case, the appellate court affirmed the trial court's granting of an anti-SLAPP motion in part. (*Cho, supra*, 219 Cal.App.4th at 525, 161 Cal.Rptr.3d 846.) In doing so, the appellate court explicitly refused to acknowledge *Oasis's* adoption of the *Mann* rule, instead arguing that because it did not read *Oasis* as involving a mixed cause of action, *Oasis* could not have intended to apply the *Mann* rule in the context of a mixed cause of action. (*Id.* at 527.) As pointed out by the concurring opinion in *Wallace*, what the *Cho* court failed to recognize was that this Court in *Oasis* never reached the issue of whether the causes of action were mixed. (*Wallace, supra*, 196 Cal.App.4th at 1219 ("The *Oasis* court declined to conduct a first prong SLAPP statute analysis and therefore we have no way of knowing whether any of the causes of action at issue in that case could be characterized as mixed.").)

Even after the publication of *City of Colton* and *Cho*, California courts have continued to apply the *Mann* rule. In fact, since its publication in 2004, the *Mann* rule has been cited with approval in no less than 10 published decisions[12] and countless unpublished decisions. On the other

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[12] *See, e.g., Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th 1539, 110 Cal.Rptr.3d 129 (expressly affirming the *Mann* rule as applicable to "mixed" causes of action); *Guessous v. Chrome Hearts, LLC* (2009) 179 Cal.App.4th 1177, 102 Cal.Rptr.3d 214 (holding an anti-SLAPP motion cannot be used to strike specific requests for relief); *Marlin, supra,* 154 Cal.App.4th at 154, 64 Cal.Rptr.3d 488 (holding prayer for injunction cannot be stricken pursuant to anti-SLAPP motion); *Premier Medical Management Systems, Inc. v. California Ins. Gumrantee Assn.* (2006) 136 Cal.App.4th 464, 477-478, 39 Cal.Rptr.3d 43; *A.F. Brown Elec. Contractor, Inc. v. Rhino Elec. Supply, Inc.* (2006) 137 Cal.App.4th 1118, 1124-1125, 41 Cal.Rptr.3d 1 (adopting the *Mann* rule and holding "[t]he anti-SLAPP statute authorizes the court to strike a cause of action, but unlike motions to strike under section 436, it cannot be used to strike particular allegations within a cause of action."); *Platypus Wear, Inc. v. Goldberg* (2008) 166 Cal.App.4th 772, 786, 83

hand, only two published decisions have refused to follow the *Mann* rule. Schnitt's assertion that the Mann rule has been "widely criticized" is simply not true. (POB, 3.)

b. The Application Of A Primary Right Theory Analysis Supports Baral's Position That The Relevant Causes Of Action In The SAC Contain Multiple Acts Of Wrongdoing.

Assuming, *arguendo*, that the Court engages in a primary right theory analysis (that was never raised by Schnitt before the lower courts), it should find that the causes of action, as set forth in the SAC, cannot be split into additional causes of action. Specifically, the SAC's causes of action set forth multiple acts of wrongdoing arising from Schnitt's refusal to allow Baral to exercise his rights as a co-managing member of IQ. Schnitt's belated attempt to invoke a primary right theory analysis to segregate individual acts of wrongdoing by Schnitt into separate causes of action is meritless.

A cause of action under California's primary right theory consists of "(1) a primary right possessed by the plaintiff, (2) a corresponding primary duty devolving upon the defendant, and (3) a delict wrong done by the defendant which consists in a breach of such primary right and duty." (*Gamble v. General Foods Corp.* (1991) 229 Cal.App.3d 893, 898, 280 Cal.Rptr. 457 (*Gamble*).) A plaintiff's primary right "is defined by the *legally protected interest* which is harmed by defendant's wrongful act." (*Henderson v. Newport-Mesa Unified School District* (2013) 214 Cal.App.4th 478, 499, 154 Cal.Rptr.3d 222 (Emphasis in original).) As specifically noted by the court in *Gamble*, "two actions constitute a single

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Cal.Rptr.3d 95 (holding an anti-SLAPP motion cannot be used to "parse" a cause of action).

cause of action if they both affect the same primary right." (*Gamble, supra*, 214 Cal.App.4th at 898, 280 Cal.Rptr. 457.) Under a primary right analysis, the "cause of action" is determined "based on the harm suffered, rather than on the particular legal theory or relief sought by the plaintiff." (*Boblitt v. Boblitt* (2010) 190 Cal.App.4th 603, 610, 118 Cal.Rptr.3d 788.)

The SAC seeks redress for a single primary right: Baral's efforts to exercise his rights as a co-managing member of IQ. Under a primary right theory analysis, the SAC's applicable causes of action consist of the following: (1) Baral's rights as a co-managing member of IQ, (2) Schnitt's fiduciary duties (owed to Baral) as a co-managing member of IQ, and (3) the four distinct wrongs committed by Schnitt consisting of breaches of his fiduciary duties owed to Baral with respect to the following: (a) Baral's right to be involved in negotiations for the sale of IQ, (b) Baral's right to an opportunity to negotiate for an employment position with the purchasing company, (c) Baral's right to an opportunity to negotiate for an ownership interest in the purchasing company, and (d) Baral's right to submit additional information to Moss Adams after the Investigative Report was issued. (AA372(¶40); AA374(¶46).) With respect to item (d), the SAC specifically alleges "Schnitt circumvented Baral's rights as a co-managing member by . . . withholding his consent for Moss Adams to reopen the investigation and consider additional evidence." (AA369(¶29).) Notably, the Court of Appeal recognized this distinction. (*Baral, supra*, 233 Cal.App.4th at 1437, 183 Cal.Rptr.3d 615 ("The Moss Adams allegations in the second amended complaint regard a different wrong [from the wrong alleged in the original complaint] – breach of fiduciary duty in being frozen out of the management of IQ."); *id.* at 1442 ("Instead, the second amended complaint describes several acts of self-dealing and breaches of fiduciary duty aimed at depriving Baral of the financial benefits of his investments of time and labor in IQ, of which the Moss Adams allegations are but a small

part.").) Thus, even under Schnitt's newly invented primary right theory analysis, the Motion sought to strike only a portion of an entire "cause of action".

A troubling aspect of Schnitt's Opening Brief is the bad faith attempt to create a separate primary right that focuses on Baral's efforts to submit additional information for consideration by Moss Adams. After engaging in a long-winded, theoretical discussion of California's primary right theory, Schnitt asserts that a "distinct" primary right arises from Baral's allegation "that his reputation was injured by the Moss Adams Fraud Audit." (POB, 41.) The problem with this assertion is that the SAC does not contain any allegations about damages to Baral's ***reputation***. In fact, the word "reputation" does not appear in the SAC.

In a further attempt to obfuscate the Court's primary right theory analysis, Schnitt disingenuously contends that Baral admitted that there are two separate causes of action resulting from Baral's prior use of the phrases "LiveIt Claims" and the "Moss Adams Claims." (POB, 41.) The Court can easily verify the falsity of this contention by examining the Motion -- the phrases "LiveIt Claims" and "Moss Adams Claims" were first used by Schnitt in his Motion (AA649), and Baral adopted Schnitt's usage for ease of reference. In fact, the language on which Schnitt heavily relies is a footnote that states "***As Schnitt's motion notes***, the causes of action at issue include the "Moss Adams Claims" and the "LiveIt Claims"." (AA808 (Emphasis added).) Clearly, Baral's use of "Moss Adams Claims" and "LiveIt Claims" was for ease of reference and nothing more.

It is important to note that the "Moss Adams Claims" and "LiveIt Claims" comprise four distinct acts of wrongdoing by Schnitt that adversely impacted Baral's ability to exercise his primary right as a co-managing member of IQ. The Court of Appeal aptly acknowledged that the SAC's allegations are completely different from those in Baral's original

complaint and correctly noted that "were we to reverse the order denying the instant motion, ***not a single cause of action would be eliminated from the second amended complaint.***" (*Baral, supra*, 233 Cal.App.4th at 1442.) This Court should come to the exact same conclusion.

As a result, even under Schnitt's "primary right" theory analysis, the Motion seeks to excise allegations from the SAC by eliminating a specific act of wrongdoing that is part of the same cause of action. In other words, assuming, *arguendo*, that the Moss Adams Claims constitute protected activity and the LiveIt Claims constitute unprotected activity, the cause of action (arising from the same primary right – Baral's exercise of his rights as a co-managing member) is "mixed". The *Mann* rule specifies that Baral can defeat Schnitt's Motion, targeting mixed causes of action, by establishing the probability of prevailing on any part of the cause of action at issue. In this instance, the evidence presented by Baral overwhelmingly demonstrates the probability that he will prevail on all acts of wrongdoing that comprise the "LiveIt Claims".[13]

c. Legislative History, Statutory Interpretation, And Public Policy Favor Affirmation Of The Mann Rule.

i. The Mann Rule Is Consistent With The Statutory Language, Legislative History, And Purpose Of The SLAPP Statute.

In the 13 years since it was enacted, and through the six amendments, the unchanged aspect of the SLAPP statute is its application to actions brought "primarily" to chill the exercise of free speech. (1992 Cal. Legis. Serv. Ch. 726 (S.B. 1264).) As originally enacted in 1992, the statute addresses "a disturbing increase in lawsuits brought ***primarily*** to

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[13] The evidence presented by Baral to establish probability of prevailing on his claims is discussed in Section IV.2.d, *infra*.

chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances," and subjects a "***cause of action***" to a special motion to strike. (Cal. Code Civ. Proc. §§ 425.16(a) (Emphasis added) and 425.16(b) (1992) (Emphasis added).)

Since 1992, the SLAPP statute has been amended six times, yet the preamble explaining its intent to deter actions brought "primarily" to chill the exercise of free speech and its application to a "cause of action" has remained intact. In 1993, it was amended to "make recovery of attorney's fees and costs by a prevailing plaintiff under this provision mandatory rather than permissive if the motion to strike was frivolous or solely intended to cause unnecessary delay." (1993 Cal. Legis. Serv. Ch. 1239 (S.B. 9).) In 1997, it was amended to clarify that the legislative intent should be construed broadly, and to "specify that the section is applicable to any conduct in furtherance of the constitutional right of petition or of free speech in connection with a public issue." (1997 Cal. Legis. Serv. Ch. 271 (S.B. 1296).) In 1999, it was amended to provide that an order denying or granting a special motion to strike is immediately appealable, and also required the Judicial Council to maintain a public record of anti-SLAPP motions. (1999 Cal. Legis. Serv. Ch. 960 (A.B. 1675).) In 2005, it was amended to limit the evidentiary effect of a court's determination that the plaintiff established a probability of prevailing and to require that an anti-SLAPP motion be heard within 30 days of filing. (2005 Cal. Legis. Serv. Ch. 535 (A.B. 1158).) In 2009, it was amended again to limit the moving party's right to recover attorneys' fees. (2009 Cal. Legis. Serv. Ch. 65 (S.B. 786).) Finally, it was amended again in 2010 and 2014 with no substantive changes. (2010 Cal. Legis. Serv. Ch. 328 (S.B. 1330); 2014 Cal. Legis. Serv. Ch. 71 (S.B. 1304).) At no point in time has the statute been amended to reflect an intent that it should apply to anything less than a ***cause of action***.

Very shortly after its enactment, California courts recognized that "section 425.16 does not apply in every case where the defendant may be able to raise a First Amendment defense to a cause of action"; rather, its purpose was to address "meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so." (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 816, 33 Cal.Rptr.2d 446, disapproved on other grounds in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68 fn. 5, 52 P.3d 685 (*Equilon Enterprises*).) By way of example, "[t]he paradigm SLAPP is a suit filed by a large land developer against environmental activists or a neighborhood association intended to chill the defendants' continued political or legal opposition to the developers' plans." (*Id.* at 815.) SLAPP suits were described as suits "brought to obtain an *economic* advantage over the defendant, not to vindicate a legally cognizable right of the plaintiff." (*Id.* at 816 (Emphasis in original).) Thus, "one of the common characteristics of a SLAPP suit is its lack of merit. . . . plaintiff does not expect to succeed in the lawsuit, only to tie up the defendant's resources for a sufficient length of time to accomplish plaintiff's underlying objective." (*Id.* at 816.) Recently, the Sixth District recognized "[t]he core purpose of the anti-SLAPP law . . . is not to pose new impediments to all lawsuits arising from speech and petitioning activity but to remedy a very specific pattern by which contestants in the arena of public affairs were using meritless litigation as a device to silence and punish their adversaries." (*Old Republic Construction Program Group v. Boccardo Law Firm, Inc.* (2014) 230 Cal.App.4th 859, 876, 179 Cal.Rptr.3d 129.) This reasoning is consistent with the statute's preamble explaining its application to cases brought "primarily" to chill free speech and to "cause[s] of action," not to specific allegations or specific portions of a cause of action.

In 1999, this Court engaged in its first in-depth analysis of the legislative intent behind the SLAPP statute. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1112-23, 969 P.2d 564.) This Court noted that "[w]here, as here, legislative intent is expressed in unambiguous terms, we must treat the statutory language as conclusive; 'no resort to extrinsic aids is necessary or proper.'" (*Id.* at 1119.) Based on the statute's plain language, principals of statutory construction, and literature describing the statute's legislative intent, this Court concluded that it should not read into the statute a limitation that it would only apply to cases involving a public issue. (*Id.* at 1121.) Similarly, in 2002, this Court determined a showing of "intent to chill" or "chilling effect" should not be read into the plain language of the statute. (*Equilon Enterprises, supra*, 29 Cal.4th at 58, 52 P.3d 685; *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 75-76, 52 P.3d 695.) In 2003, this Court determined it should not create an exemption from the SLAPP statute for malicious prosecution actions because no such exemption appears in the language of the statute. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 741, 74 P.3d 737; *see also, Flatley v. Mauro* (2006) 39 Cal.4th 299, 312, 139 P.3d 2 ("Our concern for effectuating the legislative intent as demonstrated by the plain language of the statute has led us to reject attempts to read into section 425.16 requirements not explicitly contained in that language.").) Thus, over the years, this Court has recognized that the legislative intent of the SLAPP statute is clear and unambiguous by its very terms, and California courts should strictly construe and abide by that language.

The *Mann* rule is consistent with the purpose of the SLAPP statute. As noted above, the definitive aspect of a SLAPP suit is its lack of merit. By permitting a party opposing an anti-SLAPP motion to establish the

probability of prevailing[14] on "any part" of the claim at issue, the *Mann* rule effectively ensures that the claim at issue has some merit, and therefore is not meant to "primarily" chill protected speech and is not "meritless." In other words, the *Mann* rule forces moving parties to restrict anti-SLAPP motions to those cases that fall within the "very specific pattern by which contestants in the arena of public affairs were using meritless litigation as a device to silence and punish their adversaries;" *i.e.* it prohibits the use of anti-SLAPP motions in situations where the plaintiff is pursuing a meritorious claim.

The alternative espoused by Schnitt is contrary to the purpose of the SLAPP statute. Schnitt would have courts engage in an allegation-by-allegation analysis of complaints to determine whether specific allegations target protected conduct, and whether those specific allegations have merit regardless of the merits of the cause of action as a whole. This was never the intent or purpose of the SLAPP statute, and runs squarely contrary to what courts have recognized – the SLAPP statute is not meant to apply to any and all cases that invoke First Amendment concerns; rather, it was meant to apply specifically to completely meritless cases designed solely to punish protected activity. Schnitt's proposed approach is contrary to what the Legislature intended.

If the Legislature intended for the SLAPP statute to apply to specific allegations, it would have either addressed that issue when the statute was enacted, or it would have done so in one of the six amendments to the statute. This Court has previously been cautious of reading language into

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[14] It bears noting that "probability of prevailing" is not a low standard. This standard requires the plaintiff, at an early stage of litigation and without the benefit of obtaining discovery, to "state and substantiate a legally sufficient claim" with a *prima facie* showing of facts to sustain a favorable judgment. (*Rohde v. Wolf* (2007) 154 Cal.App.4th 28, 37, 64 Cal.Rptr.3d 348.)

the statute that is not explicitly stated, and it should continue to do so by refusing Schnitt's invitation to allow moving parties to excise allegations from complaints.

ii. Public Policy Favors The Mann Rule Over Alternative Approaches.

As Schnitt notes, the SLAPP statute carries with it severe consequences: it stays discovery; it precludes amendment of the complaint; it requires a plaintiff to demonstrate the probability of prevailing on the merits (often without discovery); it mandates an award of attorneys' fees to a successful moving party (while entitling opposing parties to attorneys' fees only upon a showing that the motion was frivolous or solely intended to delay); and it provides for an automatic appeal if the motion is denied and stays all other proceedings in the case. (*See,* Cal. Code Civ. Proc. § 425.16.) In today's court system, where it is difficult, and sometimes impossible, to obtain hearing dates less than six months in advance, anti-SLAPP motions effectively halt litigation in its tracks.

By ensuring that the SLAPP statute continues to apply only to cases that are completely meritless, as opposed to complaints or causes of action that may have some mention of protected activity, the Court will ensure that these severe consequences are reserved for the types of cases that the statute was specifically designed to address. In other words, the *Mann* rule ensures that complaints possessing some merit as to portions of the causes of action at issue will be free from the significant ramifications of anti-SLAPP motions, which are designed to dispose of an extremely narrow category of complaints. On the other hand, a rule permitting an anti-SLAPP motion to target specific allegations encourages abuse of the SLAPP statute by promoting the use of anti-SLAPP motions to target minor, irrelevant portions of complaints in an effort to delay trial and stay discovery. Not surprisingly, the Legislature has expressed a concern about

that abuse in an environment where anti-SLAPP motions are used so frequently. (*See,* Cal. Code Civ. Proc. § 425.17 ("The Legislature finds and declares that there has been a disturbing abuse of Section 425.16 . . . which has undermined the exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, contrary to the purpose and intent of Section 425.16.").) Expanding the reach of anti-SLAPP motions to target allegations will serve only to expand the existing abuse.

The assertion that the *Mann* rule encourages "artful pleading" is an overstatement of a nonexistent concern. Schnitt makes much ado of the theory that, under the *Mann* rule, a plaintiff may shield baseless attacks on a person's rights of petition and free speech from *any scrutiny whatsoever* by combining them under the same 'count' as some other claim that could survive scrutiny under the anti-SLAPP statute." (POB, 31-32 (Emphasis in original).) However, in the 13 years since the SLAPP statute was enacted, and in the 11 years since *Mann*'s publication, not a single published decision has had cause to specifically address concerns of "artful pleading" under the *Mann* rule. Moreover, so long as a party can establish the probability of prevailing on any part of a claim, the cause of action is, by definition, not "meritless," and therefore should be permitted to proceed.

The danger of allowing the parsing of allegations from a pleading through use of an anti-SLAPP motion was noted by the Court of Appeal:

> For a defendant to get the benefit of these extraordinary consequences merely by filing a motion aimed at some allegations would encourage a different kind of artfulness, as worrisome as the artful pleading that concerned the *Cho* court. Under the rule advocated in *Cho*, defendants would be encouraged to file an anti-SLAPP motion to excise allegations – no

> matter how minimal in relation to the remainder of the cause of action – merely to stop discovery and force plaintiff to show plaintiff's evidentiary hand early on, with further delay if the motion is denied and there is an appeal. Trial courts, moreover, would be burdened with prolix motions with little commensurate savings in trial time. (*Baral, supra*, 233 Cal.App.4th at 1442-1443, 183 Cal.Rptr.3d 615.)

This case is a perfect example of that artfulness. Schnitt's Motion, filed on February 22, 2013, targets a relatively minor portion of the SAC. (AA646.) Even ignoring the post-Motion court proceedings, Baral has been burdened with significant time and expense in opposing Schnitt's Motion, and did not receive a ruling from the trial court until 10 months later, on December 31, 2013. (AA1116.) As the Court of Appeal noted, the Motion was ultimately denied, but even if it had been granted, not a single cause of action would have been stricken from the SAC, and this matter would still proceed to a potential trial. (*Baral, supra*, 233 Cal.App.4th at 1442 ("It is undisputed that were we to reverse the order denying the instant motion, not a single cause of action would be eliminated from the second amended complaint. Each would be the subject to pretrial and potential trial proceedings in the trial court. There would be no appreciable timesaving if certain portions of the claims were struck.").) In short, anti-SLAPP motions that target only a sub-set of allegations within a cause of action do nothing to advance the underlying purpose of the SLAPP statute, which is to reduce the burden of litigating baseless claims.

Furthermore, Schnitt's contention that the *Mann* rule results in additional burdens for the parties and courts is at odds with reality. (POB, 33-34.) The Court need look no further than its own opinion in *Oasis*, in

which it reduced the burden of its SLAPP analysis by adopting the *Mann* rule, which allowed it to bypass the first prong of the analysis and focus on just one act of alleged misconduct. (*Oasis, supra*, 51 Cal.4th at 820-821, 250 P.3d 1115.) Similarly, as explicitly noted by the appellate court in *Mann*, the *Mann* rule obviates the need for a court to "engage in the time-consuming task of determining whether the plaintiff can substantiate all theories presented within a single cause of action and need not parse the cause of action so as to leave only those portions it has determined have merit." (*Mann, supra*, 120 Cal.App.4th at 106, 15 Cal.Rptr.3d 215.)[15]

Moreover, Schnitt's assertion that the *Mann* rule presents the danger that plaintiffs may be barred from asserting claims of unprotected conduct is not based in reality. (POB, 34.) Schnitt asserts that "because a party cannot amend around a previously successful anti-SLAPP motion [citation], the grant of an anti-SLAPP motion on a mixed count would permanently bar the plaintiff from asserting even the claims of unprotected conduct alleged in that count." (*Id.*, citing *Sylmar Air Conditioning v. Pueblo Contracting Services, Inc.* (2004) 122 Cal.App.4th 1049, 1055-1056, 18 Cal.Rptr.3d 882 (*Sylmar*).) The statement is a blatant misrepresentation of the law. In reality, the anti-SLAPP statute prevents a plaintiff from amending its complaint to avoid the SLAPP statute ***while the SLAPP motion is pending***, not after the motion has been heard and resolved. (*See, Simmons v. Allstate Ins. Co.* (2001) 92 Cal.App.4th 1068, 1073-1074, 112 Cal.Rptr.2d 397 (providing there is no right to amend a

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[15] The burdening of trial courts with additional time-consuming tasks is an issue that the Legislature is rectifying. The importance of reducing the trial court's burden is evidenced by the recent passage of Senate Bill 470, that eliminates the requirement that judges rule on every evidentiary objection presented on summary judgment. The passage of this new law is not an aberration at a time when the annual budget of the California judicial system is shrinking.

pleading to ***avoid*** a SLAPP motion).) In fact, the very case on which Schnitt relies contemplates a situation where the plaintiff attempted to avoid the hearing on an anti-SLAPP motion as to the original complaint by filing a first amended complaint before the anti-SLAPP motion was heard. (*See, Sylmar, supra*, 122 Cal.App.4th at 1054, 18 Cal.Rptr.3d 882 ("Sylmar contends that the trial court erred in hearing the SLAPP motion because it filed a first amended complaint pursuant to section 472 prior to the hearing on the motion.").) There is ***no*** authority that prevents a plaintiff from amending its complaint to re-allege unprotected activity after the grant of an anti-SLAPP motion. Moreover, in the 11 years since *Mann*'s publication, not a single case has had cause to address this "anomalous result" advanced by Schnitt; thus, it is yet another phantom concern invented by Schnitt.

The remainder of the concerns raised by Schnitt are similarly overstatements and fabrications. There is no dispute that courts are capable of identifying causes of action under a primary right theory analysis – indeed, they have already done so in the context of anti-SLAPP motions. (*See, e.g., South Sutter,* 193 Cal.App.4th at 659, 123 Cal.Rptr.3d 301 ("For purposes of an anti-SLAPP motion, [a] 'cause of action' is comprised of a 'primary right' of the plaintiff, a corresponding 'primary duty' of the defendant, and a wrongful act by the defendant constituting a breach of that duty.'"); *Marlin,* 154 Cal.App.4th at 162, 64 Cal.Rptr.3d 488 (denying anti-SLAPP motion based on application of primary right analysis to operative complaint).) The *Mann* rule, on the other hand, ensures that courts need not consider specific allegations within a single cause of action, which is exactly what Schnitt's Motion encouraged the trial court to do.

California *Code of Civil Procedure* § 436 provides a sufficient tool for defendants to parse allegations from a complaint. It enables defendants to strike allegations that are "irrelevant, false, or improper," and therefore

permits defendants to strike out portions of causes of action. Section 425.16 was never intended to apply in those same circumstances. This Court should accordingly affirm the *Mann* rule and further find that an anti-SLAPP motion cannot be used to excise allegations from within a cause of action.

d. The Evidence Presented By Baral Is Sufficient To Establish The Probability Of Prevailing On His Claims.

Baral has submitted sufficient evidence to establish a probability of prevailing on the claims at issue. At all relevant times, Baral and Schnitt were co-managing members of IQ. (AA891-892(¶6).) During the course of their relationship, Baral and Schnitt exchanged and/or signed no less than nine documents that indicated that Baral was a co-managing member of IQ. (AA897-1025, 1043-1076.) One of those documents is a 2007 Operating Agreement for IQ that listed Baral as a co-managing member. (AA973-978.) Perhaps most compellingly, in connection with the sale of IQ, Schnitt and Baral executed several documents that expressly state Baral was a member and manager of IQ ***since its inception***, and even represented to the buyer that Baral would be recognized as a member. (AA889, AA1043-1076.)

As co-managing members, Schnitt and Baral owed one another fiduciary duties of loyalty and care, including refraining from self-dealing and putting their own interests above those of the other managers and members. (Cal. Corp. Code §§ 16404, 17704.19.) There is no dispute that Schnitt breached those duties by (a) excluding Baral from the negotiation for the sale of IQ, (b) engaging in self-dealing by negotiating for a retention in ownership in the resulting company, and (c) engaging in self-dealing by negotiating for an employment position with the resulting company. (AA887, AA894(¶¶15-17).) As a result of being excluded from the

negotiation process, Baral was excluded from having an opportunity to retain an ownership interest or employment position with the resulting company, while Schnitt was able to negotiate for these benefits at Baral's expense. (*Ibid.*) In doing so, Schnitt put his own interests above those of his co-managing member (Baral), thereby violating his fiduciary duties and committing constructive fraud, and damaging Baral in an amount to be proven at trial.

In support of his Motion, Schnitt failed to present any evidence refuting the allegations comprising Baral's claims in the SAC. In rebuttal, Schnitt states that he was the sole managing member of IQ, relying on the secret 2003 Operating Agreement and Articles of Organization that he unilaterally submitted to the California Secretary of State. (AA688.) He provides no explanation for why the parties exchanged numerous documents verifying Baral's status as a manager and member of IQ. He does not deny that he hid the sale of IQ from Baral, nor does he deny that he engaged in self-dealing by retaining an employment and ownership interest for himself in the sale. (AA686-693.)

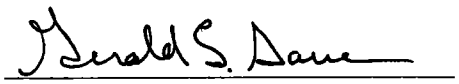
Accordingly, even if this Court finds that the SAC contains allegations that target protected activity, Baral has established a probability of prevailing on his claims involving unprotected activity. Needless to say, it is abundantly clear that the trial court did not commit an error when it denied Schnitt's meritless Motion.

V. CONCLUSION

Baral respectfully requests that this Court should uphold the Court of Appeal's affirmance of the trial court's denial of Schnitt's Motion. The Motion was procedurally improper and does not target protected activity. Moreover, the purpose of the SLAPP statute will be furthered by

application of the *Mann* rule, and an application of that rule in this instance dictates that Schnitt's Motion should be denied.

DATED: September 17, 2015 SAUER & WAGNER LLP

By: 

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CERTIFICATE OF WORD COUNT

The undersigned hereby certifies that the text of the preceding Answering Brief on the Merits, including captions and footnotes, but excluding the Cover Page, Tables of Contents and Authorities, and signature blocks, contains 13,927 words, based upon the computerized word count function of Microsoft Word.

DATED: September 17, 2015 SAUER & WAGNER LLP

By: Gerald S. Sauer

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PROOF OF SERVICE

I am employed in the County of Los Angeles, California. I am over the age of 18 years and not a party to the within action. My business address is 1801 Century Park East, Suite 1150, Los Angeles, California 90067.

On September 17, 2015 I served the foregoing document(s) described as: **ANSWERING BRIEF ON THE MERITS** on the interested party(ies) in this action, enclosed in a sealed envelope, addressed as follows:

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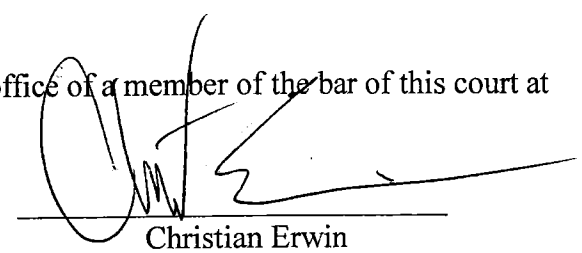
Executed this 17th day of September, 2015 at Los Angeles, California.

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

(X) (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.



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