No. A163315

In the Court of Appeal of the State of California
First Appellate District
Division One

GOLDEN GATE LAND HOLDINGS, LLC, et al.
Plaintiffs and Appellees

v.

DIRECT ACTION EVERYWHERE
Defendant and Appellant.

APPEAL FROM ALAMEDA COUNTY SUPERIOR COURT
THE HONORABLE JUDGE JAMES REILLY
CASE NO. RG21091697

Appellant's Reply Brief

Matthew Strugar, SBN 232951
Law Office of Matthew Strugar
3435 Wilshire Blvd., Suite 2910
Los Angeles, CA 90010
(323) 696-2299
matthew@matthewstrugar.com

Attorney for Defendant and Appellant
Direct Action Everywhere

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Introduction

The California Supreme Court held that where "a factual dispute exists about the legitimacy of the defendant's conduct" on an anti-SLAPP motion, "it cannot be resolved within the first step but must be raised by the plaintiff in connection with the plaintiff's burden [on the second step] to show a probability of prevailing on the merits." (*City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 424 (*City of Montebello*), quoting *Flatley v. Mauro* (2006) 39 Cal.4th 299, 316 (*Flatley*).) Defendant Direct Action Everywhere (DAE) disputes the plaintiffs' claims about the legitimacy of DAE's conduct. This case asks whether plaintiffs can blow past the Supreme Court's command to resolve such issues on the second step of the anti-SLAPP analysis with a simple unsupported allegation of vicarious liability.

The plaintiffs operate Golden Gate Fields racetrack. A whole lot of horses die there. Because of its spectacular death toll, DAE put together a petition asking local governments to shut down the track. Tens of thousands of people signed it. A local chapter of Direct Action Everywhere—a separate entity from the defendant DAE here—organized protests outside the track. And four activists affiliated with the local chapter of DAE entered the track and locked themselves down to it.

Golden Gate took this as an opportunity to take a swipe at a critic. It sued DAE, alleging it was vicariously liable for the four activists who locked down to the track because DAE gathered petition signatures against the track and wants it shut down.

After DAE moved to strike Golden Gate's claims against it under the anti-SLAPP statute, the trial court found that a mere allegation of vicarious liability for the trespassers' actions immunizes Golden Gate from the anti-SLAPP statute. No matter how much DAE had to offer in the way of "a factual dispute . . . about the legitimacy of [its] conduct," the trial court applied a rule where *any* anti-SLAPP motion fails on the first step because another party did something illegal. (*City of Montebello*, *supra*, 1 Cal.5th at p. 424.)

That ruling flouts decades of precedent interpreting the anti-SLAPP statute. It flouts decades of First Amendment precedent, both in California and from the United State Supreme Court, too. And, if affirmed, it will have devastating consequences for associational rights.

Argument

I. Golden Gate's Concession on DAE's Hypotheticals Shows What Is at Stake

Both sides agree that the anti-SLAPP statute does not protect activity that is illegal as a matter of law. (*Flatley*, *supra*, 39 Cal.4th at pp. 330–333; AOB at p. 21; RB at p. 32.) They dispute whether alleging vicarious liability for someone who engaged in illegal activity provides a second-level exemption to the anti-SLAPP statute. DAE argues that courts should look (and, with rare exception, have looked) to the facts and actions that allegedly *create the vicarious liability* in determining whether the statute applies. Golden Gate says pay no attention to the acts of the moving defendant—instead look exclusively to the illegal actions of the third party.

The rule that Golden Gate asks this Court to adopt would provide any plaintiff an opportunity to impose litigation costs on any or all of its critics anytime someone, somewhere violates a criminal law that the plaintiff can allege caused it harm. Golden Gate's proposed rule would take what to now has been a narrow exception applicable only in extreme circumstances and explode it into an exception that would allow any well-heeled party to haul its critics into protracted litigation at the slightest provocation and strip them from any protection under the anti-SLAPP statute. (*Flatley*, *supra*, 39 Cal.4th at pp. 316, 332 fn. 16 [illegality exception applies only in "extreme" circumstances].) And it would prove particularly dangerous for political advocacy organizations.

In its opening brief, DAE proposed two hypotheticals to show how Golden Gate's proposed rule would work in practice. In the first, DAE proposed a march down Telegraph Avenue for which a local Black Lives Matter organization obtains a permit. A hundred people participate. The San Francisco Chronicle has a reporter and a photographer there. One protester throws a rock through a shop window. The shop owner sues (assume for trespass) every demonstrator who participated, the Black Lives Matter chapter that obtained the permit, the reporter, the photographer, and the Chronicle itself. His only allegation against the other demonstrators, the chapter, the reporter, the photographer, and the newspaper is that they participated in the protest, organized it, or reported on it, along with a boilerplate assertion that, on information and belief, each defendant was the

agent, co-conspirator, aider and abettor, employee, representative, co-venturer, partner, and/or alter ego of the rock thrower.

Each defendant files an anti-SLAPP motion claiming they are sued over their protected speech or activity. All they did was organize, participate in, or report on a protest involving a matter of public interest in a public forum. Does the statute apply to any of them? (AOB at pp. 38–39.)

To its credit, Golden Gate candidly admits that its proposed rule means the statute would not apply. (RB at pp. 44–46.) Those defendants' actions—whether participating in a protest, organizing it, engaging in journalism, or publishing a newspaper—would be robbed of the anti-SLAPP statute's protection simply by virtue of the plaintiff including a boilerplate allegation of several vicarious liability theories, pleaded on information and belief and unsupported by facts.

But that hypothetical might fail to reveal the real dangers of Golden Gate's proposed rule because the shop owner presumably would not have had an existing axe to grind with Black Lives Matter or the Chronicle. DAE's second hypothetical gets at that scenario. It involves dueling protests about abortion rights outside of a Planned Parenthood clinic. Things get out of hand and a pro-choice protester assaults a pro-life protester. The pro-life protester then sues the pro-choice protester *and Planned Parenthood* for battery. He alleges the pro-choice protester used similar rhetoric as that found in Planned Parenthood advocacy materials and that, on information belief, both Planned Parenthood and the protester were co-conspirators or aiders and abettors of the other. Planned Parenthood files an anti-SLAPP motion

claiming it is being sued for speech in connection with an issue of public interest: its advocacy and rhetoric around abortion rights. (AOB at pp. 21–22.)

What result? Again, if Golden Gate's rule is correct, Planned Parenthood's anti-SLAPP motion fails because the assault is illegal as a matter of law and the plaintiff pleaded vicarious liability. Golden Gate concedes these results and asserts "there is nothing untoward or improper about" them. (RB at p. 45.)

Consider the implications of Golden Gate's concession. A developer seeking to build a new ski resort opposed by major environmental organizations could drag the Sierra Club, Greenpeace, and the Center for Biological Diversity into court if someone slits the tires on one of its construction vehicles. The developer could sue the lawyers who represent the groups or the judges overseeing their lawsuits. Someone claiming emotional distress from seeing the January 6, 2021 Capitol riot could sue someone who shared a video on social media and allege a conspiracy with the people who stormed the building. Each of these defendants would be stripped of the anti-SLAPP statute's protection. If courts can only focus on the underlying conduct—trespass or property damage during unrest—and not the defendant's actual conduct, the statute never applies.

And on and on. Each of these plaintiffs could turn virtually any violation of criminal law into an opportunity to take invasive discovery and impose significant litigation costs.

The anti-SLAPP statute was designed to prevent exactly such misuse of the judicial system. The Legislature sought to interrupt a disturbing rise in wealthy and powerful plaintiffs filing suits to shut down dissent by public interest groups and other critics by burying them in legal fees. (See, e.g., *FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133, 143 (*FilmOn*), citing Assem. Com. on Judiciary, Analysis of Sen. Bill No. 1296 (1997–1998 Reg. Sess.) as amended June 23, 1997, pp. 2–3; Barker, *Common-Law and Statutory Solutions to the Problems of SLAPPs* (1993) 26 Loyola L.A. L.Rev. 395, 396.)

Golden Gate's proposed rule would rip a wide hole in the protection the Legislature intended to provide. Because it's inevitable that a broad-based political or social movement will include someone involved in a criminal act. Most have throughout time. Patriots assaulted loyalists as they gathered support for American independence. Abolitionists harbored fugitive slaves. The late 19th and early 20th centuries were rife with labor violence. The civil rights movement had its (now celebrated) non-violent civil disobedience. Pro-life activists not only blockaded reproductive health clinics but also murdered doctors. And the past few years have seen political violence from both left and right flanks of American politics. But the actions of a few did not extinguish the rights of everyone else who was part of those movements. The reverse heckler's veto Golden Gate seeks to impose—where one bad actor can strip the statutory rights of everyone who ostensibly shares his positionality—sweeps broadly. And it threatens loudly.

II. The Rule at Issue—as Well as the Trial Court's Order—Involves the Exception to the Anti-SLAPP Statute for Conduct that Is Illegal as a Matter of Law, Not the Rule from *Park v. Board of Trustees of California State University*

The rule that the anti-SLAPP statute does not apply to acts are that conclusively and concededly illegal as a matter of law is almost as old as the statute itself. It was recognized by the Courts of Appeal as early as 1994 and affirmed by the Supreme Court in 2006. These courts found the exception in the "in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution" language from subsection (b)(1) of the statute. (Code Civ. Proc. § 425.16, subd. (b)(1).) And—at least until recently—cases applying the exception still looked to the moving defendant's own actions in determining whether the statute applied.

None of this has particularly much to do with *Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057 (*Park*). The rule existed before *Park* and came from different statutory language than *Park* grounded its rule in.

In fact, the trial court here didn't cite *Park* once. (AA 124–126.)

But Golden Gate hangs nearly its entire brief on *Park*. It cites or mentions *Park* more than forty times. And it asserts again and again that *Park* overturned all anti-SLAPP precedent that came before it. (RB at pp. 22–23, 37, 46.)

Because the rule that the anti-SLAPP statute does not apply to acts that are conclusively and concededly illegal as a matter of law predates *Park* and comes from different statutory language from *Park*, the rule wasn't

destroyed by *Park*. And it wasn't, as Golden Gate would have it, simultaneously destroyed by *Park* and then resurrected from different statutory language, all *sub-silentio*.

Because the rule has little-to-nothing to do with *Park*, the bulk of Golden Gate's argument is a diversion. It's a purposeful diversion, too. SLAPP plaintiffs see an opening in *Park* and seek to exploit it. This Court should decline the invitation.

A. The Illegality Exception Long Pre-Dates *Park*

The rule that activity that is conclusively or concededly illegal as a matter of law is not subject to an anti-SLAPP motion is not an outgrowth of the Supreme Court's 2017 decision in *Park*. The Supreme Court recognized the rule more than a decade earlier in *Flatley* and the Courts of Appeal recognized it since the earliest days of the statute. (See, e.g., *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 820 (*Wilcox*) ["if the defendant's act was burning down the developer's office as a political protest the defendant's motion to strike could be summarily denied without putting the developer to the burden of establishing the probability of success on the merits in a tort suit against defendant"], *disapproved on other grounds in Equilon Enterprises v. Consumer Cause, Inc*. (2002) 29 Cal.4th 53, 68 fn. 5.) The Supreme Court in *Flatley* surveyed and recited the dozen years of preceding, unanimous precedent recognizing this rule. (*Flatley*, *supra*, 39 Cal.4th at pp. 313–317.)

Flatley involved a claim for extortion where uncontested evidence showed the defendant wrote letters and made calls threatening to accuse the

plaintiff of various crimes unless he paid a large sum of money. (*Flatley*, *supra*, 39 Cal.4th at pp. 305, 328–330.) Because the evidence conclusively established criminal "extortion as a matter of law," the anti-SLAPP statute did not apply. (*Id*. at p. 333.)

The Supreme Court repeatedly emphasized the limited nature of this rule. It applied only to the "the narrow circumstance in which a defendant's assertedly protected activity could be found to be illegal as a matter of law and therefore not within the purview of section 425.16." (*Flatley*, *supra*, 39 Cal.4th at p. 315; accord *id*. at p 316 ["In such a narrow circumstance, where either the defendant concedes the illegality of its conduct or the illegality is conclusively shown by the evidence, the motion must be denied."].) The rule operates in "those rare cases where the defendant's assertedly protected speech or petitioning activity is conclusively demonstrated to have been illegal as a matter of law." (*Id*. at p. 320.) The Supreme Court's conclusion that the defendant's conduct "constituted criminal extortion as a matter of law [was] based on the specific and extreme circumstances of [that] case." (*Id*. at p. 332, fn. 16; accord *Cross v. Cooper* (2011) 197 Cal.App.4th 357, 384 [emphasizing the "narrow" nature of the rule and the "extreme circumstances" in which it applies].)

B. Cases Recognizing the Illegality Exemption Rely on Different Statutory Language than *Park*

Neither *Flatley* nor the cases it relied on grounded the illegal-as-a-matter-of-law exception in the statute's "arising from" language, as Golden Gate contends. (RB at pp. 26–29.) Instead, *Flatley* located the exception in subsection (b)(1)'s requirement that the moving defendants must be sued for

actions "in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution." (Code Civ. Proc. § 425.16, subd. (b)(1); *Flatley*, *supra*, 39 Cal.4th at p. 324 ["By necessary implication, the statute does not protect activity that, because it is illegal, is not in furtherance of constitutionally protected speech or petition rights."]; accord *Paul for Council v. Hanyecz* (2001) 85 Cal.App.4th 1356, 1365 ["[T]he activity of which plaintiff complains . . . was not a *valid* activity undertaken by defendants in furtherance of their constitutional right [to] free speech"].) The thinking, obviously, is that illegal activity is necessarily not protected by the U.S. or California constitutions, so the illegal activity could not be in furtherance of those rights. (See *Wilcox*, *supra*, 27 Cal.App.4th at p. 819 ["If the defendant's act is not constitutionally protected how can doing the act be 'in furtherance' of the defendant's constitutional rights?"].)[1]

Exactly what statutory language the requirement comes out of, or even at what stage of the analysis it operates, is unlikely to matter much from a practical perspective in most cases. Different paths through a maze can lead to the same place.

But it *does* matter for Golden Gate's argument here. Golden Gate claims the requirement comes out *Park* (and the "arising from" language it

---

[1] The Rutter Group treatise on anti-SLAPP litigation places the exception even earlier in the anti-SLAPP analysis. It treats the illegal-as-a-matter-of-law exception as a preliminary, pre-Step-One screening process, like the textual exemptions from the anti-SLAPP statute found in subsection (d) of the statute or in section 425.17, subsections (b) and (c). (Burke, Cal. Practice Guide: Anti-SLAPP Litigation (The Rutter Group 2016) ¶ 6.43, pp. 6-17 to 6-18 ["Criminally Illegal Conduct; Preliminary Inquiry"].)

interpreted), which amounted to a "shift in the law" such that it abolished all anti-SLAPP precedent to precede it. (RB at pp. 22–23, 37, 43.) But that can only be true if the illegal-as-a-matter-of-law exception is found in the "arises from" statutory language. The Supreme Court found it elsewhere. And the exception predates *Park* by more than two decades. The premise of Golden Gate's argument starts from the wrong place and follows the wrong path. (RB at 21–32.)

III. Even if the Illegality Exception of the Anti-SLAPP Statute Came from *Park*, Golden Gate's Claims Arise from DAE's Speech

But even if Golden Gate were right about the source and location of the illegality exemption, the statute would still apply because *every* factual allegation Golden Gate alleges against DAE involves DAE's speech.

As DAE stressed in its opening brief, a long line of precedent exists addressing theories of vicarious liability for advocacy organizations or other individuals associated with wrongdoers. (AOB at p. 23.) The most fundamental is the United States Supreme Court's decision in *NAACP v. Claiborne Hardware Co.* (1982) 458 U.S. 886, 927 (*Claiborne Hardware*), establishing that the First Amendment requires that advocacy organizations can only be held vicariously liable for a wrongdoer's actions when they authorize, direct, or ratify the wrongdoing. California courts have faithfully applied *Claiborne Hardware* in the anti-SLAPP context where claims "involve[d] possible tort liability for the collateral effects of a political protest," and ruled that "[a]n organizer of a political protest cannot be held personally liable for acts committed by other protesters unless he or she

authorized, directed or ratified specific tortious activity, incited lawless action, or gave specific instructions to carry out violent acts or threats." (*Lam v. Ngo* (2001) 91 Cal.App.4th 832, 837 (*Lam*), citing *Claiborne Hardware*, *supra*, 458 U.S. at p. 927; see also *Huntingdon Life Scis., Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1264 (*Huntingdon*).)

This requirement—that the allegedly vicariously liable party authorized, directed, or ratified illegal activity—is an *element* of such a claim. So while the elements of a trespass cause of action against someone who directly engaged in the tortious activity are (1) plaintiff's ownership or control; (2) entry; (3) lack of permission; (4) harm; and (5) proximate cause (see, e.g., CACI 2000), vicarious liability in the context of a political protest adds a sixth element: authorization, direction, or ratification of the trespass.

There can be no question this is an "element" of Golden Gate's causes of action against DAE. Like all elements, it is "[a] constituent part of a claim that must be proved for the claim to succeed." (Black's Law Dict. (11th ed. 2019) p. 657 col. 1.) And it makes no difference that the element was recognized through precedent. Golden Gate's claims are both creatures of common law—all the elements were recognized through precedent. And it makes no difference that it is an element specific to a certain class of defendants, either. Plenty of elements apply only to certain types of defendants, especially in the First Amendment context. The requirement that a plaintiff plead actual malice to state or prove a defamation claim against a

public figure is no less an element because it was recognized by the Supreme Court in *New York Times v. Sullivan* (1964) 376 U.S. 254.

Golden Gate's repeated refrain that neither of its claims arise out of DAE's speech because the individual defendants' trespass meets the first five elements just ignores the sixth element required by the First Amendment and controlling precedent in this context. And anything even arguably showing DAE's authorization, direction, or ratification *arises* from DAE's protected speech.

It must. *All* the complaint alleges as to DAE is protected speech. It has only six factual allegations about DAE. One, it is an animal rights organization. (AA 3–4 [Compl. ¶ 14].) Two, it maintains a website that describes its political commitments. (AA 4 [Compl. ¶ 15].) Three, it supposedly organizes protests of businesses. (*Ibid*.) Four, it gathered petition signatures asking local governments to close Golden Gate. (AA 4 [Compl. ¶ 16].) Five, people supposedly affiliated with DAE held a protest outside of Golden Gate. (AA 4 [Compl. ¶ 18].) Six, DAE provided live commentary on the individuals' civil disobedience on social media. (AA 4 [Compl. ¶ 19–20].) That's it. That's everything.

It's not for nothing that later in its brief, when Golden Gate tries to show it would prevail on the merits, it tries to show it would prevail by again *relying on DAE's speech*. It relies on DAE's petition. (RB at pp. 61–62.) It relies on a press release. (*Id*. at p. 61.) And it relies on social media posts. (*Id*. at p. 62.) DAE's speech is all Golden Gate has on DAE. But it wants to distract from the obvious through analytical acrobatics, claiming the Court

should shield its eyes to ignore all the allegations about DAE's speech and find the anti-SLAPP statute doesn't apply because Golden Gate pleaded magic words of vicarious liability.

So, of course, the *element* of authorization, direction, or ratification of the illegal acts *arises from* DAE's speech. There is nothing else alleged in the complaint about DAE for it to arise from.

IV. Golden Gate's Proposed Rule Would Cripple the Anti-SLAPP Statute and Endanger First Amendment Rights

Golden Gate's proposed rule conflicts with the text and history of the anti-SLAPP statute. It ignores the text's own focus on an individual moving defendant's actions. It circumvents existing precedent applying the anti-SLAPP in the context of political organizers. It would deepen a now-shallow split of authority on the statute's application when dealing with vicarious liability allegations. And it would contravene the legislative intent.

A. Golden Gate's Proposed Rule Contravenes the Statute's Textual Focus on an Individual Defendant's Own Actions

In its opening brief, DAE stressed that the anti-SLAPP statute looks to the acts of the individual moving defendant in assessing whether the statute applies. (AOB 25–29.) The statute's text requires this individual assessment: the statute applies to "[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." (Code Civ. Proc. § 425.16, subd. (b)(1), emphasis added.) And Courts have consistently applied this individual assessment. The Supreme Court held,

"[t]he anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability and whether that activity constitutes protected speech or petitioning." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 92 (*Navellier*), emphasis in original.)

Golden Gate itself cites this individual focus on the moving defendant's actions: """To determine whether [the statute applies], 'courts must "consider the elements of the challenged claim and what actions *by the defendant* supply those elements and consequently form the basis of liability."'" (RB at p. 22, quoting *Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871, 887, in turn quoting *Park*, *supra*, 2 Cal.5th at p. 1063, emphasis added.) Despite citing the rule, Golden Gate asserts no actions by DAE are relevant—this court need only look to whether Golden Gate met the elements of trespass by the individual defendants. Golden Gate's proposed rule would rewrite the case it itself relies on, striking the "what action by the defendant" language.

And while DAE's opening brief led with this argument and repeatedly stressed the individual focus required by the anti-SLAPP statute (AOB at pp. 25–29, citing, *inter alia,* Code Civ. Proc. § 425.16, subd. (b)(1), *Navellier*, *supra*, 29 Cal.4th at p. 92, and *Park*, 2 Cal.5th at p. 1063), Golden Gate's brief just ignores it. The closest it gets to engaging with the argument or the authority is to waive *Navellier* away because it "merely affirmed that certain causes of action, such as a breach of contract claim, are not categorically excluded from the anti-SLAPP statute's reach." (RB at p. 36.) But courts—and especially a terminal court of appeal on statutory interpretation of state

law—do more than make bottom line decisions. They set rules and guide analysis. If they didn't, there'd be little reason to write opinions. *Navellier*, along with the statute itself and even *Park*, command courts to look to the moving defendant's own actions.

B. Golden Gate's Proposed Rule Cuts Precedent Off at its Knees

In its opening brief, DAE detailed longstanding precedent applying the anti-SLAPP statute in the political association context. (AOB pp. 40–42.)

In *Lam*, a business owner sued the organizer of a series of protests against the business after some protesters slashed patron's tires, posted banners on the business, and urinated on it.[2] (*Lam*, *supra*, 91 Cal.App.4th at p. 838.) The court found that organizer Kyle Ngo's anti-SLAPP motion should have been granted because "there [was] no doubt that" organizing the popular protests "satisfie[d] the first prong" of the anti-SLAPP statute. (*Id*. at p. 845.) And the plaintiff failed the second prong because he failed to show that Ngo directed, authorized, or ratified the actions of the wrongdoers. (*Ibid*.)

Similarly, *Huntingdon* involved a company suing organizers and other protest participants after third-party protesters trespassed on an employee's residential property.[3] (*Huntingdon*, *supra*, 129 Cal.App.4th at p. 1239). The

---

[2] Or, put another way, like Golden Gate here, a business owner brought a claim for interference with economic advantage against a protest organizer over the illegal actions of other protesters.

[3] Or, put another way, like Golden Gate here, a business brought a claim for trespass against a protest organizer over the illegal trespass of other protesters.

court noted the exception to the anti-SLAPP statute for conduct that is concededly or conclusively illegal as a matter of law, but recognized the moving defendants neither conceded nor had the plaintiff conclusively established that "*they* committed any illegal acts." (*Id.* at p. 1246.) In other words, while others might have trespassed, that did not bar the moving defendants from the anti-SLAPP statute's protection. And, as in *Lam*, the plaintiff did not have evidence to establish that the organizers ratified the action or were otherwise agents of those who committed the illegal acts. (*Id.* at p. 1264.)

Both cases reached their decision by relying on the associational principles demanded by the U.S. Supreme Court in *Claiborne Hardware*. (*Lam*, *supra*, 91 Cal.App.4th at p. 845; *Huntingdon*, *supra*, 129 Cal.App.4th at p. 1264.) As stated in *Lam*, "*NAACP v. Claiborne Hardware Co.* is quite clear that there must be some evidence of authorization, direction, or ratification of 'specific' constitutionally unprotected tortious activity by the organizer of a protest before the organizer can be held responsible for the consequences of the activity." (*Lam*, *supra*, 91 Cal.App.4th at p. 845, citing *Claiborne Hardware*, *supra*, 458 U.S. at p. 927.)

Golden Gate waves away both cases by claiming "the court simply found . . . that there was no evidence to support vicarious liability, and therefore the plaintiffs failed to establish a probability of prevailing on the merits." (RB at p. 48.) But Golden Gate's proposed rule, and the rule adopted by the trial court, prevents exactly that inquiry from *ever* happening. If a court is presented with a plaintiff who suffered damages from some illegal

action and a defendant who claims he had nothing to do with the illegal action, the innocent defendant can *never* present evidence to that effect if he cannot proceed past step one simply because someone somewhere committed a crime. That's why it's pure cynicism for Golden Gate to assert that "[t]o the extent that DAE denies that the trespassers were *in fact* its agents, that is a matter for the second step of the anti-SLAPP analysis." (RB at p. 36.) DAE can never get there under Golden Gate's rule because the unadorned allegation of vicarious liability stops DAE dead in its track on step one.

Golden Gate's proposed rule cuts the associational precedent off at its knees and blocks courts from looking at any evidence.

C. Adopting Golden Gate's Proposed Rule Would Deepen a Currently Shallow Split of Authority

Admittedly, there is a split in authority on the issue presented here. On the deeper side of the split are not only *Lam* and *Huntingdon*, but also *Contreras v. Dowling* (2016) 5 Cal.App.5th 394 (*Contreras*), where a tenant complaining that her landlords trespassed in her apartment sued the landlords' attorney, asserting he conspired with and aided and abetted the landlords. (*Id*. at p. 399.) While trespass is illegal as a matter of law, this District found the anti-SLAPP statute still applied because "[c]onclusory allegations of conspiracy or aiding and abetting d[id] not deprive [the attorney's] actions of their protected status." (*Id*. at p. 413.) "Conspiracy and aiding and abetting . . . are no more than legal conclusions" that "have 'no talismanic significance.'" (*Ibid*., quoting *Berg & Berg Enterprises, LLC v. Sherwood Partners, Inc.* (2005) 131 Cal.App.4th 802, 824.)

Golden Gate has three responses to *Contreras*. None are persuasive.

First, Golden Gate argues that because it predates *Park*, *Contreras* can mean nothing. (RB at p. 37.) As shown above, though, Golden Gate's *Park*-the-Destroyer theory does not square with the text and history of the exception for illegal actions. (See, *supra*, section II.)

Second, Golden Gate contends *Contreras* established a rule specific to the "unique context" of lawyers providing services to clients. (RB at p. 38.) Nothing in the case suggests as much. And why on earth would such a carve out exist? The anti-SLAPP statute was not designed to provide special protection to lawyers against lawsuits involving their services. The legislative history shows the Legislature's interests were far afield from such concerns and were, in fact, much more closely aligned to seeking to prevent well-heeled, litigious corporations from dragging their critics through protracted and potentially ruinous lawsuits. (*FilmOn*, *supra*, 7 Cal.5th at p. 143.)

Third, Golden Gate attempts to distinguish *Contreras* as involving only "conclusory" allegations of conspiracy. (RB at p. 38.) But that's no distinction here. In supporting its own assertion of vicarious liability in its facts section, Golden Gate relies on three paragraphs in its complaint: 10, 17, and 28. (RB at p. 18.) Each is as conclusory as it could be. Paragraph 10 is a boilerplate allegation made "on information and belief" that all defendants are "the agent, co-conspirator, aider and abettor, employee, representative, co-venturer, partner, and/or alter ego of each and every other defendant." (AA 3.) Paragraph 17 details the individual defendants' trespass with an unsupported allegation that they are "four people affiliated with DAE." (AA 4.) And paragraph 28 is another unsupported allegation that "Defendants,

acting on their own and through agents acting on their behalf, engaged in an unauthorized entry on the GGF property that disrupted those possessory rights." (AA 6.) That's it. The allegations Golden Gate itself points to lack factual support and, in one case, are admittedly pleaded on information and belief. They are virtually word-for-word the type of "secondary-liability allegations" that the Supreme Court labeled "egregious examples of generic boilerplate" in affirming that such allegations are "too conclusory to state a cause of action." (*Moore v. Regents of Univ. of Cal.* (1990) 51 Cal.3d 120, 134 & fn.12.) One would be hard pressed to make *more* conclusory allegations of vicarious liability than what Golden Gate pleads here.[4]

This deeper side of the split also follows the text of the anti-SLAPP statute and heavy weight of authority interpreting it. The statute looks to the "act *of that person*"—not the act of another person—in determining whether the statute applies. (Code Civ. Proc § 425.16, subd. (b)(1); accord *Navellier*, *supra*, 29 Cal.4th at p. 92 ["[t]he anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability," emphasis in original].) And it avoids allowing a plaintiff to evade the anti-SLAPP statute through creative pleading. (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 393.)

---

[4] Even if the allegations of vicarious liability contained well-pleaded, specific factual allegations of vicarious liability, Golden Gate's proposed rule would still wreak havoc. What if a defendant wished to contest those allegations and had uncontroverted evidence that they were untrue? Under Golden Gate's rule, the defendant could never present that evidence on the second step of the anti-SLAPP analysis because the allegation of illegal activity would obstruct the anti-SLAPP statute's application at step one.

On the other side of this split is *Spencer v. Mowat* (2020) 46 Cal.App.5th 1024 (*Spencer*). *Spencer* declared that ""[w]hen a tort cause of action is asserted on a conspiracy theory," a court should consider "the acts which constitute the tort itself" and not the "acts which evidence the defendant's participation in the conspiracy" to determine whether the statute applies. (*Id*. at p. 1037.) This is the rule the trial court adopted and that Golden Gate asks this Court to apply.

The split is that shallow. *Spencer* is the lone appellate case to adopt or apply its rule.

Of course, *Ratcliff v. Roman Catholic Archbishop of Los Angeles* (2021) 63 Cal.App.5th 869, also applied this rule. But the Supreme Court vacated that decision.[5] (*Ratcliff v. The Roman Catholic Archbishop of L.A.* (2021) 494 P.3d 1.)

Golden Gate asserts that *Simmons v. Bauer Media Group USA, LLC* (2020) 50 Cal.App.5th 1037, also falls on its side of the split. (RB at p. 24.) There, a celebrity plaintiff sued a tabloid that hired a private investigator who placed an illegal tracking device on the celebrity's car. (*Id*. at p. 1040.) But unlike here, the tabloid did not deny the existence of the agency

[5] After tentatively granting DAE's anti-SLAPP motion and then denying it based on *Ratcliff*, the trial court invited DAE to move for reconsideration if the Supreme Court order the Second District's opinion in *Ratcliff* depublished. (AA 125.) Because DAE needed preserve the anti-SLAPP statute's stay of discovery, DAE had to file this appeal before the Supreme Court ordered *Ratcliff* depublished.

relationship; it appears to have conceded it hired the private investigator. (E.g., *id*. at pp. 1041–1042.)

And Golden Gate claims that *Novartis Vaccines & Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2006) 143 Cal.App.4th 1284 (*Novartis*), also supports its rule. But *Novartis* didn't just look to the fact that there was a boilerplate allegation of vicarious liability for illegal action and declare the matter over. It looked to the evidence submitted by both sides and found "ample evidence" of a conspiracy with those committing the wrongful acts. (*Id*. at p. 1296.) The moving defendant posted employees' home addresses (and the names of their 2 spouses), set up a calendar to show which employees would be targeted on which day, and provided instructions on how to attack people's homes in the middle of the night. (*Id.* at p. 1300.) Directly picking the target and date, and instructing people on how to carry the illegal action, evidenced ultimate control.[6] (*Ibid*.)

Golden Gate's proposed rule operates differently. It doesn't allow the court to weigh evidence because evidence doesn't matter. That someone, somewhere committed an illegal act mixes with a conclusory allegation of vicarious liability to synthesize a wholesale exemption from the statute. Here, the uncontested evidence is that DAE does not organize protests and had nothing to do with anything that happened at the racetrack on the day the individual defendants locked down the track. (E.g., AA 35.)

---

[6] Other courts have distinguished the extreme facts of *Novaritus* from routine allegations of illegal conduct arising from speech in connection with an issue of public interest. (See, e.g., *Mendoza v. ADP Screening & Selection Servs., Inc.* (2010) 182 Cal.App.4th 1644, 1655.)

This Court should decline the invitation to deepen this now-shallow split.

D. Golden Gate's Proposed Rule Flouts the anti-SLAPP Statute's Textual Command to Interpret it Broadly

It cannot be that the Legislature, in mandating the statute be "construed broadly," intended the statute to be so easily defeated. (Code Civ. Proc. § 425.16, subd. (a).)

The legislature added the broad construction mandate in 1997 in response to repeated judicial efforts to narrowly interpret the statute. (See *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1120, citing Stats. 1997, ch. 271, § 1 and disapproving narrow interpretations in *Zhao v. Wong* (1996) 48 Cal.App.4th 1114, 1128 and *Linsco/Private Ledger, Inc. v. Investors Arbitration Services, Inc.* (1996) 50 Cal.App.4th 1633, 1638.) In the wake of the amendment, the Supreme Court has been clear that exemptions to the statute are to be interpreted narrowly. (*City of Montebello*, *supra*, 1 Cal.5th at p. 417 ["narrow interpretation [of an anti-SLAPP statute exception] is consistent with the statutory language and with our decisions construing exceptions to the anti-SLAPP statute"].)

Golden Gate's no-facts-needed exception for supposed conspiracy with a wrongdoer is not a narrow construction. It's a hole in the statute that a cynical enough plaintiff could drive a truck through.

It's not as if the legislators who enacted the statute hadn't considered conspiracy liability, either. The Report for the Assembly Committee on the Judiciary assessing SB 1296—the bill that would mandate the statute's broad construction—described the problem it was trying to cure by quoting a law

review article addressing SLAPPs. (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 1296 (1997–1998 Reg. Sess.) as amended June 23, 1997, p. 2–3, quoting Sills, *SLAPPs: How Can the Legal System Eliminate Their Appeal?* (1993) 25 Conn. L.Rev. 547, 547.) The Report described a developer applying to a zoning commission to build a set of luxury condos. (*Ibid.*) Local residents raise environmental concerns and testify before the commission, which rejects the developer's plan. (*Ibid.*) The developer sues not only the residents but also the members of the commission on the theory they "conspired with the protesters." (*Ibid.*) "As this troubling scenario demonstrates," the Report continued, "such lawsuits are often pernicious, masquerading as standard defamation and interference with prospective economic advantage litigation, while really brought by well-heeled parties who can afford to misuse the civil justice system to chill the exercise of free speech or petition rights by the threat of impoverishing the other party." (*Id.* at p. 3.) The legislators who enacted the modern version of the anti-SLAPP statute recognized that conspiracy liability was an oft-deployed weapon in the SLAPP plaintiff's arsenal.

Golden Gate's proposed rule would make the statute unrecognizable to the legislators who enacted the law.

* * *

The Court should reject this attempt to explode the illegality exemption to the anti-SLAPP statute. Golden Gate's proposed rule conflicts with the history and text of the statute as well as the wealth of authority interpreting it. Looking to DAE's own action—as the Court should—the statute applies

because Golden Gate's claims arise out of DAE's protected political speech and petitioning.

V. The Court Should Permit the Trial Court to Apply the Second Step of the Statute in the First Instance

This Court should remand to the trial court to determine in the first instance whether Golden Gate established a probability of prevailing on the merits of its causes of action against DAE. (*Hunter v. CBS Broadcasting Inc.* (2013) 221 Cal.App.4th 1510, 1527 ["[T]he more prudent course is to remand the matter to the trial court to determine in the first instance whether [the plaintiff] demonstrated a reasonable probability of prevailing on the merits of his causes of action."].)

The second step here involves issues of whether Golden Gate sued the correct entity and examining the complaint and evidence to determine whether Golden Gate met both its burden of showing legally sufficient claims and prima facia evidence supporting those claims. (*Digerati Holdings, LLC v. Young Money Entm't, LLC* (2011) 194 Cal.App.4th 873, 884.) The trial court did not reach these issues and they are not the focus of the parties' briefing. And Golden Gate does not ask the Court to reach the second step issues in the first instance. (RB at p. 58.)

The trial court held two hearings on DAE's anti-SLAPP motion and is well positioned to determine Golden Gate's probability of prevailing on step two in the first instance.

VI. If the Court Wants to Reach the Second Step, Golden Gate Loses Because It Did Not Plead an Element of Its Claims and Failed to Present Evidence Making a Prima Facia Showing It Would Have Prevailed

If the Court wishes to reach the second step issues, Golden Gate did not prevail on either of its dual burdens of showing that its complaint is "legally sufficient" (i.e., it is adequately pleaded) or supported by a prima facia evidentiary showing. (*Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821; *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123; *Navellier*, *supra*, 29 Cal.4th at p. 88.)

The complaint does not state legally sufficient claims against DAE because it lacks an essential element of Golden Gate's claims against DAE—that DAE "authorized, directed[,] or ratified [the] specific tortious activity." (*Lam*, *supra*, 91 Cal.App.4th at p. 837, citing *Claiborne Hardware*, *supra*, 458 U.S. at p. 927.) While not an element of a cause of action for someone alleged to have *directly* engaged in tortious activity, authorization, direction, or ratification is a required element of a claim against "[a]n organizer of a political protest" being sued "for acts committed by other protesters." (*Ibid.*)

Because the complaint did not state an essential element of Golden Gate's claims against DAE, Golden Gate failed its burden of showing its claims against DAE are legally sufficient. That failure is itself fatal on the second step. (*Navellier*, *supra*, 29 Cal.4th at p. 88.)

Even if it had stated legally sufficient claims against DAE, it still did not make a prima facia showing that it had a probability of prevailing on its claims.

For starters, DAE showed that it did not organize the protest against Golden Gate on March 4, 2021, whether that be the activists who protested on the public right of way outside the track or the people who entered the track and locked down to it. (AA 35–36.) DAE—the defendant here—is a 501(c)(3) nonprofit corporation that does not organize protests at all. (AA 36.) Local chapters of Direct Action Everywhere share a similar mission and often do organize protests. (AA 35.) And while DAE sometimes publicizes content produced by the local chapters, DAE-the-501(c)(3) does not operate or control the local chapters. (*Ibid*.)

Like all states, California law presumes a separate existence of corporate entities. (*Mid-Century Ins. Co. v. Gardner* (1992) 9 Cal.App.4th 1205, 1212.) "Separate legal personality has been described as an almost indispensable aspect of the public corporation." (*First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba (Bancec)* (1983) 462 U.S. 611, 625).[7] That presumption of separate existence of corporate entities extends even to a wholly owned subsidiary of another corporation. (*F. Hoffman-La Roche, Ltd. v. Superior Court* (2005) 130 Cal.App.4th 782, 798.) This structure is as common among national or international advocacy organizations as it is in the for-profit world. Movements from Greenpeace to Black Lives Matter operate similarly, with a national or international organization operating separately from independent local organizations that share a broad common mission.

[7] This concept is not unknown to the plaintiffs. They themselves are three corporations, each doing business as Golden Gate Fields. (AA 2.)

There are, of course, methods of piercing the corporate veil to show one corporation is responsible for the actions of another. But those require facts that overcome DAE's evidence. (*Oasis W. Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820.) Golden Gate has *no* evidence that DAE is the entity that organized any protest. The closest it comes is an unauthenticated press release from DAE cheering on individuals and recognizing they "are affiliated with the global grassroots animal rights network Direct Action Everywhere." (AA 99–100.) But as DAE's evidence made clear, DAE-the-501(c)(3) is not the network. It is its own separate entity; the network is a network of separate entities.

While DAE spelled all of this out in its anti-SLAPP motion (AA 20, 24), Golden Gate did not move for discovery under subsection (g) of the anti-SLAPP statute to even attempt to gather evidence to contest DAE's evidence that it does not organize protests.

And even if DAE had organized the protest outside Golden Gate, the track still failed to submit evidence that DAE directed, authorized, or ratified the civil disobedience on the track. It didn't bother to seek discovery on that issue, either. And in claiming that DAE did direct, authorize, or ratify the trespass, Golden Gate again reverts to relying exclusively on DAE's political speech: the petition to shut down the track on DAE's website and that DAE shares a political ideology with the trespassers. (RB at p. 61.)

Left with only the press release on DAE's website, Golden Gate claims that it is enough to establish direction, authorization, or ratification. In support, Golden Gate argues *Novartis* supports finding that a press release

praising an action is alone enough to establish direction, authorization, or ratification. (RB at 60–63, citing *Novartis*, *supra*, 143 Cal.App.4th at pp. 1300–1301.) But as explained above, *Novartis* involved a lot more than a laudatory press release. The moving defendant posted the target's home address, published a calendar showing who to target and when, and provided instructions on how to attack people's homes in the middle of the night. (*Novartis*, *supra*, at p. 1300.) It was picking the target and the date and instructing people on how to carry the illegal action that showed ratification, not simply a press release. (*Id*. at p. 1300.)

Praising—or even advocating for—unlawful activity is protected speech. (*Brandenburg v. Ohio* (1969) 395 U.S. 444, 447.) If it weren't, millions of Americas would be at risk of civil liability, from those who supported civil rights activists during the unrest in the summer of 2020 to those who shared videos of and praised the Capitol riot protesters on January 6, 2021.

Finally, the third Plaintiff, Pacific Racing Association II, fails to make a legally sufficient claim against DAE (or any other defendant). It asserts only the third cause of action, which is a request for relief and not a cause of action, as Golden Gate's brief concedes. (AA 7–8; RB at p. 28.) It has no probability of prevailing on its claims against DAE because its claims are not legally sufficient.

Conclusion

The Court should not draw a map for SLAPP plaintiffs to evade the statute. It should reverse the trial court's order finding the anti-SLAPP statute does not apply to Golden Gate's claims against DAE.

April 6, 2022

Law Office of Matthew Strugar

By: /s/ Matthew Strugar

Attorney for Defendant and
Appellant Direct Action Everywhere

Certificate of Word Count

The text of this brief consists of 7,737 words as counted by Microsoft Word for Mac version 16.59 word processing program used to generate this brief.

Dated: April 6, 2022 By: /s/ Matthew Strugar

Proof of Service

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 3435 Wilshire Boulevard, Suite 2910, Los Angeles, California 90010.

On April 6, 2022, I served true copies of Appellant's Reply Brief on the interested parties in this action as follows:

Robert R. Moore Michael J. Betz Alexander J. Doherty Allen Matkins Leck Gamble Mallory & Natsis LLP Three Embarcadero Center, 12th Floor San Francisco, CA 94111-4074	Clerk of the Court California Court of Appeal First Appellate District Division One 350 McAllister Street San Francisco, CA 94102-7421 [Electronic Service Under CRC 8.212(c)(2)]

I served an electronic copy of said document via the Court's TrueFiling portal on April 6, 2022, following the ordinary business practice.

Clerk to the Hon. James Reilly
Alameda County Superior Court
1221 Oak Street
Oakland, CA 94612
[Case No. RG21091697]

By Mail: I enclosed the document in a sealed envelope or package addressed to the persons at the addresses listed above and placed the envelope for

collection and mailing, following our ordinary business practices. I am readily familiar with my office's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on April 6, 2022 at Los Angeles, California.

Matthew Strugar