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**ORDER OF THE SUPREME COURT OF
CALIFORNIA DENYING PETITION FOR REVIEW
(OCTOBER 21, 2020)**

IN THE SUPREME COURT OF CALIFORNIA
EN BANC

SPIELBAUER LAW OFFICE,

Plaintiff and Appellant,

v.

MIDLAND FUNDING, LLC ET AL.,

*Defendants and
Respondents.*

S263930

Court of Appeal,
Sixth Appellate District - No. H047393

Before: CANTIL-SAKAUYE, Chief Justice.

The petition for review is denied.

Cantil-Sakauye
Chief Justice

ORDER OF THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
DENYING PETITION FOR REHEARING
(JULY 29, 2020)

IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA SIXTH APPELLATE DISTRICT

SPIELBAUER LAW OFFICE,

Plaintiff and Appellant,

v.

MIDLAND FUNDING, LLC ET AL.,

*Defendants and
Respondents.*

H047393

Santa Clara County Super. Ct. No. CV339157

Before: Mary J. GREENWOOD, P.J.

BY THE COURT:

Appellant's petition for rehearing is denied.

/s/ Mary J. Greenwood
P.J.

Date: 7/29/2020

ORDER OF THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA GRANTING
RESPONDENTS' MOTION TO DISMISS
(JULY 13, 2020)

IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA SIXTH APPELLATE DISTRICT

SPIELBAUER LAW OFFICE,

Plaintiff and Appellant,

v.

MIDLAND FUNDING, LLC ET AL.,

*Defendants and
Respondents.*

H047393

Santa Clara County Super. Ct. No. CV339157

Before: Mary J. GREENWOOD, P.J.

BY THE COURT:

Respondents' motion to dismiss is granted. The appeal filed on October 1, 2019, is dismissed as untimely.

/s/ Mary J. Greenwood
P.J.

Date: 7/13/2020

**DECISION ON SUBMITTED MATTER GRANTING
SPECIAL MOTION TO STRIKE THE COMPLAINT
(SIGNED JULY 3, 2019, FILED JULY 5, 2019)**

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA**

**SPIELBAUER LAW OFFICE,
A SOLE PROPRIETORSHIP, LLC,**

Plaintiff,

v.

MIDLAND FUNDING, LLC, ET AL.,

Defendants.

AND RELATED CROSS-ACTION

Case No. 2018-CV-339157

**Before: Mary E. ARAND,
Judge of the Superior Court.**

The special motion to strike the Complaint by defendants Midland Funding, LLC and Midland Credit Management, Inc. came on for hearing before the Honorable Mary E. Arand on June 11, 2019, at 9:00 a.m. in Department 9. The matter having been submitted, and the Court concluding that the tentative ruling and this order addresses the arguments made at the hearing, the Court adopts the tentative ruling and orders as follows:

Factual and Procedural Background

This case arises from the collection of a debt. Defendant Midland Funding, LLC acts as and is a debt collector in the State of California and throughout the United States. (Complaint at ¶ 2.) Midland Funding LLC (“MCM”) works with its affiliate, defendant Midland Credit Management, Inc. in its collection and enforcement activities.¹ (*Id.* at ¶ 4.)

On October 2, 2013, Midland filed a collection action against Melanie Barr (“Ms. Barr”) in Santa Clara County Superior Court (case no. 2013-1-CV-254015). (Complaint at ¶ 5.) Midland allegedly purchased a defaulted credit card agreement from Wells Fargo Bank. (*Id.* at ¶ 16.) Midland sued Ms. Barr for the total amount of \$20,112.67. (*Ibid.*)

To defend against the lawsuit, Ms. Barr obtained the services of The Spielbauer Law Office (“SLO”). (Complaint at ¶ 17.) SLO conducted a vigorous defense of Ms. Barr by issuing third party subpoenas, bringing discovery motions, making court appearances, attending conferences with opposing counsel and preparing for a jury trial. (*Ibid.*) The case was set for a jury trial on November 16, 2015. (*Id.* at ¶ 18.)

Beginning in August 2015, SLO entered into discussions with counsel for Midland. (Complaint at ¶ 19.) On September 16, 2015, Midland filed a notice of conditional settlement and thus the jury trial date was vacated. (*Ibid.*) The parties however never entered into a settlement and no such agreement was ever executed. (*Id.* at ¶ 20.)

¹ Both defendants referred to collectively as “Midland.”

The collection case thereafter sat idle for three years as Midland did nothing to prosecute the action after filing its notice of conditional settlement. (Complaint at ¶ 22.) As a result, the matter was subject to mandatory dismissal with prejudice as of October 2, 2018. (*Id.* at ¶ 23.) In April and May 2018, Midland resolved the case with Ms. Barr by having her pay in excess of \$20,112.67. (*Id.* at ¶¶ 25-26.) Midland resolved the matter without notifying SLO of these discussions nor of the case settlement. (*Id.* at ¶ 27.) In addition, Midland did not undertake any efforts to confirm that SLO was no longer representing Ms. Barr. (*Ibid.*) The court dismissed the collection action on May 30, 2018.

SLO generated attorney fees in the amount of \$24,428.25 through its representation of Ms. Barr in the collection action. (Complaint at ¶ 30.) Due to Midland's misconduct and concealment of activities, SLO was not able to bring a timely motion for attorney fees against Midland, fees it would otherwise be entitled to. (*Id.* at ¶ 31.)

On December 6, 2018, plaintiff SLO filed a Complaint against Midland alleging causes of action for: (1) intentional interference with contractual relations; (2) negligent interference with prospective economic advantage; (3) unjust enrichment; and (4) unfair business practices.²

Special Motion to Strike the Complaint

Currently before the Court is Midland's special motion to strike each cause of action in the Complaint. (Code Civ. Proc., § 425.16) Midland also submitted a

² Midland filed a cross-complaint against Ms. Barr seeking equitable indemnity.

request for judicial notice in conjunction with the motion. Plaintiff SLO filed written opposition. Midland filed reply papers.

Request for Judicial Notice

In support of the motion, Midland requests judicial notice of the following: (1) Santa Clara County Superior Court’s Register of Actions as of February 7, 2019, in the case entitled *Midland Funding, LLC v. Melanie Bautista*³ (case no. 2011-1-CV-208539) (Exhibit 1); and (2) Santa Clara County Superior Court’s Register of Actions as of February 7, 2019, in the case entitled *Midland Funding, LLC v. Melanie Barr* (case no. 2013-1-CV-254015) (Exhibit 2). Midland argues these requests are relevant for the Court to understand the facts and circumstances giving rise to the claims in the current lawsuit. The request is unopposed and the Court may take judicial notice of these exhibits as records of the superior court under Evidence Code section 452, subdivision (d). (*See Stepan v. Garcia* (1974) 43 Cal.App.3d 497,500 [the court may take judicial notice of its own file].)

Accordingly, the request for judicial notice is GRANTED.

Legal Standard

Code of Civil Procedure section 425.16 provides for a “special motion to strike” when a plaintiff’s claims arise from certain acts constituting the exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, “unless the court

³ Ms. Barr is also identified as “Melanie Bautista.” (Logan Decl. at ¶ 5.)

determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” (Code Civ. Proc., § 425.16, subds. (a) & (b)(1).)

“Consistent with the statutory scheme, ruling on an anti-SLAPP motion involves a two-step procedure. First, the moving defendant must identify ‘all allegations of protected activity’ and show that the challenged claim arises from that activity. [Citations.] Second, if the defendant makes such a showing, the ‘burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated.’ [Citation.] Without resolving evidentiary conflicts, the court determines ‘whether the plaintiff’s showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment.’ [Citation.]” (*Bel Air Internet, LLC v. Morales* (2018) 20 Cal.App.5th 924, 934.)

First Prong: Protected Activity

“A defendant meets his or her burden on the first step of the anti-SLAPP analysis by demonstrating the acts underlying the plaintiff’s cause of action fall within one of the four categories spelled out in [Code of Civil Procedure] section 425.16, subdivision (e).” (*Collier v. Harris* (2015) 240 Cal.App.4th 41, 50-51 (*Collier*).) That section provides that an “act in furtherance of a person’s right of petition or free speech under the United States or California Constitution in connection with a public issue includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or

judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.” (Code Civ. 25 Proc., § 425.16, subd. (e).) “These categories define the scope of the anti-SLAPP statute by listing acts which constitute an ‘act in furtherance of a person’s right of petition or free speech under the United States or California Constitution in connection with a public issue.’” (*Collier, supra*, at p. 51, citing Code Civ. Proc., § 425.16, subd. (e).)

“A claim arises from protected activity when that activity underlies or forms the basis for the claim. [Citations.] Critically, ‘the defendant’s act underlying the plaintiff’s cause of action must itself have been an act in furtherance of the right of petition or free speech.’ [Citations.] ‘[T]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute.’ [Citations.] Instead, the focus is on determining what ‘the defendant’s activity [is] that gives rise to his or her asserted liability-and whether that activity constitutes protected speech or petitioning.’ [Citation.]” (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1062-1063 (*Park*)).

“[A] claim may be struck-only if the speech or petitioning activity itself is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted.” (*Park*,

supra, 2 Cal.5th at p. 1060.) To determine whether the speech constitutes the wrong itself or is merely evidence of a wrong, “in ruling on an anti-SLAPP motion, courts should consider the elements of the challenged claim and what actions by defendant supply those elements and consequently form the basis for liability.” (*Id.* at p. 1063.)

“In deciding whether the ‘arising from’ requirement is met, a court considers ‘the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.’” (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 670.) “[I]f the defendant does not demonstrate this initial prong, the court should deny the anti-SLAPP motion and need not address the second step.” (*Baharian-Mehr v. Smith* (2010) 189 Cal.App.4th 265, 271.)

Midland argues each cause of action in the Complaint is based on protected activity consisting of litigation-related conduct in settling the collection action brought against Ms. Barr.⁴ (See Complaint at ¶ 25, 26, 27; Logan Decl. at ¶¶ 5-15; Pogosian Decl. at ¶¶ 6-17.)

As stated above, one category of protected conduct includes “any written or oral statement or writing made in connection with an issue under consideration

⁴ The Court notes the Complaint addresses only a collection action involving Ms. Barr and an account from Wells Fargo Bank. Midland however offers evidence showing that Ms. Barr also had a Citibank account which became a subject “for collections and ultimately settlement. (Pogosian Decl. at ¶¶ 6-7, 15; Logan Decl. at ¶¶ 5, 12-14.) Midland contends the total settlement amount for both the Citibank Account and the Wells Fargo Account was in the amount of \$35,983.69. (Logan Decl. at ¶ 13.)

or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law.” (Code Civ. Proc., § 425.16, subd. (e)(2).) Courts “have adopted a fairly expansive view of what constitutes litigation-related activities within the scope of section 425.16.” (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 908.)

Protected litigation-related activities include statements made as part of settlement negotiations. (*See Suarez v. Trigg Laboratories, Inc.* (2016) 3 Cal. App.5th 118, 123 [“Communications in the course of settlement negotiations are protected activity within the scope of section 425.16”]; *Navellier v. Sletten* (2002) 29 Cal.4th 82, 85-87 [anti-SLAPP statute applied to claim that party “committed fraud in misrepresenting . . . intention to be bound” by release in prior action]; *Seltzer v. Barnes* (2010) 182 Cal.App.4th 953, 963-967 (*Seltzer*) [reversing denial of anti-SLAPP motion in homeowner’s action for fraud in connection with settlement negotiations in underlying lawsuit]; *GeneThera, Inc. v. Troy & Gould Professional Corp.* (2009) 171 Cal.App.4th 901, 908 [affirming grant of anti-SLAPP motion in lawsuit based on firm’s communication of settlement offer]; *Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1420 (*Dowling*) [attorney’s negotiation of stipulated settlement in unlawful detainer action was protected conduct]; *see also Applied Business Software, Inc. v. Pacific Mortgage Exchange, Inc.* (2008) 164 Cal.App.4th 1108, 1118 [entering into a settlement agreement is protected activity].)

Here, each cause of action arises from facts regarding settlement of the collection action between Midland and Ms. Barr. With respect to the first and

second causes of action, plaintiff alleges the settlement interfered with the attorney-client relationship between SLO and Ms. Barr. (Complaint at ¶ 37, 46.) In particular, plaintiff SLO claims Midland failed to disclose the settlement discussions to avoid paying attorney fees to SLO arising from the collection action. (*Ibid.*) Similarly, the third and fourth causes of action for unjust enrichment and unfair business practices allege Midland engaged in settlement discussions with Ms. Barr without notifying plaintiff SLO. (*Id.* at ¶¶ 51, 62.) Midland disputes any such interference as Ms. Barr confirmed in writing that she was no longer represented by counsel at the time of settlement. (Logan Decl. at ¶¶ 11, 15; Ex. 1.) In fact, according to Midland, Ms. Barr wanted to settle her collection action because she was pursuing a home refinancing. (*Id.* at ¶ 12.) As settlement of the underlying collection action constitutes the gravamen the Complaint, each cause of action is based on protected activity to satisfy the first prong.

In opposition, plaintiff SLO argues the Complaint does not arise from protected activity as it is based on Midland's *conduct*, i.e. settling the collection case, rather than any specific statements or communicative actions made in the collection litigation. (*See* OPP at pp. 2-7.) This contention is not persuasive for several reasons. First, the protections of the anti-SLAPP statute extend to "any act" in furtherance of a person's right of petition. (Code Civ. Proc., § 425.16, subd. (b)(1).) "Any act" includes communicative conduct such as the filing, funding, and prosecution of a civil action. (*Ludwig v. Sup. Ct.* (1995) 37 Cal.App.4th 8, 17-19 (*Ludwig*)). Thus, if filing and prosecuting a lawsuit is protected, so too are the acts of settling and ultimately

dismissing a case. As mentioned in the reply brief, plaintiff SLO has not cited any legal authority demonstrating that settlement of a lawsuit constitutes non-communicative conduct that is not protected by the anti-SLAPP statute.

In addition, the Complaint specifically refers to discussions between Midland and Ms. Barr that were concealed from plaintiff SLO and which ultimately led to settlement of the collection action. (*See* Complaint at ¶¶ 27, 36, 37, 44, 45.) Also, as stated above, the Court may consider declarations in support of the motion in its first prong analysis. The declaration by MCM's Account Manager, Mary Kay Logan, details the communications between Midland and Ms. Barr resulting in settlement of the collection action. (Logan Decl. at ¶¶ 5-14.) Evidence of said communications therefore support the settlement-related conduct alleged in the Complaint.

Furthermore, as the reply points out, it is hard to imagine Midland settling the collections case with Ms. Barr without communicating with her. In addressing “communicative” v. “non-communicative” conduct in the anti-SLAPP context, the appellate court in Ludwig stated:

“Barstow contends strenuously that Ludwig’s activities in recruiting and encouraging his agents are ‘noncommunicative.’ We are at a loss to imagine how Ludwig accomplished the recruiting and encouragement without communication. [Citation.] We must assume that he asked Keating, Krier, Hendrix, and Sweet to take certain actions on his behalf. This required a communication. Further communicative conduct was then committed

by the agents in speaking, writing, and making allegations in legal documents.”

(*Ludwig, supra*, 37 Cal.App.4th at p. 20.)

Similarly, there would need to be some degree of communication or negotiation between Midland and Ms. Barr to result in any kind of settlement. To conclude otherwise would be seemingly absurd and nonsensical. The Complaint here concedes such discussions took place but were concealed from plaintiff SLO. Midland submits evidence showing these discussions occurred ultimately culminating-in settlement and dismissal of the collection action. The Court therefore finds that Midland’s efforts in settling the collection action constitute communicative conduct in support of the first prong of the motion.

The only other argument raised in opposition is that Midland’s conduct is not protected as it does not involve a public issue or an issue of public interest. (See OPP at pp. 7-8.) A defendant may satisfy the first prong based on “any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.” (Code Civ. Proc., § 425.16, subd. (e)(4).) This argument is immaterial as Midland is not seeking relief under subdivision (e)(4), but subdivision (e)(2) which does not require the existence of a public issue or issue of public interest. (See *Vergas v. McNeal* (2007) 146 Cal.App.4th 1387, 1395 [Section 425.16, subdivision (e)(2) does not require the defendant to show a public issue or issue of public interest].) For reasons stated above, Midland has satisfied its initial burden in showing that each cause of action in the Complaint arises from protected activity. The burden now shifts

to plaintiff SLO to demonstrate a probability of success on the merits.

Second Prong: Probability of Success on the Merits

“To establish a probability of prevailing, the plaintiff must demonstrate that the complaint is both legally sufficient and supported by a sufficient *prima facie* showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited. For purposes of this inquiry, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant; though the court does not weigh the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant’s evidence supporting the motion defeats the plaintiff’s attempt to establish evidentiary support for the claim. In making this assessment it is the court’s responsibility . . . to accept as true the evidence favorable to the plaintiff . . . The plaintiff need only establish that his or her claim has minimal merit to avoid being stricken as a SLAPP.” (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291 [internal citations and quotation marks omitted].)

Plaintiff SLO’s opposition fails to address the second prong or offer evidence to establish a probability of success on the merits. Nor does plaintiff SLO attempt to overcome the defense of the litigation privilege which appears to bar each cause of action alleged in the Complaint. (*See Flatley v. Mauro* (2006) 39 Cal.4th 299, 323 [Civil Code § 47, subd. (b) litigation privilege presents a substantive defense plaintiff must overcome to demonstrate probability of success on the merits]; *see also Seltzer, supra*, 182 Cal.App.4th at p. 970 [litigation privilege applies to statements

made by counsel during settlement negotiations]; *Dowling, supra*, 85 Cal.App.4th at p. 1422 [applying litigation privilege to an action based on statements the attorney defendant made while negotiating a settlement].)

As plaintiff SLO has not established a probability of success on the merits, the special motion to strike is GRANTED.

Disposition

The special motion to strike the Complaint is GRANTED.

Midland's request for attorney's fees and costs shall be sought by way of a noticed motion and attorney declaration to support an award of fees and costs. (Code Civ. Proc., § 425.16, subd. (c); *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131.)

SLO's request for attorney's fees and costs is DENIED as it did not prevail in opposing the motion.

Midland shall submit a proposed judgment after compliance with Rules of Court, Rule 4 3.1312.

/s/ Mary E. Arand
Judge of the Superior Court

Date: July 3, 2019

**JUDGMENT OF THE
SUPERIOR COURT OF CALIFORNIA
(AUGUST 9, 2019)**

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SANTA CLARA**

**SPIELBAUER LAW OFFICE,
A SOLE PROPRIETORSHIP,**

Plaintiff,

v.

**MIDLAND FUNDING, LLC, MIDLAND CREDIT
MANAGEMENT, INC.; and DOES 1-10,**

Defendants.

AND RELATED CROSS-COMPLAINT

Case No. 18CV339157

**Before: Mary E. ARAND,
Judge of the Superior Court.**

The Special Motion to Strike the Complaint pursuant to Code of Civil Procedure Section 425.16 (“Motion”) came on regularly for hearing on June 11, 2019, in Department 9 of the Santa Clara County Superior Court, the Honorable Mary E. Arand presiding. Plaintiff, SPIELBAUER LAW OFFICE (“SLO”), appeared by attorney Richard Antognini, Esq., of the Law Office of Richard Antognini, and the Defend-

ants/Cross-Complainants, MIDLAND FUNDING, LLC and MIDLAND CREDIT MANAGEMENT, INC. (collectively, "Midland"), appeared by attorney Thomas F. Landers, Esq., of Solomon Ward Seidenwurm & Smith, LLP.

The Motion was submitted to the Court and, based on the evidence submitted, the arguments of counsel and on the pleadings and papers on file in the matter, on July 5, 2019 the Court issued its order to grant the motion, and

NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

1. The Special Motion to Strike the Complaint was GRANTED.
2. Plaintiff SLO shall take nothing by way of its Complaint against Midland Funding, LLC and Midland Credit Management, Inc.
3. Pursuant to Code of Civil Procedure section 425.16(c) attorneys' fees may be sought by way of noticed motion.**
4. Costs are to be sought by way of Memorandum of Costs.
5. (Deleted as unnecessary.)
6. SLO's request for attorney's fees and costs is DENIED as it did not prevail in opposing the Special Motion to Strike the Complaint.

IT IS SO ORDERED.

** As documents that are electronically filed cannot be modified in the case management system, Defendants may submit an amended judgment after entry of an attorney fees order.

/s/ Mary E. Arand
Judge of the Superior Court

Date: August 7, 2019

NOTICE OF APPEAL
(OCTOBER 1, 2019)

IN THE SUPERIOR COURT OF THE STATE OF
CALIFORNIA SANTA CLARA COUNTY

SPIELBAUER LAW OFFICE,
A SOLE PROPRIETORSHIP,

Plaintiff,

v.

MIDLAND FUNDING, LLC, MIDLAND CREDIT
MANAGEMENT, INC.; and DOES 1-10,

Defendants.

No. 18CV339157

Before: Mary E. ARAND,
Judge of the Superior Court.

Plaintiff Spielbauer Law Office appeals the judgment entered in this matter on August 9, 2019 granting defendants anti-slapp motion.

The Spielbauer Law Office also appeals any and all orders and findings that are separately appealable.

An appeal may be taken from a final judgment. [California Code of Civil Procedure § 904.1(a)(1).] Additionally, an appeal may be taken From an order granting or denying a special motion to strike under Code of Civil Procedure § 425.16. [California Code of

Civil Procedure § 904.1(a)(13).] An order granting or denying a special motion to strike is appealable under California Code of Civil Procedure § 904.1. [California Code of Civil Procedure § 425.16(i)/]

A copy of the entry of judgment accompanies this notice of appeal.

THE SPIELBAUER LAW OFFICE

/s/ Thomas Spielbauer, Esq.

Attorney for Plaintiff

Signature by Email/Fax

Dated: October 1, 2019

**AMICUS LETTER OF KEVIN SULLIVAN
(AUGUST 18, 2020)**

LAW OFFICE OF KEVIN M. SULLIVAN
490 POST STREET, SUITE 452
SAN FRANCISCO, CA 94102
(415) 860-2170

Kevin M. Sullivan*
Certified Specialist
Legal Malpractice State Bar of California

Honorable Tani-Gorre Cantil-Sakauye, Chief Justice,
and the Honorable Associate Justices of the Supreme
Court of the State of California
Supreme Court of California
Earl Warren Building at Civic Center Plaza
350 McAllister Street
San Francisco, CA 94102-4797

Re: Petition for Review
Spielbauer Law Office v. Midland Funding, LLC et al., S263930

To the Honorable Tani-Gorre Cantil-Sakauye,
Chief Justice, and the Honorable Associate Justices
of the Supreme Court of the State of California:

I am writing to this Court to encourage this Court
to grant review in the matter of *Spielbauer Law Office
v. Midland Funding, LLC et Al.*, S263930.

I am certified by the California State Bar as a
specialist in Legal Malpractice. Justice Rubin articu-
lated in *Russell v. Foglio* (2008) 160 Cal.App.4th 653,
664 a trap which awaits every practitioner who enters
the water of SLAPP litigation. I agree with his concerns.

I also agree with Petitioner's argument that given the ambiguity of the code sections involved, there should be two timelines to file a notice of appeal from the grant of an Anti-SLAPP motion, i.e., from entry of decision and from entry of judgment.

Justice Rubin wrote, "Moreover, splitting the proceedings into two appeals [Order and Judgment] creates a trap for the unwary, who may lose their right to appeal from the order granting the motion to strike while they await the final judgment. This is especially true in cases in which the trial court, as what happened here, grants the motion to strike the entire complaint. It is hard to imagine any benefit to the plaintiff in requiring it to appeal before final judgment is entitled. ¶ And the trap is not limited to the unwary."

A Plaintiff generally will come to practitioners such as myself when his attorney, no matter how talented he/she may have been, misses filing of the notice of appeal when the anti-SLAPP motion is granted in the trial court. I view this matter from the perspective of potential malpractice. The ambiguous deadline for the filing of a notice of appeal discussed in California Code of Civil Procedure § 425.16(i) and California Code of Civil Procedure § 904.1 is indeed a trap for the wary and unwary. The ambiguity of the code sections involved makes this case worthy of review.

If for no other reason than to hope to avoid these kinds of cases from my malpractice representation in the future, I would request that this Court grant review.

Truly yours,

/s/ Kevin Sullivan, Esq.

cc:

Thomas Spielbauer, Esq.
Spielbauer Law Office
200 South Market Street, Suite 1001
San Jose, CA 95113

Thomas Landers, Esq.
Leah S. Strickland, Esq.
Solomon Ward Seidenwurm & Smith LLP
401 B St., Suite 1200
San Diego, California 92101

**AMICUS LETTER OF GLEN MOSS
(AUGUST 19, 2020)**

MOSS AND MURPHY
1297 B STREET
HAYWARD, CA 94541
TEL: 510 583 1155
FAX: 510 583 1299
E mail: m-m@pacbell.net

Honorable Tani-Gorre Cantil-Sakauye, Chief Justice,
and the Honorable Associate Justices of the Supreme
Court of the State of California
Earl Warren Building at Civic Center Plaza
350 McAllister Street
San Francisco, CA 94102-4797

Re: Petition for Review
Spielbauer Law Office v. Midland Funding, LLC et al., S263930

To the Honorable Tani-Gorre Cantil-Sakauye, Chief Justice, and the Honorable Associate Justices of the Supreme Court of the State of California:

Moss and Murphy is a small civil law firm consisting of the undersigned and my wife, Ann Murphy. We have practiced law in California for about 50 years, and I am one of the update authors / consultants for the CEB text dealing with Mortgages, Deeds of Trust and Foreclosures. I am writing to this Court to encourage this Court to grant review in the matter of *Spielbauer Law Office v. Midland Funding, LLC et al.*, S263930. This case highlights a clear ambiguity in the statutes governing the time for noticing an appeal of a decision granting or denying a SLAPP motion. In particular,

CCP 904.1(a) states an appeal may be taken from any of the following: (1) From a Judgment. . . . (13) From an order under CCP 426.16. Thus, the plain reading of this statute states that counsel may file a Notice of Appeal from either the order or the ultimate judgment. Unfortunately, the Court of Appeal refused to hear the instant appeal from the Judgment. Without explanation, the Court of Appeal concluded CCP 904.1 did not mean what it plainly says.

This is an important issue which arises in literally hundreds of cases every year. Counsel dealing with SLAPP motions should not be required to speculate whether the Court of Appeal will accept a Notice of Appeal that is timely under CCP 904(a)(1)—even if it is not timely under section 904(a)(13). To my knowledge, there are no court of appeal or Supreme Court cases dealing with this conflict. The conflict arises frequently. Review should be granted.

Truly yours,

Glen Moss, Esq.

cc:

Thomas Spielbauer, Esq.
Spielbauer Law Office
200 South Market Street, Suite 1001
San Jose, CA 95113

Thomas Landers, Esq.
Leah S. Strickland, Esq.
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AMENDED CERTIFICATE OF SERVICE

**SUPREME COURT
OF THE STATE OF CALIFORNIA**

SPIELBAUER LAW OFFICE,

Petitioner,

v.

MIDLAND FUNDING, LLC ET AL.,

Respondents.

No. S263930

Appeal from Order Granting SLAPP Motion
and Entry of Judgment of the Santa Clara County
Superior Court (No. 18cv339157),
the Honorable Mary Arand, Judge

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Spielbauer Law Office

I, Wei Qiang, declare:

I am now, and at all times herein mentioned was, over the age of eighteen years. My business address is 200 South Market Street, Suite 1001, San Jose, CA 95113. My electronic email addresses are qaz2008love@hotmail.com.

On August 20, 2020, I caused to be served a copy of the following document: Amicus Letters from Glen Moss, Esq. And Kevin Sullivan, Esq. This was done by deposit into the United States Mail with postage fully prepaid and addressed to:

Clerk of the Court *Trial Court*
Santa Clara County Superior Court
191 North First Street
San Jose, CA 95113
Via United States Mail

These letters were further uploaded to the Attorney General of California through its website:

Attorney General of the State of California
<https://oag.ca.gov/services-info/17209-brief/add>
Via Digital Upload

Service by Upload to the AG website dedicated to service of Business & Professions Code § 17209 and 17536.5 Pleadings

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct to the best of my knowledge. Executed in Northern California on August 20, 2020.

/s/ Wei Qiang

**AMICUS LETTER OF DOUGLAS APPLEGATE
(SEPTEMBER 17, 2020)**

PACIFIC LEGAL GROUP, PC
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September 17, 2020

Delivered via *TrueFiling*

Honorable Tani-Gorre Cantil-Sakauye, Chief Justice
The Honorable Associate Justices
Supreme Court of the State of California
Earl Warren Building at Civic Center Plaza
350 McAllister Street
San Francisco, CA 94102-4797

Re: Petition for Review
Spielbauer Law Office v. Midland Funding, LLC etc. (Case No. S263930)

Dear Justices:

I write pursuant to Rule 8.500(g) of the California Rules of Court and urge the Court to accept review of the matter of *Spielbauer Law Office v. Midland Funding, LLC*. A petition for review is currently pending under Case Number S263930.

I am the founder of Pacific Legal Group, PC, a small appellate firm located in San Francisco. I am also a member of the San Francisco Trial Lawyers Association and frequently contribute to their commu-

nity bulletin board when appellate issues arise. My experience, both from my practice and my relationship with the lawyers fighting in the trial court trenches, is that the anti-SLAPP law provides a constant source of confusion for the general bar.

The petition for review in *Spielbaur* provides a prime opportunity for the Court to dispel some of the confusion and resolve the conflicts among the District Courts of Appeal on the impact of anti-SLAPP orders and the purpose and role, if any, for the ensuing judgments entered in anti-SLAPP cases.

In the *Spielbaur* case, the Sixth District Court of Appeal held that a plaintiff must appeal from the grant of an anti-SLAPP order and not the subsequent judgment. That holding conflicts with the Fourth District Court of Appeal's decision in *Tuchscher Development Enterprises v. San Diego Unified Port District* (2003) 106 Cal.App.4th 1219. In *Tuchscher*, after the court issued its order granting the Port District's anti-SLAPP motion, the plaintiff sought reconsideration and filed a motion for discovery. After those motions were denied, the trial court entered final judgment on August 16, 2001. *Tuchscher* Development filed its notice of appeal forty-three days later on September 28, 2001 expressly appealing the judgment and not the earlier anti-SLAPP order. (*Id.*, 106 Cal. App.4th at p. 1231.) Indeed, after noting that the appeal was "from the August 2001 judgment" the Fourth District Court of Appeal proceeded to assert jurisdiction and issued a decision on the merits. "

The *Tuchscher* court did not specifically address the timeliness of the appeal, but that decision was one of the early rulings on the anti-SLAPP law and it is routinely cited for its discussion of the proof

requirements that rest on a party opposing an anti-SLAPP motion. As widely read authority on the anti-SLAPP law, the *Tuchscher* decision has likely lulled many practitioners into believing that it is appropriate to appeal from the final judgment in an anti-SLAPP case. Whether *Tuchscher* and those practitioners are right and the Sixth District is wrong is an issue that this Court can resolve by accepting review.

The confusion for practitioners on the timing for anti-SLAPP appeals has been exacerbated by the August 27, 2020 decision of the Third District Court of Appeal in *Marshall v. Webster* (Appellate Case C088240), a decision certified for publication. In *Marshall* (on which I was the attorney for the appellant), the court took the Sixth District's approach one step further and held an anti-SLAPP order is the same as a judgment and divests the trial court of jurisdiction to even reconsider an erroneous anti-SLAPP order. That Court thus held that the time for an appeal in an anti-SLAPP case cannot be extended by Rule 8.108(e) (3) of the California Rules of Court. This decision conflicts with the approaches taken by the First, Second and Fourth Districts. (See *Holland v. Jones* (2nd Dist. 2012) 210 Cal.App.4th 378 [appeal allowed after reconsideration of anti-SLAPP order]; *Melbostad v. Fisher* (1st Dist. 2008) 165 Cal.App.4th 987 [appeal allowed after reconsideration of anti-SLAPP order]; *Cheveldave v. Tri Palms Unified Owners Association* (4th Dist. 2018) 27 Cal.App.5th 1202 [appeal allowed after reconsideration of anti-SLAPP order].)

Clear guidance from this Court on the appeal deadline for anti-SLAPP orders that strike an entire complaint is thus sorely needed. Does the appeal period begin with the initial order, or can a practitioner

wait until final judgment? If the practitioner cannot wait until final judgment, can he file a motion for reconsideration, and does that impact the time for an appeal? As it stands, this area of the law is an unnecessary trap for diligent attorneys.

The Court should thus accept review.

Very Truly yours,

/s/ Douglas A. Applegate

DAA:r

cc:

Thomas Spielbauer, Esq., via TrueFiling
Thomas Landers, Esq., via TrueFiling

**AMICUS LETTER OF JOHN SHEPARDSON
(OCTOBER 5, 2020)**

**LAW OFFICE OF JOHN A. SHEPARDSON
125 E. SUNNYOAKS AVE., No. 104
CAMPBELL, CA 95008
(408) 395-3701**

Honorable Tani-Gorre Cantil-Sakauye
Chief Justice
The Honorable Associate Justices
Supreme Court of the State of California
Earl Warren Building
350 McAllister Street
San Francisco, CA 94102-4797

Re: Petition for Review
Spielbauer Law Office v. Midland Funding, LLC etc. (Case No. S263930)

Dear Justice Cantil-Sakauye and all Justices,

I write pursuant to Rule 8.800(g) of the California Rules of Court and urge the Court to accept review of the matter of *Spielbauer Law Office v. Midland Funding, LLC*. ("SLO"). A petition for review is currently pending under Case Number S263930.

I am trial and appellate counsel in the matter of *Reyes v. Kruger* (Cal. Ct. App., Sept. 25, 2020, No. H044661) 2020 WL 5742675. Reyes is a recently published decision.

Reyes v. Kruger is more involved than the SLO matter. Reyes asserts a substantial change in the substantive orders (award of attorney fees). Another difference is if the 15-day deadline commences to file

motion for new trial after a party serves notice of entry of an anti-SLAPP order (not judgment). However, there are related ambiguities on the timing of the appeal process. *Reyes* will be filing a petition for rehearing with the Sixth District Court of Appeal. If the petition is denied, she will file a Petition for Review.

I urge this Court to grant review in the SLO case. In the alternative, I request this Court stay the hearing of the SLO petition until either the Sixth District reverses its decision in *Reyes v. Kruger*, or until *Reyes* can join the SLO Petition for Review before your Court.

Respectfully,

/s/ John A. Shepardson, Esq.

Cc: Thomas Spielbauer, Esq.