Case No. S239777

In the

Supreme Court

of the

State of California

NEWPORT HARBOR VENTURES, LLC, et al.,
Plaintiffs and Respondents,

v.

MORRIS CERULLO WORLD EVANGELISM et al.,
Defendants and Appellants.

AFTER A DECISION OF THE CALIFORNIA COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION THREE, CASE NO. G052660
ORANGE COUNTY SUPERIOR COURT CASE NO. 30-2013-00665314
HONORABLE DEBORAH C. SERVINO

OPENING BRIEF ON THE MERITS

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I. ISSUES PRESENTED

These two issues were presented in Appellants' petition for review, which the Supreme Court granted without limitation:

1. Can an anti-SLAPP motion strike any claim in an amended complaint, or can it only strike new claims which appear for the first time in the amended complaint?
2. When a plaintiff pleads inconsistent claims and undisputed evidence precludes one of those claims, should courts apply a demurrer-like pleading standard allowing inconsistent claims to survive an anti-SLAPP motion, or should they apply a summary judgment-like standard that precludes inconsistent claims?

Rule 8.520(b)(2)(B).

II. SUMMARY OF ARGUMENT

This case asks the Court to determine whether an anti-SLAPP motion is nothing more than a demurrer attached to a discovery stay, or if it is instead the equivalent of an early motion for summary judgment, as the statute's language and legislative history imply. There is a threshold issue, as well: The anti-SLAPP statute states that a motion must be filed within 60 days of service of the complaint it targets, but what is unclear is whether that motion may target all the claims in an amended pleading, or just the newly added claims. This Court's decision in *Baral v. Schnitt* holds that the anti-SLAPP motion may target "particular allegations" in a complaint, regardless of how they are phrased. *Baral v. Schnitt* (2016), 1 Cal. 5th 376, 393-394. Accordingly, the Fourth District's decision below, which allows a motion to target only the newly added legal theories of recovery, conflicts with *Baral v. Schnitt*, not to mention several intermediate appellate decisions and the statute itself, which is to be "construed broadly". Code of Civ. Proc. §425.16(a). This Court should follow that mandate from the Legislature and hold that a motion filed within 60 days of an amended

complaint may target *any* claims in that complaint that arise from the right to petition, and that any claims in conflict with the undisputed evidence must be stricken. To accomplish this, the Court should also reaffirm *Baral*'s holding that the term "claims" includes particular allegations, legal theories of recovery, or even individual sentences which seek to impose liability for the defendant's exercise of the right of petition.

In the trial court, Defendants-Appellants[1] filed an anti-SLAPP motion targeting four causes of action in Plaintiffs'-Respondents'[2] third amended complaint. Two of those causes of action (breach of contract, breach of covenant of good faith) had appeared in the original complaint, while the other two (quantum meruit, promissory estoppel) appear for the first time in the third amended complaint. The anti-SLAPP motion was filed within 60 days of the third amended complaint – but more than three years after the original complaint. The trial court declined to consider the motion on its merits, finding that the whole thing was untimely. On appeal, Appellants argued that *Yu v. Signet Bank* gives a defendant the absolute right to file an anti-SLAPP motion within 60 days of an amended pleading, even if some of the claims in that pleading were first pleaded years earlier. *Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, 313, 315. In the published decision below, the Fourth District Court of Appeal expressly disagreed with *Yu v. Signet Bank*, and held that the motion was untimely,

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[1] Morris Cerullo World Evangelism, Inc., and Roger Artz and Lynn Hodge, as trustees of the Plaza Del Sol Real Estate Trust, are the defendants in the trial court, appellants in the intermediate court of appeal, and petitioners/appellants in this Court. This brief will refer to them collectively as "Appellants".

[2] Newport Harbor Ventures, LLC and Vertical Media Group, Inc. are the plaintiffs in the trial court, respondents in the intermediate court of appeal, and respondents in this Court. This brief will refer to them collectively as "Respondents."

even though it was filed within 60 days – at least insofar as it targeted the two causes of action based in contract, which had appeared in earlier pleadings in some form. The court nevertheless held that the motion could timely challenge the two newly pleaded causes of action for promissory estoppel and quantum meruit, and evaluated the motion on its merits as to those claims.

In doing so, the appellate court departed from *Yu v. Signet Bank* and *Lam v. Ngo*, narrowing the anti-SLAPP statute in the process. To justify the departure, the Fourth District discounts the holding of *Yu v. Signet Bank* and relies instead on dicta from *Hewlett-Packard v. Oracle Corp.* (2015) 239 Cal.App.4th 1174, 1192 fn. 11. *Hewlett-Packard*, in a footnote, noted that the anti-SLAPP statute was enacted to dispose of claims at an early stage in litigation. The court mused that a rule "properly tailored" to that objective "would permit an amended pleading to extend or reopen the [60-day] time limit only as to *newly pleaded* causes of action arising from protected conduct." *Hewlett-Packard*, supra, at 1192 fn. 11 (emphasis in original). Relying on that footnote's musings about the policy behind the anti-SLAPP statute, and disagreeing with *Yu* and the statute's plain language, the court below held that the motion was untimely as to the first two causes of action. In other words, the Fourth District held that *Hewlett-Packard*'s eleventh footnote was not merely wistful pining for a better rule, it *was* a rule, despite *Yu*'s holding to the contrary. *Yu v. Signet Bank* provides the better rule because it comports with the plain language of the statute, which does not limit the motion's purview to newly added claims. The statute says "The special motion may be filed within 60 days of the service of the complaint", with no qualifying language restricting the claims it may target. Code Civ. Proc. §425.16(f). The service of a "complaint" – not any particular claims *within* the complaint – is what reopens that 60-day period. This interpretation also comports with *Baral v.*

Schnitt, which allows an anti-SLAPP motion to target individual allegations in a pleading, regardless of how those allegations are organized into legal claims. *Baral v. Schnitt*, (2016) 1 Cal.5th 376, 393-394 (holding that anti-SLAPP motion, "like a conventional motion to strike" may challenge "particular allegations" within a pleading).

This appeal also asks the Court to reverse the Fourth District's decision to deny the motion on its merits as to the causes of action for quantum meruit and promissory estoppel. On the second, "merits" prong of the anti-SLAPP motion, Appellants should have prevailed because the existence of a contract covering the same topic as the "quasi-contracts" defeats those quasi-contract claims as a matter of law. A valid contract means there was an exchange of consideration, and consideration is fatal to promissory estoppel and quantum meruit claims. The existence of a contract is therefore itself fatal to such claims. But the Fourth District denied the anti-SLAPP motion targeting those quasi-contract claims, despite the existence of a contract, on the rationale that a plaintiff may "plead inconsistent counts". *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism* (2016), 6 Cal.App.5th 1207, 1222-1223. Although a plaintiff cannot *recover* on both contract and quasi-contract claims, the Fourth District insisted that inconsistent claims can be *pleaded*, and that such pleadings survive an anti-SLAPP motion despite countervailing evidence. It characterized Appellants' anti-SLAPP motion as an attempt to force the plaintiffs (Respondents) to elect a remedy at the pleading stage, rather than as a test of the factual support for each cause of action. The court held: "Nothing in the anti-SLAPP statute required [Plaintiffs-Respondents] to make an election between the breach of contract and quantum meruit causes of action in response to the anti-SLAPP motion." *Id*. In so holding, the panel cited decisions allowing a plaintiff to plead inconsistent claims in the alternative, while also citing a decision

holding a plaintiff "cannot recover for both breach of contract and quantum meruit." *Id*. (citing *Mendoza v. Continental Sales Co.* (2006) 140 Cal.App. 4th 1395, 1402; *Crowley v. Katleman* (1994) 8 Cal.4th 666, 691; *Hedging Concepts, Inc. v. First Alliance Mortgage Co.*, supra, 41 Cal.App. 4th 1419-1420). None of these cited cases addressed the pleading standard on an anti-SLAPP motion, however.

The panel's reliance on these cases was misplaced. Although filed at the "pleading" stage, an anti-SLAPP motion is not subject to the same standard as a demurrer, where a plaintiff may plead inconsistent claims. The anti-SLAPP motion requires a plaintiff to provide evidentiary support for each claim; if evidence supports one of two inconsistent claims, the claim defeated by the evidence should be stricken. To hold otherwise would neuter the anti-SLAPP motion, rendering it little more than a demurrer with a discovery stay attached.

Appellants respectfully request this Court reverse the decision of the Fourth Appellate District and issue two holdings: 1) an anti-SLAPP motion filed within 60 days of the pleading it targets may strike any allegations in those pleadings, consistent with *Baral v. Schnitt* and *Yu v. Signet Bank*, and 2) inconsistent claims cannot survive an anti-SLAPP motion when evidence defeats one of those claims.

III. BACKGROUND AND STATEMENT OF THE CASE

A. Appellants sublease the Subject Property to Newport Harbor Offices & Marina

Appellant Morris Cerullo World Evangelism ("MCWE") is the sub-landlord and sublessor of an office building and marina in Newport Beach, California ("Subject Property"). Volume 1 of Clerk's Transcript at pp. 124-

125[3]. Appellant Roger Artz, as trustee of the Plaza Del Sol Real Estate Trust ("Plaza"), subleased the Subject Property from MCWE until 2004. Appellant Lynn Hodge is another trustee of Plaza. The fee owner of the Subject Property is a trust operated by John Jakosky ("Jakosky"), who serves as lessor to MCWE under a Ground Lease that has been amended several times. 2 CT 341. Since 2004, the Subject Property's primary sublessee has been Newport Harbor Offices & Marina, LLC ("NHOM"), a company with a history of failing to maintain and repair the property. 1 CT 135.

B. Appellants execute a management agreement, hiring Respondents to manage the Subject Property.

On March 3, 2011, Respondent Newport Harbor Ventures, LLC ("NHV") entered into a property management agreement with Appellants ("Management Agreement"). 1 CT 135-149. In exchange for Appellant MCWE promising to introduce Respondent NHV to Jakosky to request an extension of the Ground Lease, Respondent NHV agreed to perform property management duties. According to the Management Agreement, "all costs" of those management duties "shall be borne by NHV." 1 CT 138. In addition, Respondent "NHV shall be responsible for the costs of an Unlawful Detainer action (or actions) together with customary defenses thereto and no other litigation." *Id*. NHV also agreed to "perform all duties normally associated with the administration of a sublease by the master lessor," which included monitoring the property, enforcing the ground lease and sublease, and serving notices of default on tenants. 1 CT 136-173.

Respondent NHV and Appellants mutually agreed to modify the Management Agreement on April 22, 2011 ("Modification"), whereby

[3] Future references to the Clerk's Transcript will appear in the format "[Volume number] CT [page number]:[line or paragraph number].

Respondent Vertical Media Group, Inc. ("Vertical Media") "would act as the Asset Manager in place of NHV." 1 CT 147. The Modification stated that "[Vertical Media] will act in the place and stead of NHV in the capacity as Asset Manager, under the terms of the [Management Agreement] dated March 3, 2011, with NHV continuing to have all rights and obligations set forth in said prior agreement. All other terms of said prior agreement remain the same." 1 CT 147. Appellant MCWE made no promises and had no agreement with Respondents as to what would happen to the Subject Property after any unlawful detainer action against the sublessee. 2 CT 427:16-21, 428:5-6.

C. Respondents file an unlawful detainer action in MCWE's name against the sublessee, and MCWE settles the action.

The sublessee, NHOM, was not maintaining or repairing the Subject Property, so Respondents began the unlawful detainer process through service of "notices to cure" defaults beginning on April 22, 2011. 3 CT 613-655. The tenant did not cure, so Respondents, acting as property manager, filed an unlawful detainer action in Appellant MCWE's name on June 21, 2011 in the Superior Court for the County of Orange in *MCWE v. Newport Harbor Offices & Marina, LLC*, case number 30-2011-00485656 ("UD Action"). 1 CT 76:24-77:1; 1 CT 127:4-8.

On August 15, 2012, Appellant MCWE signed an agreement to settle the UD Action. 3 CT 881-882.

D. Respondents file this lawsuit for breach of contract.

Respondents filed this lawsuit against Appellants on July 29, 2013. 1 CT 4. They filed a first amended complaint on December 16, 2013 (1 CT 9), a second amended complaint on March 28, 2014 (1 CT 12), and a third amended complaint on June 24, 2015. 1 CT 43.

In the original complaint, drafted on a judicial council form, Respondents allege three causes of action: breach of contract and two

untitled "intentional torts" with allegations substantively identical to the breach of contract claim. Appellants allegedly "granted contract rights and settled unlawful detainer action without P's consent in breach of [the written Management] Agreement." Exhibit A to Respondents' Motion to Augment Record ("R.M[4]") at p. 1-5. The original complaint contains no claims for quantum meruit or promissory estoppel, and no allegations that Appellants MCWE, Artz, or Hodge made any oral promises. *Id*.

Respondents' first amended complaint alleges six causes of action, including claims for breach of the written Management Agreement. R.M. at pp. 22-34. The first amended complaint alleges that Appellants failed to reimburse Respondents for the costs of managing the Subject Property, and breached the Management Agreement by "going behind [Respondents'] backs and by settling The Litigation by signing The Settlement Agreement on August 15, 2012…without Plaintiffs' and Dennis D'Alessio's knowledge…." R.M. at p. 27. There were no claims in the first amended complaint for quantum meruit or promissory estoppel, and no allegations that Appellants MCWE, Roger Artz, or Lynn Hodge made any oral promises. *Id*.

The second amended complaint asserts claims for breach of the Management Agreement, breach of the covenant of good faith, and fraud, based on the same allegations as the first amended complaint. R.M. at p.55-66. No oral promises or claims for quantum meruit or promissory estoppel appear in the second amended complaint.

Quasi-contract claims and allegations about oral promises appear only in the third amended complaint, which states four causes of action:

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[4] In the Fourth District, Respondents filed a motion to augment the record. Their motion was granted. Future references to the portion of the appellate record supplemented by Exhibit A to Respondents' Motion to Augment the Record will be referred to as "R.M. at [page number]".

breach of the written Management Agreement, breach of the covenant of good faith inherent in the Management Agreement, quantum meruit for reimbursement of the costs of asset management, and promissory estoppel for reimbursement of those same costs. 1 CT 123-150. All of these causes of action allege, in significant part, that Appellants harmed Respondents by entering into a settlement agreement for an unlawful detainer action. Respondents, it seems, had hoped to evict the sub-tenant NHOM and take its place in the Subject Property. They were frustrated when Appellants settled the unlawful detainer instead of seeing it through to trial, and now want to be reimbursed for the costs of asset management, despite the existence of the written Management Agreement, which says Respondents need to bear those costs themselves. When litigating the UD Action and paying its costs, Respondents acted "in reliance on the Management Agreement." 1 CT 126:28, 1 CT 127:8. In the cause of action for quantum meruit, the Third Amended Complaint repeatedly alleges that Respondents acted solely in reliance on the written Management Agreement. 1 CT 131:1-8; 1 CT 131:24-26 ("Defendants have unjustly benefited from the services Plaintiffs performed on Defendants' behalf under the Management Agreement"). The cause of action for promissory estoppel alleges that Respondents acted on oral promises made "during the negotiations of the Management Agreement". 1 CT 132:14-16.

The third amended complaint states that "Each allegation for each cause of action is incorporated by reference in every other cause of action." 1 CT 125¶8. There are no allegations in any of the complaints that the Management Agreement is invalid or lacks consideration.

E. Appellants file an anti-SLAPP motion to strike the third amended complaint.

On July 23, 2015 – 29 days after the third amended complaint was filed – Appellants timely filed a motion for judgment on the pleadings and a special motion to strike Respondents' third amended complaint as a meritless SLAPP under section 425.16 of the Code of Civil Procedure. 2 CT at 301-323. Appellants argued that Respondents' claims are subject to subdivision (e)(1), (e)(2), and (e)(4) of the anti-SLAPP statute because they arise out of Appellants' act of settling the unlawful detainer lawsuit, a quintessential exercise of the constitutionally protected right to petition the government. *Id*.

F. Trial court finds the anti-SLAPP motion "untimely" in its entirety.

On August 28, 2015, a hearing was held on Appellants' special anti-SLAPP motion to strike before the Honorable Judge Deborah Servino. 6 CT 1738. The trial court issued a brief order denying the motion to strike as untimely. 6 CT 1738.

G. On appeal, Fourth District declares anti-SLAPP motion half timely, half untimely.

Appellants timely appealed. The Court of Appeal, Fourth District, Division Three, held that the anti-SLAPP motion was untimely insofar as it targeted the counts for breach of contract and breach of the covenant of good faith, since both causes of action could have been targeted when they first appeared in earlier complaints. *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism*, (2016), 6 Cal.App.5th 1207. The court also held, however, that the motion was timely filed as to the two new causes of action for quantum meruit and promissory estoppel. But on those quasi-contract claims, the court denied the anti-SLAPP motion on its merits, holding that a plaintiff is entitled to plead inconsistent claims. This

petition followed, which the Supreme Court of California granted on March 22, 2017.

IV. LEGAL DISCUSSION

A. Anti-SLAPP motion served within 60 days of an amended complaint may challenge any claims in that complaint, and claims inconsistent with the evidence should be stricken.

An anti-SLAPP motion must be brought within 60 days of service of the complaint it targets. Code Civ. Proc. §425.16(f). A timely filed anti-SLAPP motion is evaluated with a two-step process: "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one 'arising from' protected activity. (Code Civ. Proc., §425.16(b)(1). If the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim." *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76.

This appeal relates to the 60-day deadline in subdivision (f) and the second[5] prong of the two-step process. Specifically, it asks this Court to hold that an anti-SLAPP motion filed within 60 days of the amended complaint it targets is timely, even if some of the plaintiff's claims had appeared in earlier versions of the complaint. Appellants also ask the Court to hold that when the burden of proof shifts to the plaintiff on the second

[5] "The first prong of the anti-SLAPP procedure—whether the challenged claims arose from activity protected by section 425.16—is not in dispute. Cerullo and Artz argue the causes of action of the third amended complaint arise out of the act of settling the Unlawful Detainer Action, which is an act in furtherance of their right of petition. (§ 425.16(e).) NHV and VMG do not contend otherwise." *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism* (2016) 6 Cal.App.5th 1207, 1220–21.

prong of the anti-SLAPP analysis, claims which are inconsistent with other claims and the evidence cannot survive.

B. The Fourth District incorrectly relied on dicta in *Hewlett-Packard* when holding that anti-SLAPP motions cannot target all claims in an amended complaint.

In the Fourth District, Respondents Vertical Media Group and Newport Harbor Ventures, LLC failed to cite a single appellate decision holding that an anti-SLAPP motion filed within 60 days of the most recent complaint is untimely. In its opinion, the Fourth District similarly failed to cite any cases with that holding. They could not cite any such decisions because none exist. Until the Fourth District issued the decision that forms the basis of this appeal, the case law was universal: An anti-SLAPP motion filed within 60 days of the most recently amended complaint is timely, regardless of whether the plaintiff is on its first, third, or hundredth amended complaint. This Court previously saw no problem with an anti-SLAPP motion striking claims from a second amended complaint, even though those allegations, which accused the defendant of refusing to correct falsehoods in an audit, had appeared in the original complaint as well. *Baral v. Schnitt* (2016), 1 Cal.5th 376, 383.

Instead of a holding grounded in case law or statutory text, the decision below was based on policy arguments about the purpose of the anti-SLAPP statute, which was indeed drafted to eliminate meritless lawsuits before trial in order to reduce costs to the defendant. But this legislative purpose is fully served by the 60-day rule: The Legislature, desiring to eliminate meritless lawsuits early, manifested that desire in a black-and-white rule that any anti-SLAPP motion filed within 60 days of the targeted pleading is **timely**. The fact that the targeted pleading was served months or years after the case originated is irrelevant. It is not the date of the case's inception but the date of the most recent complaint that matters.

Except for the decision below, every court has said so. No court – not a single one – has applied the 60-day rule in the way the Fourth District does.

In coming to its conclusion, the Fourth District's sole source of authority is dicta from the eleventh footnote in *Hewlett-Packard Co. v. Oracle Corp*, which the Fourth District refers to as a "rule". That footnote says:

> "The rule that an amended complaint reopens the time to file an anti-SLAPP motion is intended to prevent sharp practice by plaintiffs who might otherwise circumvent the statute by filing an initial complaint devoid of qualifying causes of action and then amend to add such claims after 60 days have passed. [Citation.] But a rule properly tailored to that objective would permit an amended pleading to extend or reopen the time limit only as to newly pleaded causes of action arising from protected conduct. A rule automatically reopening a case to anti-SLAPP proceedings upon the filing of any amendment permits defendants to forgo an early motion, perhaps in recognition of its likely failure, and yet seize upon an amended pleading to file the same meritless motion later in the action, thereby securing the 'free time-out' condemned in [*People ex rel. Lockyer v.*] *Brar* [(2004)] 115 Cal.App.4th 1315, 1318."

Newport Harbor Ventures, LLC, supra, at 1217-1218 (citing *Hewlett-Packard Co. v. Oracle Corp.* (2015) 239 Cal.App.4th 1174, 1192, fn. 11).

This footnote implies that such a rule would be desirable, not that such a rule already exists. This *Hewlett-Packard* "rule" is not law, but dicta, perhaps intended to catch the eye of some intrepid legislator who might want to revise the anti-SLAPP statute to enact what the *Hewlett-Packard* court describes as "a rule properly tailored" to the "objective" of the statute. The Fourth District, however, adopted this dicta as its holding, and declared it superior to the actual rule expounded in *Yu v. Signet Bank/Virginia*, a case cited by Appellants repeatedly in the trial and appellate court. *Newport*

Harbor Ventures, LLC, supra, at 1217 (disagreeing with *Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, 313, 315 (*Yu*)).

1. The statute's language and *Yu v. Signet Bank* are clear: A motion may target any claims arising out of the right of petition, not just "newly added" claims.

Contra the *Hewlett-Packard* "rule", the *Yu* decision adopts a clear holding comporting with the statutory language: Any anti-SLAPP motion filed within the 60-day period is timely – even if the reviewing judge believes it might have been an equally good idea to file the anti-SLAPP motion against an earlier complaint[6].

In *Yu*, the defendants filed an anti-SLAPP motion several years after the original complaint, but less than 60 days after service of the third amended complaint – exactly the same circumstances as this case. Like the Respondents in this case, the *Yu* plaintiffs argued "that allowance of an anti-SLAPP motion as a matter of right [several years] following service of an amended complaint would be inconsistent with the statutory design 'to prevent SLAPPs by ending them early.'" *Yu, supra*, at 103 Cal. App. 4th at

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[6] In the decision below, the Fourth District cited the relevant passage from *Yu*, but disregarded it:

> "Cerullo and Artz rely on *Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, 313, 315 (*Yu*), in which the Court of Appeal concluded an anti-SLAPP motion filed within 60 days of service of a third amended complaint was timely, even though the motion could have been filed at the outset of the case. "Admittedly," the *Yu* court stated, "this is not a case where an anti-SLAPP motion was promptly made to counter SLAPP allegations first added to an amended pleading" and the defendants' anti-SLAPP theory appeared to have been "an afterthought." (*Id.* at p. 315.)"

Newport Harbor Ventures, LLC, supra, at 1218..

314 (quoting dicta from *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 65). The court nevertheless rejected the *Yu* plaintiffs' argument and affirmed the anti-SLAPP motion, explaining that "The Yus' position is contrary to the reported cases that have considered the issue." *Id*. Citing other reported decisions, the *Yu* court held that "in view of the statutory admonition that the anti-SLAPP law be broadly construed (§ 425.16, subd. (a))," the law was clear "that the 60–day period for filing the motion runs from service of the most recent amended complaint, rather than the original complaint." *Id*. The court acknowledged that "Admittedly, this is not a case where an anti-SLAPP motion was promptly made to counter SLAPP allegations first added to an amended pleading," conceding that the defendants *could* have filed their anti-SLAPP motion at the outset of the case. *Id*. at 315. However, because the plaintiffs filed a third amended complaint, the defendants' "opportunity to belatedly raise that [anti-SLAPP] theory arose **as a matter of right**." *Id*. at 315 (emphasis added); see also *Harper v. Lugbauer* (N.D. Cal., Mar. 15, 2012), 2012 WL 1029996, at *2. The *Yu* court held that "the 60-day period for filing the motion runs from service of the most recent amended complaint, rather than the original complaint." *Id*. at 314.

Lam v. Ngo reached the same conclusion, pointing out that if the statute were construed as the Respondents urge, a plaintiff "might attempt to circumvent the anti-SLAPP law by waiting until an amended complaint to assert its SLAPP allegations." *Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, 314, *as modified on denial of reh'g (Nov. 25, 2002)* (citing *Lam v. Ngo* (2001) 91 Cal.App.4th 832, 840-842). Both *Yu* and *Lam* recognized that the danger of plaintiffs dodging the anti-SLAPP law by sandbagging their claims was greater than the danger of defendants frustrating the "purpose" of the anti-SLAPP law by keeping their anti-SLAPP powder dry until they were sure their motion would succeed. In

both *Yu* and *Lam*, the appellate court held that "broadly construing" the anti-SLAPP statute sometimes means tilting the balance in favor of the defendants.

As in *Lam*, the trial court here did not have discretion to refuse to consider the anti-SLAPP motion on its merits. Each time a plaintiff amends the complaint by adding new causes of action or new allegations, the 60-day clock resets, and an anti-SLAPP motion may be filed against the fresh pleading. The *Lam* court adopted this holding because of this Court's decision in *DuPont Merck Pharmaceutical Co. v. Superior Court,* (2000) 78 Cal.App.4th 562, 565, which "directed an appellate court to reconsider, in light of *Briggs v. Eden Council for Hope and Opportunity* (1999) 19 Cal.4th 1106, the summary denial of a petition for a writ of mandate seeking to compel the trial court to grant a special motion to strike." *Lam v. Ngo* (2001) 91 Cal.App.4th 832, 842. The summary denial had been based on the fact that the special motion was untimely because the 60 days began running from the original, as distinct from the amended, complaint. The appellate court in *DuPont* took the direction and the reference to *Briggs,* a case dealing with when defamatory statements made in the course of authorized official proceedings are protected, as a signal from the Supreme Court to consider the petition on the merits. *Dupont*, supra, 78 Cal.App.4th at 565. *Lam* inferred "that our Supreme Court saw nothing wrong in considering an anti-SLAPP suit motion directed against an amended complaint, even though more than 60 days had elapsed since the service of the original complaint." *Lam, supra,* 91 Cal.App.4th at 842. *Lam* has been the prevailing law for the last 16 years, cited once by this Court (in *Flatley v. Mauro*[7], on an unrelated issue) and dozens of times by other appellate courts. Its holding comports with the statute's text, which allows a motion to strike within 60

[7] *Flatley v. Mauro* (2006), 39 Cal. 4th 299, 313.

days of "service of the complaint", not within 60 days of "inserting a new legal theory into the complaint". Code of Civ. Proc. §425.16(f). When evaluating timeliness, it does not matter what is inside the complaint; what matters is when the complaint was served. The 60-day period resets every time a new complaint is served.

The only instance when the 60-day clock would *not* reset is if the amended pleading merely corrected a clerical error in a previous pleading. See *Country Side Villas Homeowners Assn. v. Ivie* (2011) 193 Cal.App.4th 1110, 1115 (holding anti-SLAPP motion timely if filed within 60 days of most recently amended complaint, unless amendment was mere "clerical correction" such as "substitution of a date, or case number."). A non-substantive change, like correcting a case number, does not reopen the 60-day period because it does not require service of a new pleading. But that's not what happened here. Here, Respondents' amendment was substantive, adding not just new causes of action for quantum meruit and promissory estoppel, but also 13 new paragraphs with factual allegations. 1 CT 43 (Third Amended Complaint filed June 24, 2015); 1 CT 46 (anti-SLAPP motion filed July 23, 2015); 1 CT 130-133; 2 CT 312:7-20 (demurrer to Second Amended Complaint sustained); 2 CT 321:9-10 (fourth cause of action not brought until June 24, 2015); 3 CT 709:13-710:7 (third and fourth causes of action not brought until June 24, 2015, violating statute of limitations); 4 CT 946-948 (ruling on demurrer to Second Amended Complaint's first, second, and third causes of action – none of which were promissory estoppel or quantum meruit); 4 CT 1134:5-1135:14 (quoting substantive differences between Second Amended Complaint and Third Amended Complaint); 5 CT 1450:9-1451:9 (quoting allegations first appearing in Third Amended Complaint). According to the third amended complaint, "Each paragraph in this Complaint is incorporated by reference in each other paragraphs [sic]. Each allegation for each cause of action is

incorporated by reference in every other cause of action. Despite the labels on the causes of action and section headings and dividers, **the complaint, and the remedies sought are to be read as one unit**." 1 CT 125:24-27. These broad instructions to incorporate every paragraph into every other paragraph result in a new complaint with new allegations, requiring service triggering the 60-day period in which to file an anti-SLAPP motion[8]. The third amended complaint was filed to add new causes of action and new allegations, not to correct a clerical error. Serving this new complaint reopened the period to challenge the complaint, whether by demurrer, conventional motion to strike, or anti-SLAPP motion to strike.

When the 60-day period reopens because of a service of an amended complaint, the anti-SLAPP statute allows a motion to strike any of the allegations in that new complaint, not just the newly added claims – or counts, or allegations, or legal theories, or whatever label one uses. In *Baral*, this Court emphasized the importance of focusing on the defendant's conduct, rather than the label given to the plaintiff's claims. "Causes of action" and "claims", as used in anti-SLAPP jurisprudence, refer to everything in a complaint, from a count to an individual allegation – a paragraph, or even a sentence. "Section 425.16 is not concerned with how a complaint is framed, or how the primary right theory might define a cause of action." *Baral, supra,* 1 Cal.5th at 382. An anti-SLAPP motion, "like a conventional motion to strike, may be used to attack parts of a count as pleaded". *Id.* at 488. To give effect to *Baral*'s holding, this Court should not distinguish between newly added "counts" and those "counts" which have appeared in some form or another in earlier complaints. Every

[8] Incidentally, if the complaint's instructions to read the remedies and causes of action as "one unit" are taken at face value, then the two contractual causes of action were altered by the addition of the quantum meruit and promissory estoppel allegations.

allegation arising from protected activity is open to strike, regardless of when a particular legal theory first appeared in the complaint.

2. Policy considerations caution against adopting the Fourth District's interpretation of the anti-SLAPP statute.

Adopting Respondents' position is untenable. Consider the consequences of restricting an anti-SLAPP motion only to newly added claims.

First, this would require overruling *Baral v. Schnitt*. *Baral* allowed anti-SLAPP motions to strike any allegations arising out of the right of petition, regardless of how they were organized in the complaint. *Baral*, supra, 1 Cal.5th at 392. The *Baral* decision starts out by noting the confusion over the terms "claims", "counts", and "causes of action", and resolves the confusion by expanding the anti-SLAPP statute to cover all three, clarifying that the anti-SLAPP statute can also strike mere "allegations" which support the legal theories of relief. *Id*. at 381-382. If this Court restricts the anti-SLAPP statute only to newly added claims, it will reinstate the chasm between "claims" and "allegations", differentiating a plaintiff's legal theories from the facts alleged in support of them. The Respondents would have this Court draw a distinction between allegations of protected activity and the legal theories of recovery based on those allegations, barring the anti-SLAPP motion from striking existing legal theories. After all, the Fourth District held that only "newly added claims" can be stricken from an amended complaint. Excising only the new "claims" – the new legal theories of recovery – would allow *allegations* of protected activity to remain in the complaint, because those allegations are necessary to support the *old* claims. This contradicts *Baral v. Schnitt*, which allows an anti-SLAPP motion, "like a conventional motion to strike," to

"attack parts of a count" and "challeng[e] particular allegations within a pleading." *Baral*, supra, 1 Cal. 5th at 393-394.

Second, it would redefine the term "complaint" in Section 425.16(f), overruling *Lam v. Ngo*. Subdivision (f) says that a defendant has the right to file an anti-SLAPP motion within 60 days of service of the "complaint." *Lam*, and the dozens of cases relying on it in the last 16 years, held that the word "complaint" includes "amended complaints." *Lam*, supra, 91 Cal.App.4th at 840. Upholding the Fourth District here would change the operative definition of "complaint" from "complaints – which include amended complaints" to "complaints – which include discrete legal theories appearing in amended complaints, but only those not appearing in any earlier complaint, plus any new factual allegations, but only those factual allegations which were not in earlier pleadings, though tweaks to existing factual allegations might still be OK to strike as long as those modified allegations formed the basis of one of the new legal theories of recovery." This holding would blow a hole in anti-SLAPP jurisprudence, creating new space for appellate experimentation and increasing costs to litigants and trial judges as they explore the contours of this new holding.

Third, the Fourth District's holding is unworkable in practice. The holdings of *Yu* and *Lam* and the statutory language give a simple, black-and-white rule that is easy to apply: An anti-SLAPP motion is timely if filed within 60 days of service of a complaint, including amended complaints. Whether certain allegations in that complaint are subject to strike is determined independently of the timeliness question. A timely motion should be considered on the merits – period. If, on its merits, the motion should be denied because the targeted allegations do not arise out of the right of petition, or because the plaintiff offers evidence to support his claim, then so be it. But a motion cannot be "partly" timely. A motion is either timely or it is not. The Fourth District's decision, however, would

burden trial judges with the task of chopping up the anti-SLAPP motion, determining which portions of the motion are timely and which are not. This adds a third prong to the anti-SLAPP analysis that is not contemplated anywhere in the statutory text. The statute says that the entire "motion" may be filed within 60 days of service of an entire "complaint". Code of Civ. Proc. §425.16(f). The timeliness clause speaks in terms of motions and complaints, not counts or claims.

Another problem resides with the breadth of the automatic discovery stay. An anti-SLAPP motion stays all discovery in the proceeding until the motion is heard, and an anti-SLAPP appeal stays all discovery in the lawsuit, except on "causes of action which are not affected by the motion." *Varian Medical Systems, Inc. v. Delfino* (2005), 25 Cal. 4th 180, 195 fn. 8 (interpreting Code of Civ. Proc. §425.16(g)). The primary justification for the Fourth District's opinion is to hurry along the litigation by exempting the contractual claims from the anti-SLAPP motion's purview. This justification is defeated by the *Delfino* rule, which "automatically stays further trial court proceedings on the merits". Even if this anti-SLAPP motion had only targeted the quasi-contractual claims, the contract claims still could not go to trial because they are based on the same factual allegations – and thus are "affected" by the anti-SLAPP motion targeting those allegations. *Delfino*, supra, at fn. 8. As claims based on the same allegations, they would be "affected by the [anti-SLAPP] motion" within the meaning of *Delfino*, so trial would be stayed. The case would be frozen anyway. There is no purpose in allowing the anti-SLAPP motion to target the quasi-contractual claims without also allowing it to target the contract claims, since discovery and trial are stayed on *all* causes of action related to the motion.

And if *Baral* survives this appeal, and an anti-SLAPP motion may continue to excise individual factual allegations, what happens to the

remaining causes of action once their supporting allegations are stricken? Appellants moved to strike the allegations of protected activity (i.e. settling the UD Action). If those allegations are removed from this lawsuit, *all* the causes of action – not just the quasi-contractual claims – would fail. But if, as the Fourth District held, the anti-SLAPP motion can only target the quasi-contractual claims, the contractual claims are supposed to be unaffected by the anti-SLAPP motion. Without supporting allegations, though, none of the claims can survive. Unless this Court overrules *Baral* and forbids a defendant from excising "particular allegations", immunizing the contract claims from the anti-SLAPP motion serves no purpose.

Fourth, restricting the anti-SLAPP statute only to "newly added claims" frustrates legislative intent far more than construing it broadly. The Fourth District held that the anti-SLAPP motion is supposed to terminate lawsuits at an "early" stage, a purpose supposedly defeated by allowing a defendant to file a motion to strike against the entire third amended complaint. But when a plaintiff files a new complaint demanding a new answer, and potentially a new round of discovery, the parties are back to the pleading stage – in other words, this *is* an "early" stage. A defendant is entitled to make its own decisions about how to challenge the pleadings; just because an anti-SLAPP motion *might* have succeeded against an earlier complaint is no reason to bar a defendant from using it to challenge a complaint that is even weaker than the first one. Any substantive change to the complaint might make an anti-SLAPP motion easier to win. If the purpose of the anti-SLAPP motion is to save the defendants' money, then the defendants should be allowed to file an anti-SLAPP motion against later complaints. Any successful anti-SLAPP motion that avoids a costly trial will save at least *some* of the defendants' money, even if the motion is filed after a few rounds of initial pleadings.

As this Court has held in the past, the question of whether to add new restrictions to subdivision (f) is a question for the Legislature. *Delfino*, supra, 35 Cal.4th at 196 ("[S]ome anti-sLAPP appeals will undoubtedly delay litigation… Such an assessment is, however, a question for the Legislature…."). If the Legislature wants to restrict which claims in an amended pleading can be targeted, the Legislature knows how to express that desire. The demurrer statute, for instance, includes such restrictions in the newly enacted Section 430.41(b):

> (b) A party demurring to a pleading that has been amended after a demurrer to an earlier version of the pleading was sustained shall not demur to any portion of the amended complaint, cross-complaint, or answer on grounds that could have been raised by demurrer to the earlier version of the complaint, cross-complaint, or answer.

Code of Civ. Proc. §430.41(b).

This language does not appear anywhere in the anti-SLAPP statute, but this is essentially the rule that the Fourth District has adopted. If the *Hewlett-Packard* footnote embodies a wiser policy than the statute's plain language, let the Legislature enact it. If the Legislature wants to add "anti-SLAPP motions to strike" to Section 430.41(b), it can do that, but it is folly to read this language into a statute where it does not exist. *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123 ("We find no grounds for reweighing these concerns in an effort to second-guess the Legislature's considered policy judgment. If we today mistake the Legislature's intention, the Legislature may easily amend the statute.").

3. The anti-SLAPP statute's purpose is to give flexibility to defendants, hence the mandate to "construe [it] broadly".

The construction urged by Appellants gives an advantage to defendants, but giving a strong tool to defendants was the very the reason

the anti-SLAPP statute was enacted. To borrow an aphorism from the tech industry, advantaging defendants is a feature, not a bug.

The unsuccessful plaintiffs in *Yu* argued, as the Fourth District held in this case, "that allowance of an anti-SLAPP motion as a matter of right [several years] following service of an amended complaint would be inconsistent with the statutory design 'to prevent SLAPPs by ending them early.'" *Yu, supra*, at 103 Cal. App. 4th at 314 (quoting dicta from *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 65). But the Legislature decided to serve that purpose with a clear, bright-line rule that a motion filed within 60 days of the service of an amended complaint is timely. That 60 day period *is* "early".

Incidentally, the goal of the statute is not just to end SLAPPs "early", but also "to minimize the litigation costs of SLAPP targets". *Delfino*, supra, 35 Cal.4th at 192. SLAPP victims (i.e. defendants) do not file anti-SLAPP motions unless it would minimize their costs. Whether the anti-SLAPP motion increases costs to the plaintiff is beside the point – of *course* the statute increases a plaintiff's costs. It makes it more difficult for plaintiffs to maintain frivolous lawsuits – a feature, not a bug. But anything short of a trial is a boon to a defendant; even an anti-SLAPP motion filed the week before a trial would "minimize the litigation costs of SLAPP targets" by avoiding an expensive trial. This is why subdivision (f) empowers the court to allow an anti-SLAPP motion not just within that 60-day period, but also "at any later time upon terms it deems proper." If an anti-SLAPP motion filed years into litigation would frustrate the statutory purpose, the Legislature would not have included such a clause allowing judges the discretion to frustrate the "statutory design." Any motion filed "within 60 days of the service of the complaint" is timely because "the point of the anti-SLAPP statute is that you have a right *not* to be dragged through the courts because you exercised your constitutional rights."

Delfino, supra, 35 Cal.4th at 193. The pro-defendant procedural rules are intended to favor the victim of a SLAPP, just as the pro-plaintiff procedural rules of the companion SLAPPback statute are designed to give the SLAPP victim a method of fighting back. See *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 281–82 (comparing differences between Section 425.16 and 425.18, noting that both statutes are designed to "stack the procedural deck" in favor of the SLAPP victim).

Appellants are asking for a bright-line rule based on the "broad construction expressly called for in subdivision (a) of section 425.16," an outcome this Court previously described as "desirable from the standpoint of judicial efficiency," while noting "that our straining to construe the statute as the Court of Appeal did would serve Californians poorly." *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1121–22. Where a bright-line test is not available, "confusion and disagreement" will arise, "thus delaying resolution of section 425.16 motions and wasting precious judicial resources." *Id*. at 1122. Rather than adopt the Fourth District's test, forcing trial judges to sift through allegations, comparing new complaints to old complaints and decipher which allegations have been changed enough to qualify as "newly added" for purposes of timeliness, this Court should adopt the type of "plain language construction" lauded in *Briggs*. A plain language, bright-line timeliness rule "retains for California courts, advocates and disputants a relatively clear standard for resolving a large class of section 425.16 disputes quickly, at minimal expense to taxpayers and themselves." *Briggs*, supra, at 1122.

Claims do not become immune to anti-SLAPP review simply because they manage to stick around for a while. That is not how a plaintiff's lawsuit survives an anti-SLAPP motion. Rather, "lawsuits based on protected statements are nevertheless *not* subject to being stricken when 'the court determines that the plaintiff has established a probability that he

or she will prevail on the claim'". *Id.* The option to prove a claim is a plaintiff's protection against meritless anti-SLAPP motions, not the rule invented by the Fourth District.

4. Appellants did not breach the management agreement, so claims based on breach of that agreement should be stricken.

After resolving the timeliness issue, this Court may proceed to the merits prong of the anti-SLAPP motion. "On appeal [courts] independently determine whether the challenged cause of action arises from the defendant's exercise of the constitutional right of petition or free speech and whether the plaintiff has demonstrated a probability of prevailing on the merits of the claim." *Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1345–46; *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999 ("Whether section 425.16 applies and whether the plaintiff has shown a probability of prevailing are both reviewed independently on appeal."). Using the record on appeal, this Court may properly determine whether the anti-SLAPP motion must be granted. Here, the Management Agreement requires Respondents to pay for all costs of the UD Action and managing the Subject Property, and does not forbid Appellants from settling the UD Action. 1 CT 136-145. The Third Amended Complaint accuses Appellants of "going behind [Respondents'] backs" and settling the UD Action – which Appellants have every right to do. 1 CT 130:6-11. The complaint alleges that Respondents suffered damages consisting entirely of the costs of management and litigation of the UD Action – which Respondents promised to pay for themselves. 1 CT 128:20-129:10, 1 CT 129:24-130:13. There was no breach of contract, so the first two causes of action fail on the merits prong of the anti-SLAPP motion.

C. Inconsistent claims cannot survive an anti-SLAPP motion, which evaluates claims using a summary judgment-like standard, not the demurrer-like standard applied by the Fourth District.

Unlike plaintiffs responding to a demurrer, anti-SLAPP plaintiffs must support their claims with admissible evidence, not mere allegations. *Comstock v. Aber,* (2012) 212 Cal. App. 4th 931, 950 (anti-SLAPP "plaintiff cannot rely on his pleading at all, even if verified, to demonstrate a probability of success on the merits."). If the claims are mutually exclusive, like promissory estoppel and breach of contract, then the evidence in support of one claim will necessarily defeat the other. Here, the promissory estoppel claim fails because consideration exists for the promises at issue, and the presence of consideration is fatal to promissory estoppel. Quantum meruit fails because a written contract covers the same topic. In the quantum meruit claim, Respondents demand reimbursement for money they spent litigating an unlawful detainer action. 1 CT 131:24-132:1. Quantum meruit is an equitable theory which supplies, by implication and in furtherance of equity, implicitly **missing** contractual terms. Contractual terms regarding a subject are not implicitly missing when the parties have agreed on express terms regarding that subject. A quantum meruit analysis cannot supply "missing" terms that are not missing. Under an anti-SLAPP analysis, quasi-contract claims "cannot lie where there exists between the parties a valid express contract covering the same subject matter." *Daniel v. Wayans* (2017) 8 Cal.App.5th 367, 398 (striking quasi-contract claims on second prong of anti-SLAPP analysis).

1. Respondents may indeed plead inconsistent claims when litigation begins, but they may not maintain inconsistent claims when evidence defeats one of them.

Respondents are correct that they can plead inconsistent **claims** – but they are not entitled to inconsistent **facts**. When it comes time to show evidence, the evidence will necessarily defeat one of the inconsistent claims. Since the existence of consideration is a question of fact, it is the plaintiff's burden on an anti-SLAPP motion to prove or disprove it, as the cause of action requires. See *O'Connor v. West Sacramento Co.* (1922) 189 Cal. 7, 21 ("whether or not there is a sufficient consideration to support a contract is always a question of fact."). An anti-SLAPP motion is an evidence-based motion, and Respondents must provide admissible evidence to defeat it, just as they would on summary judgment. Allegations in the Third Amended Complaint – especially inconsistent allegations – are *not* enough to carry the day. *Comstock*, supra, at 950 (anti-SLAPP "plaintiff cannot rely on his pleading at all, even if verified, to demonstrate a probability of success on the merits.").

As this Court held in *Flatley v. Mauro*, the anti-SLAPP motion "establishes a procedure where the trial court evaluates the merits of the lawsuit using a summary-judgment-like procedure at an early stage of the litigation." *Flatley v. Mauro* (2006) 39 Cal.4th 299, 312. The plaintiff must establish "a probability that the plaintiff will prevail on the claim." Code of Civ. Proc. §425.16(b)(1). No deference is given to the plaintiff's allegations. An anti-SLAPP motion, "like a summary judgment motion, *pierces* the pleadings and requires an evidentiary showing," and is "similar to that of a motion for summary judgment, nonsuit, or directed verdict." *Simmons v. Allstate Ins. Co*. (2001) 92 Cal. App. 4th 1068, 1073 (emphasis in original). "Section 425.16 therefore establishes a procedure where the trial court evaluates the merits of the lawsuit using a summary judgment-

like procedure." *Delfino*, supra, 35 Cal.4th at 192. An anti-SLAPP motion is properly treated like a motion for summary judgment or nonsuit, not a demurrer. When the evidence forecloses one of a plaintiff's two inconsistent claims, the claim cannot survive a motion for nonsuit – so it should be with a motion brought under the anti-SLAPP statute, which is supposed to be "construed broadly." Code Civ. Proc. §425.16(a).

Even before 1997, when the directive to "broadly" construe the statute was added, this Court indicated that the statute shifted the burden of proof onto the plaintiff, requiring him to produce "competent, admissible evidence" to substantiate his claims. *College Hospital Inc. v. Superior Court*, (1994) 8 Cal. 4th 704, 719.

In *College Hospital*, this Court discussed the legislative history of Section 425.16 and its companion statutes. Section 425.13, for example, imposed higher pleading requirements on plaintiffs seeking to include punitive damages claims in medical malpractice lawsuits. The statute required the plaintiff to establish "that there is a substantial probability that the plaintiff will prevail on the claim", or else the complaint cannot include a claim for punitive damages. Code Civ. Proc. §425.13(a). This Court held that such language places the burden on the plaintiff, not the defendant, a standard inconsistent with the liberal pleading standard on a demurrer. Like the anti-SLAPP plaintiff, the Section 425.13 plaintiff "may not rely on allegations of its own pleadings, even if verified, to satisfy the required evidentiary showing." *Pomona Valley Hosp. Med. Ctr. V. Superior Court* (2013), 213 Cal.App.4th 828, 836. "Rather than requiring the *defendant* to defeat the plaintiff's pleading by showing it is legally or factually meritless, the [425.13] motion requires the *plaintiff* to demonstrate that he possesses a legally sufficient claim which is 'substantiated,' that is, supported by competent, admissible evidence." *College Hospital Inc. v. Superior Court*

(1994) 8 Cal.4th 704, 719, *as modified (Nov. 23, 1994)* (emphasis in original).

Similar language was included in the anti-SLAPP statute, which requires the plaintiff to establish "a probability that the plaintiff will prevail on the claim", or else the claim must be stricken. Code Civ. Proc. §425.16(b)(1). Like Section 425.13, which was "enacted amid concern over routine inclusion of sham…claims", Section 425.16 is a remedial statute deserving of broad interpretation. See *College Hospital*, supra, 8 Cal. 4th at 717. This is especially true after the 1997 addition of the language directing courts to "construe[] broadly" the anti-SLAPP statute. Code of Civ. Proc. §425.16(a). According to *College Hospital*, a 1992 Senate report concluded that "current uses of the pleading hurdle" created by the anti-SLAPP statute "could be found in sections 425.13(a) and 425.14, and Civil Code section 1714.10." *Id*. at 718. Each of those statutes, like the anti-SLAPP statute, forces the burden of proof onto the plaintiff, compelling the plaintiff to produce admissible evidence to substantiate its claims. This is quite unlike a demurrer, under which plaintiffs receive substantial deference, their allegations are accepted as true, and they are given leave to amend their complaints.

There should be a different level of deference given to inconsistent claims facing a conventional challenge to the pleadings (like a demurrer) as opposed to an evidence-based motion (like a motion for summary adjudication or an anti-SLAPP motion). True, an anti-SLAPP motion to strike is nominally a challenge to the pleadings, but it is a challenge that demands evidentiary support. If the evidence forecloses one of the plaintiff's inconsistent counts, those claims should be stricken. The Fourth District, however, held that foreclosed claims may nevertheless survive an anti-SLAPP motion based on the principle that at the pleading stage, a plaintiff may "plead inconsistent counts". *Newport Harbor Ventures, LLC*

v. Morris Cerullo World Evangelism, (2016) 6 Cal.App.5th 1207, 1222-1223 ("When a pleader is in doubt about what actually occurred or what can be established by the evidence, the modern practice allows that party to plead in the alternative and make inconsistent allegations.") (citing *Mendoza v. Continental Sales Co.* (2006) 140 Cal.App.4th 1395, 1402). The Fourth District held that Respondents are not required "to make an election between the breach of contract and quantum meruit causes of action in response to the anti-SLAPP motion." *Newport Harbor Ventures, LLC*, supra, 6 Cal.App.5th at 1224. The court noted that "At some point," Respondents "might have to elect between a breach of contract remedy and a quantum meruit remedy", but "that point is not now." *Id*. at fn. 4. The Court reasoned that the "election" of remedies, or "in other words the decision as to which of them is sustained, is, after the taking of all the evidence, a matter for the judge or the jury." *Id*. at 1224 fn. 4.

On this last point, Appellants basically agree with the Fourth District: Yes, the judge should evaluate the evidence and make a decision as to which of the inconsistent claims is defeated by the evidence. Where Appellants differ with the Fourth District is the timing of this evaluation. The trial judge is supposed to make this determination in response to the anti-SLAPP motion, an evidence-based motion akin to a motion for nonsuit or directed verdict – motions which are brought "after the taking of all the evidence." Unlike a demurrer, a plaintiff opposing an anti-SLAPP motion cannot rely on allegations in the complaint, but must bring forth evidence that would be admissible at trial. *HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal. App. 4th 204, 212; *Ampex Corp. v. Cargle* (2005) 128 Cal. App. 4th 1569, 1576. In this way, an anti-SLAPP motion is more akin to a motion for summary judgment than a demurrer – albeit a motion for summary judgment where the plaintiff has the burden of proof. *Comstock v. Aber*, (2012) 212 Cal. App. 4th 931, 947 ("anti-SLAPP statute operates like

a 'motion for summary judgment in 'reverse.'"); *Simmons v. Allstate Ins. Co*. (2001) 92 Cal. App. 4th 1068, 1073 (anti-SLAPP motion "like a summary judgment motion, *pierces* the pleadings and requires an evidentiary showing…SLAPP motion is similar to that of a motion for summary judgment, nonsuit, or directed verdict."). A court "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." *Wilson v. Parker, Covert & Chidester* (2002) 28 Cal.4th 811, 821. The question is what a court should do with inconsistent claims when the evidence supporting one of those claims defeats a different, inconsistent claim. Here, the existence of the management agreement should have defeated the quasi-contract claims for promissory estoppel and quantum meruit, but the Fourth District held that a plaintiff may plead inconsistent claims even in the face of contrary evidence. The Fourth District treats the anti-SLAPP motion like a demurrer, ignoring the evidence, allowing the defeated claims to proceed, and drastically narrowing the effectiveness of the anti-SLAPP motion as a tool to root out baseless claims at the pleading stage.

The cases cited by the Fourth District in support of its opinion demonstrate how far outside the world of anti-SLAPP law the Fourth District wandered. *Id*. at 1224 fn. 4 (citing, inter alia, *Tanforan v. Tanforan* (1916) 173 Cal. 270, 274). *Tanforan v. Tanforan*, for instance, is a 1916 case about when it is appropriate to force a plaintiff to elect among inconsistent counts which "set forth the same cause of action". *Tanforan v. Tanforan* (1916) 173 Cal. 270. It has nothing to do with the anti-SLAPP statute, a modern procedural tool which did not exist until 1992. Stats. 1992, ch. 726, § 2; Code Civ. Proc. § 425.16.

The Fourth District also cited *Mendoza v. Rast Produce Co., Inc.* (2006) 140 Cal.App.4th 1395, 1402. In *Mendoza*, the defendant filed a

motion for judgment on the pleadings. When considering such a motion, the principle of "liberal construction" commands the court to draw all reasonable inferences in favor of the plaintiff and allow the plaintiff leave to amend, if there is a "reasonable possibility" that any defects can be cured by amendment. *Id*. The court held that "We need not and, based on the principle that a party may plead alternative theories that are inconsistent with one another, cannot conclude that the complaint stated one theory to the exclusion of the other." *Id*. at 1403. The court found "that the allegations in the complaint about Rast's transactions with respondents are sufficient to present both a reconsignment theory and an open price sales theory." *Id*. This holding does not apply to an anti-SLAPP motion. On an anti-SLAPP motion, the court's job is not to evaluate whether the plaintiff *stated* one theory to the exclusion of the other, but whether the plaintiff has offered evidence sufficient to *prove* their mutually exclusive theories of recovery – both of them. If the evidence disproves one of the theories, that disproved theory – the "claim", using this Court's terminology from *Baral v. Schnitt* – should be stricken.

In *Crowley v. Katleman* (1994) 8 Cal.4th 666, 691, another case cited by the Fourth District, the plaintiff appealed a demurrer dismissing his malicious prosecution lawsuit without leave to amend. This Court was asked to determine whether a litigant commits the tort of malicious prosecution if it alleges inconsistent counts, at least one of which turns out not to be legally tenable. The Court reiterated the principle that a plaintiff remains free to allege inconsistent counts without fear of malicious prosecution, as long as a reasonable attorney would find those claims legally tenable on the basis of the facts known to the plaintiff at the time. *Id*. However, the Court went on to hold that if one of those inconsistent claims was initiated with malice and without probable cause, the entire underlying lawsuit is vulnerable to a countersuit for malicious prosecution.

Id. at 693-695. Allowing a malicious prosecution lawsuit to proceed, even if some (but not all) of the underlying claims were valid, is compatible with a party's freedom to allege inconsistent causes of action. *Id*. The *Crowley* decision tweaked the contours of the tort of malicious prosecution; it said nothing about whether a plaintiff's inconsistent claims may survive an anti-SLAPP motion, or even a demurrer for that matter.[9]

A court considering an anti-SLAPP motion is supposed to evaluate each claim *individually*, looking at the evidence in front of the court and, based on that evidence, determining if the claim is defeated as a matter of law. At least, that is the analysis that this Court's holding in *Baral v. Schnitt* would seem to mandate. *Baral v. Schnitt* (Cal. 2016) 205 Cal.Rptr.3d 475, 488 (holding "an anti-SLAPP motion, like a conventional motion to strike, may be used to attack parts of a count as pleaded"). In *Baral v. Schnitt*, the Court said this is "summary-judgment-like procedure." *Baral v. Schnitt* (2016) 1 Cal.5th 376, 384. "Anti–SLAPP motions differ from summary judgment motions in that they are brought at an early stage of the litigation," discovery is stayed, and fees are available to the prevailing defendant. *Baral v. Schnitt* (2016) 1 Cal.5th 376, 385 fn. 5. Other than these procedural differences, the two types of motions are substantively the same. *Id*. There is no deference – or reference – to the allegations in the pleadings. In fact, "[i]n a summary judgment proceeding reference may be made to the *pleadings* for the purpose of defining the issues, but such reference may not be made for the purpose of remedying a failure to state facts in an affidavit." *Vallejo v. Montebello Sewer Co.* (1962) 209 Cal.App.2d 721,

[9] If anything, *Crowley* enables Appellants to maintain a malicious prosecution action once the quasi-contract claims are stricken. Whether or not there was a breach of the management agreement, the parties agree that the management agreement exists, rendering meritless the quasi-contract claims.

734. "Summary judgment is, as some courts have put it, the time to 'put up or shut up.'" *Wright v. Employers Reinsurance Corp.* (N.D. Cal., Mar. 31, 2005, No. C 04-03710 JW) 2005 WL 756618, at *8; *Weinstock v. Columbia University,* 224 F.3d 33, 41 ("When the [summary judgment] motion is made, ... [t]he time has come ... 'to put up or shut up" ') (quoting Fleming James, Jr. & Geoffrey C. Hazard, Jr., Civil Procedure 150 (2d ed.1977)). When opposing a defense motion for summary judgment, or an anti-SLAPP motion, the plaintiff must show their evidentiary cards. If those cards defeat one of their claims, the claim should be stricken.

Here, the existence of a written contract between the parties should defeat Respondents' quantum meruit and promissory estoppel claims as a matter of law. The parties agree that this written contract, supported by valid consideration, covers the same topics and obligations as the quasi-contract claims. If this had been a motion for summary judgment, the court would have dismissed the quasi-contractual claims. An anti-SLAPP motion is akin to a motion for summary judgment, so that is what should have happened here. See *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal. 4th 180, 192.

Instead of relying solely on the evidence and analyzing whether each claim could survive in the face of that evidence, the Fourth District accepted the allegations in the Third Amended Complaint as true. It held that a plaintiff is allowed to "**plead** inconsistent claims". And while that is technically correct – a plaintiff may *plead* inconsistent claims – when it comes time to *prove* or *substantiate* a claim, as on an anti-SLAPP motion or motion for summary judgment, a plaintiff cannot show a probability of success on mutually exclusive causes of action[10]. The lower court

[10] Although a plaintiff may plead inconsistent claims that allege both the existence of an enforceable agreement and the absence of an enforceable agreement, that is not what occurred here. Instead,

sidestepped the evidence, treated the anti-SLAPP motion like a demurrer, and allowed the inconsistent claims to survive.

"Broadly" interpreting the statute requires reversal of the Fourth District. It is true that plaintiffs may plead inconsistent **claims** – but they are not entitled to inconsistent **facts**. When it comes time to show evidence, the evidence will necessarily defeat one of the inconsistent claims. An anti-SLAPP motion is an evidence-based motion, and plaintiffs must provide admissible evidence to defeat it, just as they would on summary judgment. Allegations in the complaint are not enough to carry the day. *Comstock*, supra, at 950 (anti-SLAPP "plaintiff cannot rely on his pleading at all, even if verified, to demonstrate a probability of success on the merits."). The Fourth District's holding conflicts with *Baral* and *Comstock* and abrogates the purpose of the anti-SLAPP statute, which is to force a SLAPP plaintiff to abandon claims that are defeated by the evidence. This Court should reverse it, and clarify that an anti-SLAPP motion is no ordinary challenge to the pleadings, and the ordinary rule that a plaintiff may plead "inconsistent counts" does not factor into the anti-SLAPP analysis.

Respondents' breach of contract claims *and* their quasi-contract claims plead the existence of an enforceable agreement; nowhere in the third amended complaint do Respondents deny the existence or enforceability of the Management Agreement. When a plaintiff pleads the existence of a contract but fails to plead the opposite in the alternative, he is precluded from asserting a quasi-contract claim. *Klein v. Chevron U.S.A., Inc.* (2012) 202 Cal.App.4th 1342, 1389, *as modified on denial of reh'g (Feb. 24, 2012).* The third amended complaint fails to state a legally sufficient claim, let alone prove it, which is enough to grant the anti-SLAPP motion.

2. Quasi-contract claims cannot survive when a written contract covers the same obligations.

The third and fourth causes of action for promissory estoppel and quantum meruit cannot survive if there is a contract which covers the same topics. It is undisputed that such a contract exists, so these claims should have been stricken. 1 CT 135-149 (Management Agreement).

Recovery under quantum meruit is justified only "where services were performed by a party at the request of another under circumstances in which compensation for such services would be expected." *Spires v. American Bus Lines* (1984) 158 Cal.App.3d 211, 216-217. The only "services" allegedly performed here were the filing and prosecuting of the UD Action[11], but there were no "circumstances in which compensation for such services would be expected." In fact, Respondents expressly agreed **not** to seek compensation for such services, since the Management Agreement says NHV – not Appellants – are responsible for the costs of the UD Action. 1 CT 138:¶4 ("all costs associated with the duties set forth in Paragraph 1, above, shall be borne by NHV").

Quantum meruit also fails because it contradicts a written contract in which Respondents agreed to bear the fees for which they now seek reimbursement. In the Third Amended Complaint, Respondents allege they suffered damages when they "paid for all of the costs and expenses of the UD Action, which included attorney fees and costs, consultation fees for experts and appraiser [sic], expert and appraisal fees totaling more than $500,000.00 of which no amount has been reimbursed and which under the Management Agreement is owed by Defendants." 1 CT 127:4-17

[11] Technically, these services were performed by attorney Darryl Paul, not Plaintiff/Respondent VMG or Plaintiff/Respondent NHV. Since neither Respondent actually performed the services – they only paid for them – the person with standing to bring a quantum meruit claim would be Darryl Paul, not Plaintiffs/Respondents.

(idiosyncratic grammar in original). The Management Agreement, of course, says nothing of the sort. The third cause of action for quantum meruit seeks reimbursement under the Management Agreement, despite its language requiring Respondents to bear such costs and fees. 1 CT 131:24-132:7. In so arguing, Respondents omit a key element of any quantum meruit claim: A quantum meruit plaintiff cannot recover unless he reasonably expected to be reimbursed for the services he provided, and **only if there is no contract** governing the costs for which he seeks reimbursement. Quantum meruit is an implied promise to pay, and "it is well settled that there is no equitable basis for an implied-in-law promise to pay reasonable value when the parties have an actual agreement covering compensation." *Hedging Concepts, Inc. v. First Alliance Mortgage Co.* (1996) 41 Cal.App.4th 1410, 1419-20 (citing *Willman v. Gustafson* (1944) 63 Cal.App.2d 830, 147 P.2d 636 (there can be no implied promise to pay reasonable value for services when there is an express agreement to pay a fixed sum)). Quantum meruit is an equitable theory which supplies, by implication and in furtherance of equity, implicitly **missing** contractual terms. Contractual terms regarding a subject are not implicitly missing when the parties have agreed on express terms regarding that subject. A quantum meruit analysis cannot supply "missing" terms that are not missing. *Hedging Concepts, Inc.*, supra, at 1419. "Where the parties have freely, fairly and voluntarily bargained for certain benefits in exchange for undertaking certain obligations, it would be inequitable to imply a different liability." *Id*.

It is well-settled that a covenant will not be implied to contradict the express terms of an actual contract. *Hillsman v. Sutter Community Hospitals* (1984) 153 Cal.App.3d 743, 754. Because the parties formed an **actual** contract requiring Respondents to "be responsible for the costs of an Unlawful Detainer action" and "all costs associated with the duties" of

managing the property, it is error to find that Appellants nevertheless had an equitable **implied** duty to pay money to Respondents. 1 CT 138:§4 ("Costs of Asset Management"). "When parties have an actual contract covering a subject, a court cannot—not even under the guise of equity jurisprudence—substitute the court's own concepts of fairness regarding that subject in place of the parties' own contract." *Hedging Concepts, Inc.*, supra, at 1419-20. Because an actual written contract allocates the burden of paying for these costs, the quantum meruit claim fails as a matter of law.

The fourth cause of action for promissory estoppel fails because the presence of consideration is fatal to promissory estoppel.[12] *Youngman v. Nevada Irr. Dist*. (1969) 70 Cal. 2d 240, 249-250. "[W]here the promisee's reliance was bargained for, the law of consideration applies; and it is only where the reliance was unbargained for that there is room for application of the doctrine of promissory estoppel." *Id*. at 250. In the Third Amended Complaint, Respondents allege they assumed duties "**in exchange for**" promises made by MCWE. 1 CT 126:¶10. MCWE employee Roger Artz's supposed oral promise that Respondents could have an option to acquire the Subject Property was made "**in exchange for** [Respondent NHV] undertaking the litigation and expense of the UD Action and evicting NHOM." 1 CT 132:21-25. (emphasis added). The purported detrimental

[12] In addition, promissory estoppel requires a promise. In the trial court, Respondents failed to provide any proof Appellants actually made oral promises. Their sole evidence offered in opposition to the anti-SLAPP motion consisted of D'Alessio's declaration, and it was completely silent on the subject. 4 CT 1064-1068. D'Alessio's declaration does not state that Appellants made any affirmative oral promises at all. *Id*. It was Respondents' burden to provide this evidence in opposition to the anti-SLAPP motion, and they failed. See *Schertzinger v. Williams* (1961) 198 Cal.App.2d 242, 245 ("Obviously the creation of a different or separate agreement cannot be inferred from mere silence on the subject by both parties").

reliance alleged by Respondents – filing and prosecuting the UD Action – was nothing more than the very performance requested by Appellants under the Management Agreement. In other words, under the facts alleged by Respondents, the promises made by MCWE were bargained for and given in exchange for performance. Since this means that there *was* consideration, there can be no claim for promissory estoppel as a matter of law. See *Boon Rawd Trading Intern. Co., Ltd. v. Paleewong Trading Co., Inc.* (N.D. Cal. 2010) 688 F.Supp.2d 940, 953-54 (citing *Healy v. Brewster*, (1963) 59 Cal.2d 455); *Avidity Partners, LLC v. State*, (2013) 221 Cal.App.4th 1180, 1209 (denying promissory estoppel claim "because the reliance it claims was bargained-for consideration"). Respondents defeat their own promissory estoppel claim by alleging that Appellants bargained for Respondents' services as property manager.

3. Respondents do not allege any "conduct" by Appellants which could have created an implied-in-fact quasi-contract, and the Third Amended Complaint fails to allege the Management Agreement is void.

On the merits prong, the quasi-contract claims fail not just because they conflict with the written Management Agreement, but also because Respondents simply failed to allege sufficient facts in support. The anti-SLAPP statute puts the burden on the plaintiff "to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated." *Baral*, supra, 1 Cal.5th at 396. An implied or quasi-contract is one whose "existence and terms…are manifested by conduct" – not words, but *conduct*. Civ. Code §1621. An express contract, like the written Management Agreement, "is one, the terms of which are stated in words." Civ. Code §1620. Breach of implied-in-fact contract claims are dismissed where the "alleged breach is based not on conduct ... but on actual representations that Defendant made using words." *T & M*

Solar & Air Condit, Inc. v. Lennox Int'l Inc., 83 F. Supp. 3d 855, 873-74 (N.D, Cal. 2015); *Fallbrook Hosp. Corp.* v. *Cal. Nurses Ass 'n,* 2014 WL 2779763, at *5 (S.D. Cal. June 19, 2014) (dismissing breach of implied-in-fact claim where "Plaintiff does not allege the conduct that created the implied in fact agreement"); *Reiydelle* v. *JP. Morgan Chase Bank, N.A.,* 2014 WL 312348, at *13 (N.D. Cal. Jan. 28, 2014) (same).

In *Klein v. Chevron*, the plaintiffs alleged a claim for breach of contract and a quasi-contract claim. *Klein v. Chevron U.S.A., Inc.* (2012) 202 Cal.App.4th 1342, 1389. They alleged they entered an enforceable contract with Chevron each time they bought gasoline, and Chevron breached the contract by selling bad fuel. But their quasi-contract claim did not allege that this contract was unenforceable. The court dismissed the quasi-contract claim, holding that it was precluded by a contract covering the same topic, and noting that the plaintiffs never bothered to argue that the contract was unenforceable.

Respondents failed to allege that Appellants engaged in conduct establishing an implied-in-fact contract. Instead, Respondents rely solely on the alleged oral representations and assurances that were made by Appellants' agents, as well as the written Management Agreement. This is not enough to state a legally sufficient claim for promissory estoppel or quantum meruit. In fact, these allegations, if true, would *defeat* each quasi-contract claim by alleging the existence of an oral or written contract covering the same topics as the quasi-contracts. Unless the complaint also alleges that the actual contracts are void – and it doesn't – the quasi-contract claims are defeated. *Lance Camper Mfg. Corp. v. Rep. Indem. Co.*, 44 Cal. App. 4th 194, 203 (1996) (plaintiff "must allege that the express contract is void or was rescinded in order to proceed with its quasi-contract claim").

V. CONCLUSION

That the anti-SLAPP statute gives an advantage to defendants is a feature, not a bug. The 60-day period to file an anti-SLAPP motion is supposed to reopen whenever a new complaint is filed, and a defendant may challenge any of the allegations in that new complaint, pursuant to *Baral v. Schnitt*, *Lam v. Ngo*, and *Yu v. Signet Bank*. In the published opinion below, the Fourth District disagreed. This Court should reverse the Fourth District and clarify that a timely filed anti-SLAPP motion – one filed within 60 days of service of the most recently amended complaint – may target any allegations in that complaint, regardless of when they were added.

The Court should also resolve the second issue in Appellants' favor. The principle allowing inconsistent counts to survive a demurrer does not allow them to survive an anti-SLAPP motion, at least not when the evidence forecloses one of those inconsistent counts.

To give effect to the Legislature's admonition that the anti-SLAPP statute be "broadly construed", this Court should reverse the Fourth District and hold that the anti-SLAPP motion should have been granted in its entirety.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.204(c)(1))

The text of this petition consists of 12,888 words as counted by the word-processing program used to generate the petition. This number accounts for the text, footnotes, and headings, but not the signature blocks, tables, or this certificate.

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I, Kirstin Largent , declare that I am not a party to the action, am over 18 years of age and my business address is: 631 S Olive Street, Suite 600, Los Angeles, California 90014.

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