Filed 10/31/18 Wright v. Peters & Freedman CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

LAUREL WRIGHT et al., Plaintiffs and Respondents, v. PETERS & FREEDMAN, LLP et al., Defendants and Appellants.	E067366 (Super.Ct.No. PSC1506000) OPINION

APPEAL from the Superior Court of Riverside County. David M. Chapman, Judge. Affirmed.

Peters & Freedman, Keenan A. Parker and David M. Peters for Defendants and Appellants.

Law Offices of Joseph Amato and Joseph Amato for Plaintiffs and Respondents.

Plaintiffs and respondents Laurel Wright and Marvin Hersh, homeowners in a residential desert community, challenge an amendment to their homeowners association's covenants, conditions and restrictions (CC&Rs) that added a $250 monthly assessment to cover the costs associated with the members-only golf and tennis club located within the

community, and an assessment of $550.96 per lot "to fund defense of case #1505335," the original lawsuit filed by homeowners who sought to challenge the $250 monthly assessment. Plaintiffs sued several defendants, including appellants Peters & Freedman, LLP, and David M. Peters (Peters Defendants), lawyers for the homeowners association. The Peters Defendants filed a special motion to strike the action as a strategic lawsuit against public participation (anti-SLAPP motion[1]) pursuant to Code of Civil Procedure section 425.16. The trial court denied the anti-SLAPP motion on the grounds that plaintiffs' causes of action did not arise out of protected activity. We affirm.

I. PROCEDURAL BACKGROUND AND FACTS[2]

Plaintiffs are residents of the Morningside Community in Rancho Mirage, California. The Morningside Community Association (Association) manages the common areas of Morningside Community. Located within Morningside Community is the Club at Morningside (Club), a members-only golf and tennis club. All residents are members of the Association; however, at the time relevant to this action, only 58 percent

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[1] "SLAPP" is an acronym for "strategic lawsuit against public participation." (*Equilon Enterprises v. Consumer Cause, Inc*. (2002) 29 Cal.4th 53, 57 (*Equilon Enterprises*).)

[2] This is the first of three appeals in this case. We take judicial notice of *Wright v. The Morningside Community Association*, case No. E067818, involving the second appeal, and *Wright v. The Club at Morningside*, case No. E067980, involving the third appeal. (Evid. Code, §§ 452, subd. (d), 459, subd. (a).) We also take judicial notice of *Asher v. Peters & Freedman, LLP*, case No. E067519, and *Asher v. The Morningside Community Association*, case No. E067815, two appeals from a related case, *Asher et al., v. The Morningside Community Association et al*., Riverside Superior Court No. PSC1505335 (the *Asher* Action).

of the members of the Association were also members of the Club (Club/Association Members).

In 1983, CC&Rs for the Association were recorded. The CC&Rs provide for assessments on each residence in order to pay for common expenses, including maintenance of common areas, and facilities in Morningside Community. Separate from common areas are the property and facilities located within the Club. Due to the recession of 2008, golf course communities found it difficult to attract and retain members. The Club relied on member dues as its primary source of revenue, and as membership dropped, the Club asked the Association for financial assistance. By 2014, the Club did not have sufficient income or capital funds to "maintain itself as a first class golf club in the long term." By early 2015, the number of Club/Association Members dropped from 80 percent to 58 percent. The governing boards for both the Association and the Club worked together to consider strategies for long-term viability of the Club.

Outside their board meetings and without any motion, discussion or vote taken at a board meeting, the Association's directors discussed, considered and agreed to the addition of a new assessment (solely for use by the Club). The first open discussion of this new assessment was made in March 2015 when, relying on the legal advice of the Peters Defendants, the Association's directors notified residents that it was considering a new assessment or fee (Proprietary Fee) on each residence in the amount of $250 per month. It informed residents that this fee "would be dedicated solely to and used for the maintenance and landscaping of the golf course property at today's current standards." The funds generated would be held in a separate trust account. Payment by residents who

were not Club members did not grant ownership interest or privileges in the Club or its property. Although the fee appeared to be facially neutral in that it would be assessed against all residents equally, Club/Association Members would receive a credit of 100 percent of the monthly payment towards Club dues. Adoption of the Proprietary Fee required an amendment to the CC&Rs approved by a majority of the residents.

Because passage of the Proprietary Fee would result in residents who were not Club members subsidizing the Club, the Association's directors (who were also Club members) and the Club had a direct financial interest in the outcome of the election. Association's directors expressed concern that opponents of the ballot measure could claim the election was rigged if they (Association's directors) counted the votes. Therefore, the Association retained Mr. Peters as the inspector of elections. However, during the voting period, the directors continued to seek and rely on legal advice about the election process from the Peters Defendants, specifically Mr. Peters. The Peters Defendants supplied information (including ballots received and cast) to the Association's directors, including a list of members who had not voted, for the purpose of contacting them to remind them to vote.

On May 19, 2015, the votes were tabulated and the amendment passed, receiving 63.5 percent of the residents' votes. That same day, the Association recorded the First Amendment to the CC&Rs. The First Amendment provides that the Proprietary Fee shall be "deposited into a separate trust account from which funds will be disbursed to The Club . . . to cover maintenance expenses, including without limitation, a portion of The Club's landscaping costs, to assist in the financial viability of The Club."

On November 17, 2015, several residents initiated the *Asher* Action to challenge the validity of the First Amendment. On December 29, 2015, plaintiffs initiated this action challenging the validity of the First Amendment, along with the imposition of the assessment of $550.96 per lot to fund the defense of the *Asher* Action. Based on information gained through discovery, plaintiffs amended their complaint (FAC) on September 22, 2016, adding the Peters Defendants and alleging fraud/deceit (third cause of action), conspiracy (fifth cause of action), intentional infliction of emotional distress (seventh cause of action), restitution (tenth cause of action), negligence (eleventh cause of action), and breach of fiduciary duties (twelfth cause of action) claims against them.

On October 31, 2016, the Peters Defendants moved to strike the causes of action against them on the grounds that "the Complaint falls squarely within the scope of [the anti-SLAPP statute], relating to [their] right of free speech and petitioning in the election process," and that plaintiffs cannot establish a "probability of prevailing" on this claim. The trial court denied the anti-SLAPP motion, concluding that the plaintiffs' action did not arise from the Peters Defendants' protected activity. The court observed that "not all activity by an association is protected and there is a distinction between a suit arising from protected activity, and a suit that was prompted by protected activity. Only suits arising from protected activity are subject to an anti-SLAPP motion to strike. Here, the gravamen of the complaint is that Plaintiffs seek to set aside the adoption of the Propriety [*sic*] Fee in part on grounds that the election was not properly conducted. Plaintiffs' challenge to [the Peters Defendants'] actions related to the election does not 'arise from' a right of free speech or constitutional right of petition."

II. DISCUSSION

The trial court found that the Peters Defendants failed to meet their burden of proving that plaintiffs' claims arose out of protected activity. The Peters Defendants argue that their conduct falls under Code of Civil Procedure section 425.16, subdivisions (e)(2), (e)(3), and/or (e)(4). As we explain, the trial court did not err in its decision because the claims in the FAC do not arise from constitutionally protected free speech or petitioning activities.

A. Anti-SLAPP Law.

"The anti-SLAPP statute does not insulate defendants from *any* liability for claims arising from the protected rights of petition or speech. It only provides a procedure for weeding out, at an early stage, *meritless* claims arising from protected activity. Resolution of an anti-SLAPP motion involves two steps. First, the defendant must establish that the challenged claim arises from activity protected by [Code of Civil Procedure] section 425.16. [Citation.]" (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384.) In determining whether a cause of action arises from protected activity "'the critical consideration is whether the cause of action is *based on* the defendant's protected free speech or petitioning activity.'" (*Department of Fair Employment & Housing v. 1105 Alta Loma Road Apartments, LLC* (2007) 154 Cal.App.4th 1273, 1284.) To determine whether this requirement is met, we consider "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (Code Civ. Proc., § 425.16, subd. (b)(2); see *Equilon, supra,* 29 Cal.4th at p. 67.)

Once the defendant has established that the challenged claim arises from protected activity, "the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success. [The California Supreme Court has] described this second step as a 'summary-judgment-like procedure.' [Citation.][3] The court does not weigh evidence or resolve conflicting factual claims. Its inquiry is limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment. It accepts the plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law. [Citation.] '[C]laims with the requisite minimal merit may proceed.' [Citation.]" (*Baral v. Schnitt, supra,* 1 Cal.5th at pp. 384-385.)

We review an order granting or denying a motion to strike under Code of Civil Procedure section 425.16 de novo. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.)

B. Analysis.

1. Plaintiffs' Allegations Do Not Arise from Protected Activity.

Under the first step of the anti-SLAPP analysis, the Peters Defendants must show that (1) the FAC alleges protected speech or conduct, *and* (2) the relief is sought based on allegations arising from the protected activity. (*Park v. Board of Trustees of California*

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3 "Anti-SLAPP motions differ from summary judgment motions in that they are brought at an early stage of the litigation, ordinarily within 60 days after the complaint is served. ([Code Civ. Proc.,] § 425.16, subd. (f).) Discovery is stayed, absent permission from the court. ([Code Civ. Proc.,] § 425.16, subd. (g).) Thus, the defendant may test the sufficiency of the plaintiff's claims before incurring the costs and disruptions of ordinary pretrial proceedings."

State University (2017) 2 Cal.5th 1057, 1062-1063 (*Park*).) We find that they fail to meet this burden.

Regarding the protected speech/conduct requirement, Code of Civil Procedure section 425.16, subdivision (e), provides that an "'act in furtherance of a person's right of petition or free speech'" includes, as relevant here, "(2) any written or oral statement or writing 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." Petitioning activity may include oral or written statements made and conduct taken at board meetings and elections of a homeowners association. (*Lee v. Silveira* (2016) 6 Cal.App.5th 527, 540-545; *Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 475, 479.)

Regarding the "'arising from' requirement ([Code Civ. Proc.,] § 425.16, subd. (b)(1)), the defendant must show 'the defendant's act underlying the plaintiff's cause of action [was] *itself*' a protected act. [Citation.] '[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.' [Citation.] 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.' [Citations.]" (*Gaynor v. Bulen* (2018) 19 Cal.App.5th 864, 877].)

In *Park, supra*, 2 Cal.5th at pages 1060-1062, the California Supreme Court decided that an assistant professor's action to recover damages for a university's denial of tenure due to national origin discrimination was not subject to an anti-SLAPP motion, despite the fact that there were several communications by the defendants that led up to the challenged decision. The Supreme Court explained the "arising from" requirement, stressing the need for courts to decide whether the protected activity was the alleged injury-producing act that established the basis for the plaintiff's claim. (*Park, supra*, at pp. 1062-1063.) The Supreme Court stated that to satisfy the "arising from" requirement, the defendant must show that his or her conduct by which plaintiff claims to have been injured meets the statutory definition of protected activity, and "in ruling on an anti-SLAPP motion, courts should consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability." (*Id*. at p. 1063.) In short, courts must distinguish between "activities that form the basis for a claim and those that merely lead to the liability-creating activity or provide evidentiary support for the claim." (*Id*. at p. 1064.)

To illustrate its point, the *Park* court compared two of its prior decisions, *City of Cotati v. Cashman* (2002) 29 Cal.4th 69 (*City of Cotati*), and *Navellier v. Sletten* (2002) 29 Cal.4th 82 (*Navellier*). (*Park, supra*, 2 Cal.5th at p. 1063.) In *City of Cotati*, a city initiated an action against the owners of mobilehome parks seeking a declaratory judgment that its rent control ordinance was constitutional. (*City of Cotati, supra*, at p. 72.) The city's suit was filed after the defendant owners brought a federal suit seeking declaratory relief invalidating the same ordinance. (*Ibid*.) In the state action, the

defendant owners filed an anti-SLAPP motion alleging the city's claim arose from their protected activity of filing the federal suit. (*City of Cotati*, *supra*, at pp. 72-73.) The Supreme Court disagreed, explaining that since the constitutionality of the ordinance was the underlying dispute between the parties and the primary controversy in the city's state action, the city's claim did not arise from the owners' federal suit. (*Id*. at p. 80.)

"In contrast, in [*Navellier*], another case in which the defendant's protected activity was the prior filing of court claims, the prior claims were an essential part of the activity allegedly giving rise to liability. The *Navellier* plaintiffs sued for breach of contract and fraud, alleging the defendant had signed a release of claims without any intent to be bound by it and then violated the release by filing counterclaims in a pending action in contravention of the release's terms. Unlike in *City of Cotati*, the defendant was 'being sued because of the affirmative counterclaims he filed in federal court. In fact, but for the federal lawsuit and [the defendant's] alleged actions taken in connection with that litigation, plaintiffs' present claims would have no basis. This action therefore falls squarely within the ambit of the anti-SLAPP statute's "arising from" prong.' [Citation.]" (*Park, supra*, 2 Cal.5th at p. 1063.)

The *Park* court recognized that both *City of Cotati* and *Navellier* presented a situation wherein "the claim challenged as a SLAPP was filed *because of* protected activity," but pointed out that only one case, *Navellier*, involved a situation where the prior protected activity supplied the "elements of the challenged claim." (*Park, supra*, 2 Cal.5th at p. 1064.) Thus, the Supreme Court emphasized the need "to respect the distinction between activities that form the basis for a claim and those that merely lead to

the liability-creating activity or provide evidentiary support for the claim." (*Ibid*.; see *San Ramon Valley Fire Protection Dist. v. Contra Costa County Employees' Retirement Assn*. (2004) 125 Cal.App.4th 343, 353-354, [the mere fact an action was filed after protected activity took place does not mean it arose from that activity; rather, the anti-SLAPP statute's definitional focus is on whether the defendant's activity giving rise to his or her asserted liability constitutes protected speech, petitioning or conduct]; see also *Foothills Townhome Assn. v. Christiansen* (1998) 65 Cal.App.4th 688, 695-696) [motion to strike denied where a private homeowners association sued a member to collect an assessment despite finding that the member's "alleged activities involved matters of sufficient public interest made in a sufficiently public forum to invoke the protection of [Code of Civil Procedure] section 425.16"], disapproved on other grounds in *Equilon, supra*, 29 Cal.4th at p. 58.)

Here, the FAC alleges causes of action for fraud/deceit, conspiracy,[4] intentional infliction of emotional distress, restitution, negligence, and breach of fiduciary duties against the Peters Defendants. These causes of action arise out of two types of conduct on the defendants' part. First, the FAC alleges that the defendants improperly schemed to amend the CC&Rs to include a $250 monthly assessment which would be paid only by non-Club members for the benefit of Club members. Second, the FAC alleges that the

[4] The FAC alleges a conspiracy between the defendants regarding the actions taken to amend the CC&Rs to add the Proprietary Fee. Because such actions encompass those leading up to, and including, the election regarding the Proprietary Fee, we consider the conduct of all defendants, not just the Peters Defendants, in determining whether the claims asserted in the FAC against the Peters Defendants' arise from protected activity.

defendants "engaged in a course of conduct designed to undermine the integrity of the election" and to mislead plaintiffs "into believing that the vote and count proceeded fairly and in accordance with [the] law . . . ."

Although defendants' conduct at the Association's board meetings and the election regarding the Proprietary Fee encompasses protected activity, it is not the protected activity from which plaintiffs' claims arise. The alleged representations and actions were not about the Association's election on the Proprietary Fee or anyone encouraging a member to get out and vote, but about the alleged misconduct that defendants employed to ensure its implementation. We reject any effort to characterize all of defendants' activities (discussing, resolving, communicating the need for the Proprietary Fee, and contacting members regarding the election) as involving protected speech or petitioning conduct because they involve the governance of the Association and the Association's directors' right to solicit members' votes. The fact that the Association's directors' representations to members may have been made in public forums in which they sought to garner the support of the members, and may have been of interest to a particular community, does not convert all of their statements into acts "'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.'" (Code Civ. Proc., § 425.16, subd. (e).) Were we to accept such argument, every lawsuit concerning a private organization's business practices could be described broadly as involving "governing conduct" and would be barred under the anti-SLAPP statute, resulting in an evisceration of tort and the unfair business practices laws. (*Jewett v. Capital One Bank* (2003) 113 Cal.App.4th 805, 815.)

Similarly, the Peters Defendants' alleged misconduct surrounding the election on the Proprietary Fee may not be grouped with legitimate protected activity simply because the election involved a proposed amendment to the CC&Rs that was of interest to "all Association Members." (Original underlining.) Nor is such result dictated by the cases cited by the Peters Defendants involving the issue of when conduct involves the "public interest." (See *Damon v. Ocean Hills Journalism Club, supra,* 85 Cal.App.4th at pp. 479-480 [motion to strike granted where former manager of homeowners association sued the association for defamation over statements made about manager's policies because this controversy was "inherently political"]; *Country Side Villas Homeowners Assn. v. Ivie* (2011) 193 Cal.App.4th 1110, 1118 [homeowner's defamation complaint about a community association's management was a matter of public concern covered under Code of Civil Procedure section 425.16, subd. (e)(4)]; *Colyear v. Rolling Hills Community Assn. of Rancho Palos Verdes* (2017) 9 Cal.App.5th 119, 130-134 [homeowner's view impairment application constituted a written statement made in connection with an issue of public interest]; *Ruiz v. Harbor View Community Association* (2005) 134 Cal.App.4th 1456, 1470 [court granted anti-SLAPP motion against libel complaint aimed at attorney's letters to homeowners association regarding dispute over denial of homeowners' application to rebuild their house].) In each of these cases, motions to strike were granted where a complaint sought to suppress political or noncommercial speech through injunctive relief, or libel, slander and defamation claims. This is not the same situation. Again, the FAC is concerned with alleged misrepresentations and/or tortious actions taken by the defendants to insure the

implementation of the Proprietary Fee; it is not concerned with political and/or noncommercial speech. We look to the "pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based" (Code Civ. Proc., § 425.16, subd. (b)(2); see *Equilon, supra*, 29 Cal.4th at p. 67) when determining whether plaintiffs' claims "arise from" protected activity. Here, the pleadings and the affidavits allege a conflict of interest on the part of each Association director who was also a member of the Club, misrepresentations regarding the necessity of a permanent $250 monthly assessment solely for the benefit of the Club, and disclosure of confidential election information in order to manipulate election results. "In short the allegations, if proved, render this case not about protected activity but unprotected duplicity." (*World Financial Group, Inc. v. HBW Ins. & Financial Services, Inc.* (2009) 172 Cal.App.4th 1561, 1573.) The anti-SLAPP motion therefore was properly denied.

2. The Plaintiffs Have Demonstrated a Minimum Probability of Prevailing on Their Claims.

Because we conclude that the Peters Defendants did not meet their initial burden of establishing that the FAC "arises from" protected activity, we are not required to consider whether plaintiffs met their burden of establishing a probability of success on the merits. Nonetheless, as an alternative ground for our conclusion, we discuss the second prong of the anti-SLAPP analysis.

In order to show a probability of prevailing, plaintiffs must demonstrate that their causes of action have a """minimum level of legal sufficiency and triability,""" i.e., """minimal merit."""" (*Lanz v. Goldstone* (2015) 243 Cal.App.4th 441, 457.) """As is

true with summary judgment motions, the issues in an anti-SLAPP motion are framed by the pleadings. [Citation.] The plaintiff may not rely solely on its complaint, even if verified; instead, its proof must be made upon competent admissible evidence. [Citation.] In reviewing the plaintiff's evidence, the court does not weigh it; rather, it simply determines whether the plaintiff has made a prima facie showing of facts necessary to establish its claim at trial. [Citation.]" [Citation.]' [Citation.] 'When reviewing a ruling on a defendant's [Code of Civil Procedure] section 425.16 special motion to strike a complaint, we employ our independent judgment.' [Citation.]" (*Oviedo v. Windsor Twelve Properties, LLC* (2012) 212 Cal.App.4th 97, 109.) Applying this step, we conclude that plaintiffs have established the merits of their claims, with the exception of the claim for intentional infliction of emotional distress.

a. Further background facts.

The FAC identifies a number of acts of alleged misconduct surrounding the election on the Proprietary Fee. The acts of the alleged misconduct were exposed through discovery. The following was revealed:

On April 22, 2015, Christopher Norman (an Association director and Club member) sent an email message to Michele Abdelnour (general manager of the Association), Randy Zien (an Association director and Club member), and Greg Harris (general manager of the Club), stating the following: "I just spoke with Dave Peters. Because I asked him for the list of who has voted he is sending it to me. If someone else asks him for it he will send it to them. Let's keep this absolutely between the four of us. Michele, you won't need to see it and I know you won't mention it. I will get it over to

Greg and Randy as soon as I receive it. Greg, you will have to just ask people to call certain members without telling them you know they haven't voted." On April 23, 2015, Mr. Harris asked Ms. Abdelnour to send a replacement ballot to Ray Yates, one of the members who did not sign his ballot.

On April 28, 2015, Mr. Harris emailed Rusty Goepel and Richard Cantlin (both Association members and Club governing board members), Randy Zien, Christopher Norman, and Shelley Tratch (Zien's spouse) attaching an "updated spreadsheet with votes received as of [April 27, 2015]." He stated, "We have received 216 votes with 122 Yes votes, 86 no votes and 8 member votes that we are not sure of. That is a 56.5% yes rate which is too close for comfort!"

On May 1, 2015, Mr. Harris emailed Messrs. Goepel, Cantlin and Norman updated information on the vote count. He stated: "Attached is the updated vote tracker as of today. There are now 266 ballots in with 157 yes votes and 2 yes votes that were not signed. 97 no votes. We are now at 59% yes votes of those sent back and need another 23 yes votes to pass the measure. There are 43 members who are 'yesses' whose ballots have not been received, 7 non-members or new members who have indicated they will vote yes and 14 members who are on the fence. The votes are there . . . we just need to go get them! WE are getting close." (Original capitalization.) Mr. Harris sent further updates on May 6, May 8, May 13, and May 15, 2015. In the May 13, 2015, update, Mr. Harris stated: "We still do not have the replacement ballots for Mr. Rosen and Stein so I will call them both tomorrow." In the May 15, 2015, update, Mr. Harris stated, "Mr. Goepel. I tried Mr. Stein twice yesterday and did not get a response. He seemed to

respond promptly to your emails. Would you mind sending him another note reminding him that he did not sign his first ballot and needs to send the second one in? The Rotner's [*sic*] are contacting Mr. Rosen."

On May 22, 2015, Mr. Peters submitted his official report as inspector of the election. According to that report, the votes were counted and the ballots were tabulated on May 19, 2015, at 9:00 a.m.

b. Analysis.

The Peters Defendants moved to strike the third (fraud/deceit), fifth (conspiracy), seventh (intentional infliction of emotional distress), tenth (restitution), eleventh (negligence), and twelfth (breach of fiduciary duties) causes of action in the first amended complaint.

We consider the fraud/deceit, conspiracy, negligence and breach of fiduciary duties causes of action together, as they are based on the defendants' allegedly tortious conduct in providing confidential voter information to the governing members of the Association and the Club during the voting period. If we conclude that plaintiffs have demonstrated a probability of prevailing on the merits of these claims, then it follows that they have also demonstrated a probability of prevailing on their claim for restitution. Separately, we consider the claim for intentional infliction of emotional distress.

1. Intentional Infliction of Emotional Distress.

"The elements of a cause of action for intentional infliction of emotional distress are: '"(1) outrageous conduct by the defendant, (2) intention to cause or reckless disregard of the probability of causing emotional distress, (3) severe emotional suffering

and (4) actual and proximate causation of the emotional distress."' [Citation.]" (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1376 (*Wong*).) "The California Supreme Court has set a 'high bar' for what can constitute severe distress. [Citation.] 'Severe emotional distress means "'emotional distress of such substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it.'" [Citations.]' [Citations.]" (*Ibid.*)

The California Supreme Court has held that a plaintiff's assertions that the defendant's conduct caused her to suffer "discomfort, worry, anxiety, upset stomach, concern, and agitation" did not constitute the substantial or enduring emotional distress that would support a cause of action for intentional infliction of emotional distress. (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1051 (*Hughes*).) In *Wong*, the plaintiff claimed that the defendant's conduct was "very emotionally upsetting" and caused her to lose sleep and to have an upset stomach and generalized anxiety. (*Wong*, *supra*, 189 Cal.App.4th at p. 1377.) The Court of Appeal held that the plaintiff had not shown emotional distress that was any more "severe, lasting, or enduring" than the emotional distress shown by the *Hughes* plaintiff. (*Wong*, *supra*, at p. 1377.) Thus, the plaintiff's reaction did not "constitute the sort of severe emotional distress of such lasting and enduring quality that no reasonable person should be expected to endure. [Citation.]" (*Ibid.*)

Here, plaintiffs claim that the conduct of the Peters Defendants caused them to experience "anger, chagrin, shame, worry, disappointment, and humiliation." They further assert that they sustained "extreme stress, anxiety, shock, and nervous trauma"

Such emotional distress is no more severe than the emotional distress alleged in *Hughes* and *Wong*. Thus, it does not constitute "'"'"emotional distress of such substantial quality or enduring quality that no reasonable [person] in civilized society should be expected to endure it.'"'"' (*Hughes, supra,* 46 Cal.4th at p. 1051.) Accordingly, plaintiffs failed to demonstrate that their seventh cause of action for intentional infliction of emotional distress possesses at least minimal merit within the meaning of the anti-SLAPP statute.

2. Conspiracy, Fraud/Deceit, Negligence and Breach of Fiduciary Duty.

"Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration. [Citation.] By participation in a civil conspiracy, a coconspirator effectively adopts as his or her own the torts of other coconspirators within the ambit of the conspiracy. [Citation.] In this way, a coconspirator incurs tort liability co-equal with the immediate tortfeasors." (*Applied Equipment Corp. v. Litton Saudi Arabia Ltd*. (1994) 7 Cal.4th 503, 510-511.) "'"The elements of an action for civil conspiracy are the formation and operation of the conspiracy and damage resulting to plaintiff from an act or acts done in furtherance of the common design. . . . In such an action the major significance of the conspiracy lies in the fact that it renders each participant in the wrongful act responsible as a joint tortfeasor for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor and regardless of the degree of his activity."' [Citation.]" (*Id*. at p. 511.)

"The well-established common law elements of fraud which give rise to the tort action for deceit are: (1) misrepresentation of a material fact (consisting of false

representation, concealment or nondisclosure); (2) knowledge of falsity (scienter); (3) intent to deceive and induce reliance; (4) justifiable reliance on the misrepresentation; and (5) resulting damage. [Citations.]" (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 481-482.) The elements of a cause of action for negligence are: (1) the existence of the duty; (2) breach of that duty; (3) a causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the negligence. (*Tribeca Companies, LLC v. First American Title Ins. Co.* (2015) 239 Cal.App.4th 1088, 1114.) The elements of a cause of action for breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) breach of fiduciary duty, and (3) damage proximately caused by the breach. (*Shopoff & Cavallo LLP v. Hyon* (2008) 167 Cal.App.4th 1489, 1509.)

Plaintiffs contend that the Peters Defendants had duties of trust and good faith, which required them to manage the election with the highest degree of impartiality so as to ensure that it was conducted fairly in accordance with all applicable election laws, including those set forth in the Davis-Stirling Common Interest Development Act (the Act), Civil Code sections 4000, and 5100, et seq. Plaintiffs further assert that defendants "engaged in a course of conduct designed to undermine the integrity of the election" and to mislead plaintiffs "into believing that the vote and count proceeded fairly and in accordance with [the] law."

The Act's election provisions govern, inter alia, the "elections regarding assessments legally requiring a vote." (Civ. Code, § 5100, subd. (a).) They require homeowners associations to select one or three "independent third party or parties as an

inspector of elections." (Civ. Code, § 5110, subd. (a).) "An independent third party may not be a person, business entity, or subdivision of a business entity who is currently employed or under contract to the association for any compensable services unless expressly authorized by rules of the association . . . ." (Civ. Code, § 5110, subd. (b).) The *inspectors of elections shall*, among other duties, "[c]ount and tabulate all votes" (*id.*, subd. (c)(5)); "[d]etermine the tabulated results of the election" (*id*., subd. (c)(7)); "[p]erform any acts as may be proper to conduct the election with fairness to all members" (*id*., subd. (c)(8)); and "*perform all duties impartially, in good faith,* to the best of the inspector of election's ability . . . ." (*Id.*, subd. (d), italics added.)

The statutes set forth specific procedures for ensuring the secrecy of ballots, provide that ballot counting be conducted in public, and specify who shall retain custody of the sealed ballots until after the tabulation of the vote. (Civ. Code, §§ 5115, 5120, 5125.) More precisely, "*[n]o person,* including a member of the association or an employee of the management company, *shall open or otherwise review any ballot prior to the time and place at which the ballots are counted and tabulated*. The inspector of elections, or the designee of the inspector of elections, may verify the member's information and signature on the outer envelope prior to the meeting at which ballots are tabulated. *Once a secret ballot is received by the inspector of elections, it shall be irrevocable*." (Civ. Code, § 5120, subd. (a), italics added.) An association member may initiate a civil action for a violation of the Act, and if the action is successful, a court may void the election results. (Civ. Code, § 5145, subd. (a).)

While the FAC identifies, and plaintiffs argue, a number of acts of alleged misconduct surrounding the election on the Proprietary Fee, for purposes of reviewing the ruling on an anti-SLAPP motion, it is enough to focus on just one. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.) The Peters Defendants were both the Association's attorneys and inspector of the election. As the Association's attorneys, they were fiduciaries "'of the very highest character.'" (*Ibid.*) As inspectors of the election, plaintiffs contend that they had the duty "to ensure the election was conducted fairly, with advantages or disadvantages given to neither side, and in accordance [with] all applicable election laws, including the [Act]." As previously explained, "*[n]o person . . . shall open or otherwise review any ballot prior to the time and place at which the ballots are counted and tabulated*." (Civ. Code, § 5120, subd. (a), italics added.) Accordingly, the inspector of elections is prohibited from opening or otherwise reviewing ballots prior to the date and time at which they are to be counted and tabulated.

Plaintiffs contend that the Peters Defendants violated the provisions of the Act when they "released confidential voter identity information to members of the Association and the Club," thereby facilitating the passing of the Proprietary Fee. To support their contention, plaintiffs offered the email exchanges between the Association's directors and the general manager of the Club, which evidence their knowledge of the vote count, unsigned ballot packages,[5] and actions they took to increase the number of

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[5] During oral argument, the Peters Defendants pointed out that the homeowners received ballot packages, consisting of an envelope within an envelope. The inside envelope, which contained the actual ballot with no identifying information, was placed

[footnote continued on next page]

votes in favor of passing the Proprietary Fee. Considering these undisputed communications (detailed previously) and the contents therein, it is reasonable to infer that the Peters Defendants violated the Act when they reviewed the ballot packages and disclosed the identities of those who had cast a ballot, along with any shortcomings in the ballot packages themselves (for example, that they were unsigned). Based on this showing, we conclude that plaintiffs have demonstrated a probability of prevailing on these causes of action.

The Peters Defendants offer a number of arguments as to why the causes of action are neither legally nor factually sufficient, but none of them address the review and disclosure of confidential ballot information, or are persuasive.

In response to plaintiffs' contention that they violated the provisions of the Act, the Peters Defendants argue that "nothing statutorily prohibits providing the identities of members who have either voted or have not voted."[6] However, this court finds that the

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[footnote continued from previous page]
inside the outside envelope, which required the voters' identity information and signature.

[6] During oral argument, the Peters Defendants maintained that their actions amounted to nothing more than soliciting the maximum participation of the homeowners in the election. They referenced *Fourth La Costa Condominium Owners Assn. v. Seith* (2008) 159 Cal.App.4th 563, and *Quail Lakes Owners Assn. v. Kozina* (2012) 204 Cal.App.4th 1132, 1138-1139 [homeowners association is the de facto representative of the homeowners; individual homeowner may not "raise due process claims on the purported behalf of objecting homeowners"].) In *Fourth La Costa*, a homeowners association sought to amend the CC&Rs and bylaws by vote. (*Fourth La Costa*, *supra*, at p. 568.) In an August newsletter to owners, the association asked for an affirmative vote and notified them of an October 1 informational meeting. It requested that the owners return their ballots by October 7. The owners were reminded to vote in the September

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disclosure of that information to the other defendants invaded the sanctity of the voting process allowing defendants to contact members during the voting period to confirm they had voted or to persuade those who had not voted to submit their ballot packages. Also, during the voting period, while ballot packages were still being submitted to the inspector, the governing members of the Association and the Club were tabulating voting totals, suggesting that the disclosure of who had voted allowed the Association and the Club to manipulate the outcome of the election. Moreover, the Peters Defendants allowed unsigned ballot packages to be replaced with signed ballot packages when they informed the Association's directors or general manager that certain members' ballot packages were unsigned. Those individuals, in turn, arranged for additional ballot packages to be sent to those members, who then recast their ballots and sent them to the Peters Defendants. However, Civil Code section 5120 provides that "[o]nce a secret ballot is received by the inspector of elections, it shall be irrevocable." (Civ. Code, § 5120, subd. (a).)

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newsletter. When many owners failed to return their ballots, the association sent another ballot on October 11 to "each owner who had not voted." (*Ibid*.) Division One of this District found that sending another ballot to the owners who had not voted satisfied the statutory requirement that an association make a "reasonably diligent effort . . . to permit all eligible members to vote on the proposed amendment." (*Id.* at p. 574, citing Civ. Code, former § 1356, subd. (c) [Added Stats. 1985, ch. 1003, § 1; repealed Stats. 2012, ch. 180, § 1 (AB 805), eff. Jan. 1, 2013, operative Jan. 1, 2014.].) In contrast to the facts in *Fourth La Costa*, here the Association never contacted all the homeowners who had not voted. Rather, the Club's general manager (Mr. Harris) or Club members contacted them. Moreover, the evidence suggests that they only contacted those homeowners who had indicated a favorable vote based on the Club's prior polling.

Finally, we conclude that plaintiffs have set forth a prima facie case of actual injury and entitlement to relief and damages. Plaintiffs argue that because of the breach of the Peters Defendants' duties and their intentional conduct, the results of the election that approved the Proprietary Fee are invalid, plaintiffs are entitled to a refund of all sums paid in connection with the Proprietary Fee, and plaintiffs were compelled to retain legal counsel to protect their rights.

Based on the respective showings of the parties, we conclude that plaintiffs' claims for conspiracy, fraud/deceit, negligence, breach of fiduciary duty, and restitution possess at least minimal merit within the meaning of the anti-SLAPP statute.

III. DISPOSITION

The order denying the anti-SLAPP motion is affirmed. Plaintiffs are awarded costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

CODRINGTON
J.

SLOUGH
J.