Case No. B308496

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION 2

MOUNTAINGATE OPEN SPACE MAINTENANCE ASSOCIATION ET AL.,

Plaintiffs and Appellees,

v.

MONTEVERDI, LLC, A CALIFORNIA LIMITED LIABILITY COMPANY, BERGGRUEN INSTITUTE ET AL.,

Defendants and Appellants.

Appeal from the Superior Court of the County of Los Angeles
Superior Court Case No. 19STCV33839
The Honorable Rupert Byrdsong, Judge Presiding

APPELLANTS' OPENING BRIEF

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Document received by the CA 2nd District Court of Appeal.

TABLE OF CONTENTS

Page(s)

I. INTRODUCTION 9

II. STATEMENT OF THE CASE 13

III. STATEMENT OF APPEALABILITY 14

IV. STATEMENT OF FACTS 14

A. C&C acquires and seeks to develop the Adjacent Land. 14

B. C&C and MOSMA execute the MOU. 15

C. Monteverdi acquires and seeks to develop a portion of the Adjacent Land. 16

D. Plaintiffs file this action. 18

E. The trial court denies Berggruen's special motion to strike. 21

V. LEGAL STANDARD 21

VI. STANDARD OF REVIEW 22

VII. ARGUMENT 23

A. Berggruen satisfied step one of the anti-SLAPP statute because Plaintiffs' claims arise from protected activity. 23

1. In analyzing step one, courts must determine whether the plaintiff's claims arise from defendant's protected activity. 24

2. All of Plaintiffs' claims arise from Berggruen initiating the City's environmental review and engaging in related lobbying activities. .. 26

Document received by the CA 2nd District Court of Appeal.

TABLE OF CONTENTS (*Continued*)

Page(s)

3. Berggruen's filing of the EAF and related activities are indisputably protected conduct. 31

4. The trial court's analysis of step one was legally and logically flawed. 34

B. Plaintiffs did not and cannot establish a probability of success under step two of the anti-SLAPP analysis... 38

1. The MOU does not give rise to any viable claim against Berggruen. 38

a. Berggruen is not bound by the MOU.... 39

b. The MOU does not run with the land... 42

c. The MOU is not an equitable servitude.. 43

2. The MOU does not create a permanent restriction on development............................. 44

3. MOSMA cannot recover because it breached the MOU... 45

4. Berggruen received no benefit, and MOSMA suffered no damages. 47

5. Plaintiffs' claim for declaratory relief regarding Stoney Hill Road fails.................... 48

VIII. CONCLUSION... 51

Document received by the CA 2nd District Court of Appeal.

TABLE OF AUTHORITIES

Page(s)

Cases

1-800 Contacts, Inc. v. Steinberg (2003)
107 Cal.App.4th 568 29

A Local & Reg'l Monitor v. City of Los Angeles (1993)
16 Cal.App.4th 630 32

Bacich v. Board of Control of California (1943)
23 Cal.2d 343 .... 50, 51

Bonni v. St. Joseph Health Sys. (2021)
11 Cal.5th 995 .... 11, 12, 23, 25, 28, 36, 37, 38

Briggs v. Eden Council for Hope & Opportunity (1999)
19 Cal.4th 1106 24

Careau & Co. v. Sec. Pac. Bus. Credit, Inc. (1990)
222 Cal.App.3d 1371 .... 45, 47

Citizens Suburban Co. v. Rosemont Dev. Co. (1966)
244 Cal.App.2d 671 40

City of Cotati v. Cashman (2002)
29 Cal.4th 69 .... 25, 29

Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn. (1986)
42 Cal.3d 929 32

Dixon v. Superior Court (1994)
30 Cal.App.4th 733 .... 11, 32, 33

DuPont Merck Pharm. Co. v. Superior Court (2000)
78 Cal.App.4th 562 33

Equilon Enterprises v. Consumer Cause, Inc. (2002)
29 Cal.4th 53 .... 22, 24, 30

FCC v. League of Women Voters of California (1984)
468 U.S. 364 33

Laurel Hills Homeowners Assn. v. City Council (1978)
83 Cal.App.3d 515 32

Document received by the CA 2nd District Court of Appeal.

TABLE OF AUTHORITIES (*continued*)

Page(s)

Lieberman v. KCOP Television, Inc. (2003)
110 Cal.App.4th 156 25

Ludwig v. Superior Court (1995)
37 Cal.App.4th 8 33

Lyles v. Sangadeo-Patel (2014)
225 Cal.App.4th 759 47

Mahler v. Judicial Council of California (2021)
67 Cal.App.5th 82 30

Makaeff v. Trump Univ., LLC (9th Cir. 2013)
715 F.3d 254 38

Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes (2010)
191 Cal.App.4th 435 41

Mendoza v. Wichmann (2011)
194 Cal.App.4th 1430 22

Moriarty v. Laramar Mgmt. Corp. (2014)
224 Cal.App.4th 125 36

Nahrstedt v. Lakeside Village Condominium Assn. (1994)
8 Cal.4th 361 44

Navellier v. Sletten (2002)
29 Cal.4th 82 .... 10, 11, 24, 28, 35, 38

Neighbors for Smart Rail v. Exposition Metro Line Constr. Auth. (2013)
57 Cal.4th 439 31

Ojjeh v. Brown (2019)
43 Cal.App.5th 1027 30

Optional Capital, Inc. v. Akin Gump Strauss, Hauer & Feld LLP (2017)
18 Cal.App.5th 95 22

Otworth v. Southern Pac. Transportation Co. (1985)
166 Cal.App.3d 452 .... 45, 47

Document received by the CA 2nd District Court of Appeal.

TABLE OF AUTHORITIES (*continued*)

Page(s)

People v. Russell (1957)
48 Cal.2d 189 50

Piscitelli v. Friedenberg (2001)
87 Cal.App.4th 953 48

Redfearn v. Trader Joe's Co. (2018)
20 Cal.App.5th 989 .... 45, 47

Riley v. Bear Creek Planning Comm. (1976)
17 Cal.3d 500 43

Roberts v. Los Angeles County Bar Assn. (2003)
105 Cal.App.4th 604 22

Ruiz v. Harbor View Community Ass'n (2005)
134 Cal.App.4th 1456 25

Self v. Sharafi (2013)
220 Cal.App.4th 483 42

Tuszynska v. Cunningham (2011)
199 Cal.App.4th 257 22

UFCW & Emps. Benefit Tr. v. Sutter Health (2015)
241 Cal.App.4th 909 41

Unterberger v. Red Bull (2008)
162 Cal.App.4th 414 41

Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova (2007)
40 Cal.4th 412 32

Wang v. Wal-Mart Real Estate Business Trust (2007)
153 Cal.App.4th 790 36

Weddington Productions, Inc. v. Flick (1998)
60 Cal.App.4th 793 39

Statutes

14 Cal. Code Regs. § 15063, subd. (a)-(b) 32

Cal. Civ. Code, § 3301 47

Document received by the CA 2nd District Court of Appeal.

TABLE OF AUTHORITIES (*continued*)

Page(s)

Cal. Code Regs. §15201 32

Civ. Code, § 1468, subd. (a) 42, 43

Civ. Code, § 1468, subd. (c) 42, 44

Civ. Code, § 1468, subd. (d) 42

Civ. Code, § 1550 39

Civ. Code, § 1565 39

Civ. Code, § 1589 .... 39, 41

Code Civ. Proc., § 425.16, subd. (a) 24

Code Civ. Proc., § 425.16, subd. (b) 9, 22

Code Civ. Proc., § 425.16, subd. (b)(1) 21, 22, 24, 26

Code Civ. Proc., § 425.16, subd. (b)(2) 26

Code Civ. Proc., § 425.16, subd. (e)(1) 25, 31

Code Civ. Proc., § 425.16, subd. (e)(2) 25

Evid. Code, § 1200 41

Gov. Code, § 27201, subd. (b)(1) 43

L.A. Mun. Code § 17.03 49

L.A. Mun. Code § 17.03, subd.(A) 49

Other Authorities

Burke, Anti-SLAPP Litigation (Rutter Group 2021) § 3.15 26

Selmi, *The Judicial Development of the California Environmental Quality Act* (1984) 18 U.C. Davis L.Rev. 197 33

5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 817 29

Document received by the CA 2nd District Court of Appeal.

I. INTRODUCTION

This is a classic SLAPP suit; the trial court should have stricken it. Plaintiffs Mountaingate Open Space Maintenance Association ("MOSMA") and the Crest/Promontory Common Area Association ("Crest/Promontory") sued Monteverdi, LLC ("Monteverdi") and the Berggruen Institute (collectively, "Berggruen"). Plaintiffs allege that Berggruen is contractually bound to develop a project they refer to as the "Reduced Density Plan." But according to Plaintiffs, Berggruen set out to develop a *different* project, which they refer to as the "Berggruen Project." To that end, Plaintiffs allege that Berggruen filed an Environmental Assessment Form ("EAF") with the City of Los Angeles to initiate the City's environmental review of the proposed Berggruen Project. Filing the EAF was the first step in the City's approval process under the California Environmental Quality Act ("CEQA")—a process that is still underway, and which must be completed before development can begin. Plaintiffs do not dispute that filing the EAF and initiating the CEQA review process is a textbook example of protected petitioning activity.

Under the anti-SLAPP statute, a defendant's special motion to strike involves a two-step analysis. Here, the trial court denied Berggruen's motion under step one—finding that Plaintiffs' claims did not "arise from" protected activity (Code Civ. Proc., § 425.16, subd. (b)), but rather that they arose from a Memorandum of Understanding ("MOU") to which Plaintiffs claim Berggruen is bound. This was reversable error.

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As explained below, although Plaintiffs assert a variety of claims and legal theories (breach of contract, tortious interference, declaratory relief, and unjust enrichment), the factual underpinning of *each* of them is that Berggruen should not have filed the EAF or sought the City's environmental review of the Berggruen Project because the MOU requires Berggruen to develop the Reduced Density Plan instead. Critically, the *only affirmative acts* that Berggruen is alleged to have undertaken are filing the EAF and related documents with the City and lobbying public officials in support of the Berggruen Project—all of which is indisputably protected conduct.

In concluding that Plaintiffs' claims nonetheless "arose from" the MOU instead of from Berggruen's protected conduct, the trial court made two fundamental mistakes—each of which independently warrants reversal.

First, the court embraced the same "logical flaw" that the California Supreme Court rejected two decades ago in *Navellier v. Sletten* (2002) 29 Cal.4th 82. There, as here, the plaintiff asserted a claim for breach of contract—and there, as here, the defendant's alleged *act* of breach was itself protected conduct. In concluding that the claim arose from protected activity under step one of the anti-SLAPP analysis, the Court warned of a "false dichotomy between actions that target 'the formation or performance of contractual obligations' and those that target 'the exercise of the right of free speech.' A given action, or cause of action, may indeed target both." (*Id.* at p. 92, citation omitted.)

The key, the Court explained in *Navallier*, "is not the form

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of the plaintiff's cause of action but, rather, the defendant's activity that gives rise to his or her asserted liability." (29 Cal.4th at p. 82.) And there, as here, the alleged "activity that gives rise to" liability is constitutionally protected petitioning. (See *Dixon v. Superior Court* (1994) 30 Cal.App.4th 733, 742 [statements made in connection with CEQA proceedings were matters of public concern and thus fall under the anti-SLAPP statute].) In other words, "but for" Berggruen's protected conduct, "plaintiffs' present claims would have no basis." (*Navallier*, *supra*, 29 Cal.4th at p. 90.)

Second, the trial court adopted Plaintiffs' theory that the "gravamen" or "principal thrust" of the case is about the MOU, and not about Berggruen initiating the City's environmental review process. (1 RT 2:22–23, 25:16–22.) Although the trial court acknowledged that the EAF is "the triggering event" for "why we're here," it concluded "that does not take [this case] into the SLAPP context [because] that's not the bas[i]s for why we're here. We're really talking about the MOU." (1 RT 2:16–3:5.) This, too, was error.

Just last year, the California Supreme Court repudiated the "gravamen" or "principal thrust" approach in *Bonni v. St. Joseph Health Sys.* (2021) 11 Cal.5th 995. The Court explained that the "gravamen" approach "risk[s] saddling courts with an obligation to settle intractable, almost metaphysical problems about the 'essence' of a cause of action . . . ." (*Id.* at p. 1011.) "[A]t the end of the day, we do not believe the Legislature in enacting the anti-SLAPP statute intended to make the protections of the anti-

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SLAPP law turn on a plaintiff's pleading choices." (*Ibid.*)

Under the framework announced in *Bonni*, once a "court determines that relief is sought based on allegations arising from activity protected by the statute," the defendant satisfies step one of the anti-SLAPP analysis. (*Bonni*, *supra*, 11 Cal.5th at p. 1010, quotation marks omitted). And here, as explained, the relief Plaintiffs are seeking is inextricably (and exclusively) tied to Berggruen's protected petitioning activity—regardless of how one describes the "gravamen" of the case. The bottom line is that all the "actions alleged to establish th[e] elements" of Plaintiffs' claims are protected activities. (See *id.* at p. 1015 [courts must "consider the claim's elements, the actions alleged to establish those elements, and whether those actions are protected"].)

Because the trial court erroneously denied Berggruen's motion under step one of the anti-SLAPP analysis, it did not proceed to step two—that is, whether Plaintiffs had established a probability of success on their claims. This Court should reverse and remand with instructions for the trial court to proceed to step two.

Alternatively, should this Court be inclined to analyze step two in the first instance, it should find, for a host of reasons, that Plaintiffs did not meet their burden:

- Berggruen is not bound by the MOU because it's not a party to the agreement, had no notice of the MOU when it purchased the subject property, and never agreed to assume its obligations.

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- The MOU is not a covenant running with the land or an equitable servitude because it was never recorded, and because Berggruen had no notice of it.

- Plaintiffs themselves breached the MOU, barring their ability to recover on their claims.

In sum, the anti-SLAPP statute exists precisely because of suits like this one—which seeks to prevent Berggruen from petitioning the City in connection with a proposed development project. This Court should reverse the trial court's order denying Berggruen's special motion to strike.

II. STATEMENT OF THE CASE

MOSMA filed the suit below against Berggruen and Castle & Cooke ("C&C") (from whom Berggruen acquired the subject property) on September 20, 2019. MOSMA asserted claims for declaratory relief, breach of contract, breach of the covenant of good faith and fair dealing, intentional interference, and unjust enrichment. (1 CT 24–30.)

On October 12, 2019, Plaintiffs filed the FAC. The FAC added a seventh cause of action for declaratory relief and included Crest/Promontory as an additional plaintiff. (1 CT 58–59.)

Berggruen filed its special motion to strike on December 13, 2019, challenging all causes of action asserted in the FAC. (1 CT 86.) Plaintiffs opposed on September 29, 2020. (3 CT 732.) Berggruen filed its reply on October 5, 2020. (3 CT 868.)

On October 13, 2020, the Honorable Rupert A. Byrdsong, Superior Court Judge, heard arguments on the motion to strike

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and issued an order denying it the same day. (1 RT 1, 26–27; 4 CT 958.)

On October 15, 2020, Berggruen timely filed a notice of appeal under Code of Civil Procedure section 904.1(a)(13). (4 CT 962.)

III. STATEMENT OF APPEALABILITY

An order denying or granting a special motion to strike under the anti-SLAPP statute is appealable under California Code of Civil Procedure section 904.1, subdivision (a)(13), which states that "[a]n appeal . . . may be taken from any of the following . . . From an order granting or denying a special motion to strike under Section 425.16."

IV. STATEMENT OF FACTS

A. C&C acquires and seeks to develop the Adjacent Land.

C&C acquired the property at issue (the "Adjacent Land") in 1996. (1 CT 43, ¶ 17.) C&C attempted to develop the Adjacent Land with a 117-home development, but faced a number of challenges from the City and MOSMA. (*Ibid.*)[1] In July 1998, C&C filed a lawsuit against the City, titled *Castle & Cooke California,*

[1] MOSMA is a common interest association responsible for the oversight and management of the common area and open space in Mountaingate. (1 CT 41–42, ¶ 11.) The Mountaingate community, styled as a "resort-like enclave of luxury residential homes" and "Brentwood's only resort community," is a hillside residential neighborhood in the Brentwood-Pacific Palisades area. (1 CT 41, ¶ 10.)

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Inc. v. The City of Los Angeles, et al. (the "Prior Lawsuit"). (2 CT 409.) MOSMA intervened on behalf of the City and negotiated a settlement with C&C. (1 CT 43, ¶ 21.)

B. C&C and MOSMA execute the MOU.

MOSMA, the Mountaingate Community Association ("MCA") (an association of Mountaingate community members), and C&C entered the MOU on October 4, 1999. (1 CT 44, ¶ 23; 2 CT 404.) The MOU required C&C to (i) withdraw from further consideration its application to develop 117 homes; (ii) file a new vesting tentative tract map with only 29 homes (the Reduced Density Plan); and (iii) dismiss the Prior Lawsuit. (1 CT 44, ¶¶ 23–24; 2 CT 404 ¶¶ 1–2.) C&C met each of these obligations: it withdrew the 117-home application in 2000, dismissed the Prior Lawsuit in 1999, and filed the Reduced Density Plan (formally referred to as Vesting Tentative Tract No. 53072 in City records) on February 19, 2004, which the City Council later approved. (1 CT 128–132, 134–139, 141–142.)

In turn, the MOU required MOSMA to (i) endorse the Reduced Density Plan, provided the City determined it was consistent with the updated Brentwood-Pacific Palisades Community Plan; (ii) agree that questions, conditions, and approvals concerning the project will be decided by the City; (iii) negotiate in good faith toward an agreement on the maintenance and disposition of the open space land; (iv) not support, finance, or participate in any effort (including, without limitation, any litigation) to prevent C&C from developing the Adjacent Land in accordance

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with the Reduced Density Plan, or to challenge any final decision of the City; and (v) acknowledge C&C's position that it needs to develop the Adjacent Land in a financially feasible manner. (2 CT 404–405, ¶ 3.)

The MOU also provided that if MOSMA breached the MOU, C&C could seek specific performance, or commence the processing of any development plan it chose. (2 CT 406, ¶ 6.) If C&C elected to pursue any of those remedies in the event of MOSMA's breach, or if C&C breached the MOU by not complying with any of its three requirements, then MOSMA could oppose the Reduced Density Plan or any new development proposed by C&C. (*Ibid.*) The MOU further provided that if all approvals necessary for the development of the Reduced Density Plan are not received despite C&C's good-faith efforts, or if C&C determines in good faith that costs or conditions arising or resulting from such approvals make the Reduced Density Plan economically or otherwise infeasible, C&C may terminate the MOU. (2 CT 406, ¶ 7.)

The MOU was never recorded in the Official Records of Los Angeles County, and it does not state that it runs with the Adjacent Land. (2 CT 562–599.)

C. Monteverdi acquires and seeks to develop a portion of the Adjacent Land.

The Berggruen Institute is a multi-disciplinary, multi-cultural scholarly institute that develops ideas to reshape political and social institutions in the face of a changing social and political landscape. (2 CT 548.) In 2014, Monteverdi, an affiliate of

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the Berggruen Institute, acquired a portion of the Adjacent Land from C&C (the "Monteverdi Property"), while C&C, through its subsidiary C&C Mountaingate, Inc., retained the remainder of the Adjacent Land, but reserved for Monteverdi an option to purchase it a later date. (*Ibid.*) The Monteverdi Property includes the majority of the lots contemplated by the Reduced Density Plan. (*Ibid.*)

In 2014, the Berggruen Institute approached MOSMA about its plans to develop a center to study social issues—plans that eventually became the Berggruen Project. (2 CT 548.) By building the Berggruen Project in Los Angeles, the Berggruen Institute hopes to advance the position of Los Angeles as a world center for ideas. (*Ibid.*) At the time, the Berggruen Institute was optimistic that the parties could work together to develop plans that would be agreeable to everyone involved. (*Ibid.*)

The campus plan and its design reflect the Berggruen Institute's desire to respect and restore the landscape of the 447-acre site[2]—over 95% of which will be preserved as open space—and intention to create a private educational forum where distinguished scholars can interact with other thought leaders. (2 CT 548.) Public hiking trails will be maintained and enhanced. (2 CT 552–555.) The plans evolved over a period of time, with input from various entities, including MOSMA.

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[2] The 447-site includes the entire area covered by the Reduced Density Plan, including the land retained by C&C and the Monteverdi Property. (2 CT 549.)

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In May 2019, Monteverdi and C&C Mountaingate requested that the City approve the recordation of Final Map 53072 (the "Final Map") before the expiration of the Approved Tentative Map 53072. (1 CT 144–160.) The City Council approved the Final Map in July 1, 2019, and it was promptly recorded in the Official Records of Los Angeles County. (1 CT 117.) The Final Map reflected the Reduced Density Plan (as modified at the request of C&C in 2009), and subdivided the Adjacent Land into legal lots that can be conveyed to end users. (1 CT 144–160.)

On August 1, 2019, Berggruen filed an EAF with the City, providing information on the potential environmental impact of the Berggruen Project and marking the formal request for the City to commence the CEQA review process. (1 CT 162–298.)

On August 8, 2019, MOSMA sent a letter to C&C and Berggruen, asserting that filing the EAF was a breach of the MOU. (2 CT 559.)

D. Plaintiffs file this action.

On September 20, 2019—less than two months after Berggruen filed the EAF—MOSMA filed the action below. Ten days later, Plaintiffs filed the FAC. (1 CT 51–59.)

Plaintiffs allege that the MOU created a permanent restriction on development of the Adjacent Land. (1 CT 44, ¶ 23.) They assert that (i) Berggruen was "aware of the MOU and its terms prior to acquiring [its] interests in the Adjacent [Land] and prior to seeking to develop the land," and that (ii) by purchasing a portion of the Adjacent Land, Berggruen is a successor in interest

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and/or assignee of the MOU, "and [is] bound by the MOU to develop and use the Adjacent [Land] in accordance with the approved Reduced Density Plan." (1 CT 47, ¶ 37; 1 CT 53, ¶ 61.) Plaintiffs also allege that Berggruen breached the MOU when it filed the EAF "and related documents with the City . . . requesting that it approve the development of an entirely different, non-residential development"—and that the filing of the EAF "announced that [Berggruen] do[es] not desire or intend to develop the Reduced Density Plan." (1 CT 47–48, ¶ 39.) The FAC does not allege that Berggruen has taken *any action* with regard to potential development of the Adjacent Land *other than* filing the EAF and related documents with the City and engaging in lobbying activities concerning the Berggruen Project.

Plaintiffs' first two claims seek a declaratory judgment that the MOU is binding on Berggruen and limits development of the Adjacent Land to the Reduced Density Plan, contrary to what Berggruen has proposed in the EAF. (1 CT 51, ¶ 58(c); 1 CT 52, ¶ 60.) Plaintiffs contend that the EAF and related environmental-review documents filed with the City "indicated that Berggruen is now seeking [the] right to develop . . . the Berggruen Project," and that the "development and operation of the Berggruen Project would conflict with the development limitations of the MOU." (1 CT 47–48, ¶¶ 39, 41; see also 1 CT 49, ¶ 45 [alleging that Berggruen's "application for the Berggruen Project" filed with the City "exceeds the City's Hillside Development Standards."].) The third and fourth causes of action are claims for breach of the MOU and covenant of good faith and fair dealing,

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alleging that by moving forward with the City's environmental review of the Berggruen Project, Berggruen is "seeking to develop and developing the [Adjacent Land] contrary to the terms of the MOU." (1 CT 47–48, ¶¶ 39, 41; 1 CT 53, ¶ 67; 1 CT 55, ¶ 74.)

Plaintiffs' fifth cause of action is for intentional interference with the MOU, alleging that Berggruen was "aware of the MOU and the obligations thereunder at all relevant times including prior to acquiring the [Adjacent Land]," yet acquired the property "with the intent to develop the land contrary to the MOU." (1 CT 56, ¶¶ 82–83; see also 1 CT 48, ¶ 41 ["The development and operation of the Berggruen Project would conflict with the development limitations of the MOU."].) Plaintiffs' sixth cause of action is a claim for unjust enrichment and likewise based on Berggruen moving forward with the City's environmental review of the Berggruen Project—Plaintiffs allege that Berggruen was unjustly enriched because Plaintiffs supported the Reduced Density Plan, and Berggruen "profited from this by avoiding protracted delay, disputes, litigation and by receiving vested development approvals from the City that significantly increased the value of the Adjacent Land." (1 CT 57, ¶ 88.)

Finally, the seventh cause of action seeks declaratory relief regarding Stoney Hill Road, which abuts the Adjacent Land. (1 CT 58, ¶¶ 90–95.) Plaintiffs allege that Berggruen falsely stated in the Final Map and EAF filed with the City that it had a right of ingress and egress on the road. (1 CT 58, ¶ 92.)

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E. The trial court denies Berggruen's special motion to strike.

The trial court denied Berggruen's motion to strike under step one of the anti-SLAPP analysis, finding that Plaintiffs' claims did not arise from actions taken in furtherance of protected activity. (1 RT 2:16–3:5, 25:16–22, 26:27–27:5; 4 CT 958.)

Plaintiffs argued, and the trial court agreed, that courts must "look at the principal thrust, the gravamen, and the core of the case … , which here is whether the MOU is binding." (1 RT 15:21–25, 26:27–27:5.) The court adopted plaintiffs' framing of their claims and held that "the case focuses on the MOU," not the filing of the EAF—and that while "[t]he EAF is evidence of [Berggruen's] breach," it is merely "collateral, incidental activity among thou-sands of other activities involved in developing the project." (1 RT 15:14–20.) Although the trial court recognized that the EAF is "the triggering event" for "why we're here," it nonetheless found "that does not take [this case] into the SLAPP context [because] that's not the bas[i]s for why we're here. We're really talking about the MOU." (1 RT 2:16–3:5; see also 1 RT 2:22 [stating that the case is "really asserting the rights under the MOU"].)

V. LEGAL STANDARD

California's anti-SLAPP statute provides for a special motion to strike a complaint where it arises from an act in furtherance of a person's right of petition or free speech. (Code Civ. Proc., § 425.16, subd. (b)(1).)

Courts conduct a two-step inquiry in deciding an anti-

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SLAPP motion. (Code Civ. Proc., § 425.16, subd. (b); *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) First, the court considers whether the claims "arise from" protected activity—namely, "any act . . . in furtherance of the [defendant's] right of petition or free speech under the United States Constitution or the California Constitution . . . ." (Code Civ. Proc., § 425.16, subd. (b)(1).)

Second, if the claims arise from protected activity, the burden shifts to the plaintiff to show, by "competent, admissible evidence," a probability of prevailing on the merits. (*Roberts v. Los Angeles County Bar Assn.* (2003) 105 Cal.App.4th 604, 613–614.) The plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." (*Mendoza v. Wichmann* (2011) 194 Cal.App.4th 1430, 1447.)

VI. STANDARD OF REVIEW

"On appeal, [this Court] review[s] the trial court's decision de novo, engaging in the same two-step process to determine, as a matter of law, whether the defendant met its initial burden of showing the action is a SLAPP, and if so, whether the plaintiff met its evidentiary burden on the second step." (*Optional Capital, Inc. v. Akin Gump Strauss, Hauer & Feld LLP* (2017) 18 Cal.App.5th 95, 113, quoting *Tuszynska v. Cunningham* (2011) 199 Cal.App.4th 257, 266.)

Document received by the CA 2nd District Court of Appeal.

VII. ARGUMENT

"The anti-SLAPP statute is 'designed to protect defendants from meritless lawsuits that might chill the exercise of their rights to speak and petition on matters of public concern.'" (*Bonni*, *supra*, 11 Cal.5th at pp. 1008–1009, citation omitted.) As noted above, anti-SLAPP motions involve a two-step inquiry, but the trial court stopped at the first step here—concluding that Plaintiffs' claims against Berggruen did not "arise from" protected activity. The trial court got it wrong.

Critically, although Plaintiffs hurl a variety of historical allegations and legal theories at Berggruen, the *only* thing Berggruen is actually alleged to have done thus far in support of its project is to file an environmental-review form (the EAF) with the City and engage in related lobbying activity. This constitutionally protected conduct is the factual predicate and basis for relief in *all* of Plaintiffs' claims. For that reason, this Court should reverse the trial court's analysis of step one and direct the trial court to proceed to step two of the anti-SLAPP inquiry.

Alternatively, should this Court elect to proceed to step two in the first instance, Plaintiffs have failed to show that any of their claims have "at least minimal merit." (*Bonni*, *supra*, 11 Cal.5th at p. 1065.) The claims should be stricken.

A. Berggruen satisfied step one of the anti-SLAPP statute because Plaintiffs' claims arise from protected activity.

Plaintiffs are unhappy that Berggruen is seeking to develop the Berggruen Project instead of the Reduced Density Plan. But

Document received by the CA 2nd District Court of Appeal.

the *only* affirmative steps that Berggruen is alleged to have taken toward developing the Berggruen Project—that is, initiating the City's environmental review under CEQA by filing the EAF, and engaging in related lobbying activities—are indisputably protected conduct. "But for" those protected activities, "plaintiffs' present claims would have no basis." (*Navallier, supra*, 29 Cal.4th at p. 90.) The trial court should have found that Berggruen satisfied step one of the anti-SLAPP analysis.

1. In analyzing step one, courts must determine whether the plaintiff's claims arise from defendant's protected activity.

Under the anti-SLAPP statute, "[a] cause of action against a person arising from any act of that person *in furtherance of the person's right of petition* or free speech under the United States Constitution or the California Constitution *in connection with a public issue* shall be subject to a special motion to strike … ." (Code Civ. Proc., § 425.16, subd. (b)(1), italics added.)

Because of the fundamental importance of free speech and petitioning in our democracy, the anti-SLAPP statute must be "construed broadly." (Code Civ. Proc., § 425.16, subd. (a); see also *Equilon*, *supra*, 29 Cal.4th at p. 60.) The California Supreme Court has made clear that courts must apply the statute expansively "to protect not just statements or writings on public issues, but all statements or writings made before, or in connection with issues under consideration by, official bodies and proceedings." (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1120.)

Document received by the CA 2nd District Court of Appeal.

In the first step of the anti-SLAPP analysis, "the moving defendant must identify the acts alleged in the complaint that it asserts are protected and what claims for relief are predicated on them. In turn, a court should examine whether those acts are protected and supply the basis for any claims." (*Bonni, supra,* 11 Cal.5th at p. 1009.)

Among the categories of protected conduct identified by the Legislature are "any written or oral statement made before a legislative [or] executive … proceeding, or any other official proceeding authorized by law" (Code Civ. Proc., § 425.16, subd. (e)(1)), and "any written or oral statement or writing made in connection with an issue under consideration or review by a legislative [or] executive … body, or any other official proceeding authorized by law" (*id.*, subd. (e)(2)).

Anti-SLAPP protection is available if the "defendant's act underlying the plaintiff's cause of action" is "*itself* . . . an act in furtherance of the right of petition or free speech." (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78, italics added.) The statutory phrase "in furtherance of petitioning," as used in section 425.16(b), means "helping to advance, assisting." (*Lieberman v. KCOP Television, Inc.* (2003) 110 Cal.App.4th 156, 166; see also *Ruiz v. Harbor View Community Ass'n* (2005) 134 Cal.App.4th 1456, 1467–1470 [anti-SLAPP protection applied to libel action arising from statements made in letters from attorney for homeowners' association concerning disputes over approval of the plaintiffs' conceptual building plans, since the letters were part of the ongoing discussion that contributed to the public debate].)

Document received by the CA 2nd District Court of Appeal.

The statute also broadly protects statements and conduct "in connection with" such matters of public interest. (Code Civ. Proc., § 425.16, subd. (b)(1); see also Burke, Anti-SLAPP Litigation (Rutter Group 2021) § 3.15.)

In making the inquiry under step one, courts are to consider "the pleadings and supporting and opposing affidavits stating facts upon which the liability or defense is based." (Code Civ. Proc., § 425.16, subd. (b)(2).)

2. All of Plaintiffs' claims arise from Berggruen initiating the City's environmental review and engaging in related lobbying activities.

Plaintiffs contend that Berggruen is bound by the MOU and the limitations it imposes on developing the Adjacent Land. Plaintiffs' overarching grievance is that Berggruen intends to pursue a *different* development plan—one allegedly not authorized by the MOU—and has taken some initial steps in that direction by seeking environmental review and lobbying public officials.

Specifically, Plaintiffs allege that Berggruen does "not desire or intend to develop the Reduced Density Plan" described in the MOU. (1 CT 47–48, ¶ 39.) Instead, Plaintiffs assert, Berggruen "filed an Environmental Assessment Form ('EAF') and related documents with the City of Los Angeles requesting that it approve an entirely different, non-residential development," namely, the Berggruen Project. (*Ibid.*)

Plaintiffs complain that Berggruen's applications to the

Document received by the CA 2nd District Court of Appeal.

City "falsely characterize the Berggruen Project as an 'Educational Institution' under the City's Zoning Code" to avoid the development limitations on "private think tanks" and "avoid hillside height and slope density limits." (1 CT 49, ¶ 47.) And Plaintiffs say that Berggruen's environmental-review applications "concede[]" that the Berggruen Project would violate zoning restrictions and the City's own development standards. (*Id.*, ¶ 45.)

Plaintiffs also assert that Berggruen is trying to circumvent City's planning and zoning restrictions by "host[ing] elected representatives at lavish parties, ma[king] political contributions, and engag[ing] public officials … to lobby public officials to approve the Berggruen Project." (1 CT 50, ¶ 49.) Plaintiffs similarly refer to "press releases and filings" that set forth Berggruen's alleged intent to host business and political leaders, among others, at the planned Berggruen Project. (1 CT 48, ¶ 40.)

Likewise, regarding Stoney Hill Road, Plaintiffs allege that Berggruen made a false statement *in its submissions to the City*. They assert that Berggruen "claimed in the EAF and Final Map [it] caused to be filed with the City in 2019 that [it has] an easement of ingress and egress over Stoney Hill Road. This is not true as Stoney Hill Road is private and [Berggruen] [has] no right to use Stoney Hill Road for ingress or egress." (1 CT 51, ¶ 54.)

Significantly, Berggruen's filing of the EAF "and related documents" with the City, and its alleged lobbying activities, are the *only affirmative conduct* that Berggruen is alleged to have undertaken in connect with its project. In analyzing step one of the anti-SLAPP statute—that is, whether Plaintiffs' claims "arise

Document received by the CA 2nd District Court of Appeal.

from" Berggruen's protected activity—"courts are to 'consider the elements of the challenged claim and what actions by the defendant supply those elements and consequently form the basis for liability.'" (*Bonni*, *supra*, 11 Cal.5th at p. 1009, citation omitted.) Here, that analysis confirms that Berggruen protected activity forms the basis for each of Plaintiffs' claims.

First, Plaintiffs' claim for breach of the MOU alleges that Berggruen "has breached, and/or imminently soon anticipates to breach or further breach, the terms of the MOU by seeking to develop and developing the [Adjacent] Property contrary to the terms of the MOU." (1 CT 53, ¶ 67.) But what *specifically* has Berggruen done to "seek[] to develop" the property in purported breach of the MOU? Again, the *only* affirmative steps alleged in the FAC are that Berggruen sought the City's environmental review by filing the EAF and related documents, and purportedly lobbied public officials. (See *Navallier*, *supra*, 29 Cal.App.4th at p. 90 [applying anti-SLAPP statute to what the plaintiff labeled a "'garden variety breach of contract'" claim because the alleged act of breach was the defendant's filing of a counterclaim in court, which is protected conduct].)

Plaintiffs' contemporaneous communications confirm that Berggruen's filing of the EAF is the basis for their claims. On August 8, 2019—a month before filing this suit—MOSMA sent a letter to counsel for Berggruen stating, "MOSMA is informed that on July 31, 2019, Monteverdi filed applications to develop the Property with a project other than the Reduced Density Plan, *which action constitutes a breach of the Agreement*." (2 CT 559,

Document received by the CA 2nd District Court of Appeal.

italics added.) And four days later, MOSMA sent a letter to the City stating that it was not allowed to process the EAF unless and until MOSMA "granted access over Stoney Hill Road" pursuant to their alleged rights under the MOU. (3 CT 302.)

Second, Plaintiffs' intentional interference claim asserts that Berggruen interfered with the MOU between MOSMA and C&C. (1 CT 56–57, ¶¶ 80–86.) Plaintiffs refer to Berggruen's "intent to develop the land contrary to the MOU," and Berggruen's *specific* acts of interference are alleged to be making arrangements with C&C "to aid in, and allow for, the development of the Berggruen Project, in breach of the MOU …." (1 CT 56–57, ¶¶ 83–84.) And again, according to the FAC, Berggruen's only affirmative steps toward developing the land or causing C&C to do so "contrary to the MOU" are filing the EAF and related documents with the City, and lobbying public officials. (See *1-800 Contacts, Inc. v. Steinberg* (2003) 107 Cal.App.4th 568, 581, 584 [affirming order striking intentional interference claim under anti-SLAPP statute where the claim was premised on delivering information to assist optometrist associations in taking legislative or legal action].)

Third, as for Plaintiffs' declaratory relief claims, "'[t]he fundamental basis of declaratory relief is the existence of an *actual, present controversy* over a proper subject.'" (*City of Cotati*, *supra*, 29 Cal.4th at p. 79, quoting 5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 817, p. 273, italics added.) Although couched as an effort to ascertain the parties' rights under the MOU (1 CT 51–52, ¶¶ 56–58 [claim one], 52–53, ¶¶ 59–63 [claim

Document received by the CA 2nd District Court of Appeal.

two], 58–59, ¶¶ 90–95 [claim seven]), the only thing Berggruen is actually alleged to have done thus far is file the EAF and associated documents with the City, and engage in related lobbying activities. (See, e.g., 1 CT 58, ¶ 92 [alleging the existence of an actual controversy because Berggruen "claimed in the Final Map and Environmental Assessment Form that they filed in 2019 with the City that they have an ingress and egress easement over Stoney Hill Road"].)

These protected filings and statements are the only alleged conduct by Berggruen that would made a declaratory relief claim "ripe." (See *Mahler v. Judicial Council of California* (2021) 67 Cal.App.5th 82, 110 ["actual controversy" supporting a declaratory relief claim "must be ripe"].) And courts have consistently held that declaratory relief claims premised on protected conduct are subject to anti-SLAPP protection. (See, e.g., *Equilon Enters. v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 [concluding that the plaintiff's "action for declaratory and injunctive relief is one arising from [defendant's] activity in furtherance of its constitutional rights of speech or petition"].)

Finally, Plaintiffs' claim for unjust enrichment asserts that Berggruen received certain benefits from the MOU, but it "reject[ed]" the MOU's corresponding obligations. (1 CT 57, ¶ 89.) Once again, the only thing Berggruen is actually alleged to have done—the only acts by which Berggruen is alleged to have "rejected" the MOU—was filing the environmental-review documents with the City and engaging in lobbying activity. (See *Ojjeh v. Brown* (2019) 43 Cal.App.5th 1027, 1038–1039 [affirming anti-

Document received by the CA 2nd District Court of Appeal.

SLAPP protection against cause of action for unjust enrichment that was premised on the defendant's protected activity of soliciting investments and performing work on an uncompleted documentary].)

Simply put, each of the claims and legal theories in the FAC is predicated on Berggruen initiating the City's environmental review and allegedly lobbying City officials in support of the Berggruen Project.

3. Berggruen's filing of the EAF and related activities are indisputably protected conduct.

Plaintiffs have never disputed (nor could they) that the federal and California Constitutions protect the filing of an EAF and related documents with the City to initiate an environmental review process in connection with a proposed project, and engaging in related lobbying activities in support of that project. (3 CT 737.) Yet as explained above in Sections IV(D) and VII(A)(2), *ante*, these are the *only things* that Berggruen is alleged to have done; these purported activities give rise to Plaintiffs' claims.

Filing an EAF (and related documents) to initiate a city's environmental review of a project is plainly a "statement or writing" made before, or in connection with, an issue under consideration or review by a "legislative [or] executive… body, or any other official proceeding authorized by law," and the related CEQA process is a matter of public concern. (Code Civ. Proc., § 425.16, subd. (e)(1).)

CEQA is a California statute passed in 1970. (*Neighbors for Smart Rail v. Exposition Metro Line Constr. Auth.* (2013) 57

Document received by the CA 2nd District Court of Appeal.

Cal.4th 439, 466.) It requires public agencies to inform the public and public officials of any significant effect that proposed projects may have on the environment. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 442.) CEQA approval is a prerequisite of project approval, and the submission of an EAF is only the first step in causing the City to initiate the CEQA process. (See, e.g., *A Local & Reg'l Monitor v. City of Los Angeles* (1993) 16 Cal.App.4th 630, 636; *Laurel Hills Homeowners Assn. v. City Council* (1978) 83 Cal.App.3d 515, 522.)[3]

"Public participation is an 'essential part of the CEQA process.'" (14 Cal. Code Regs. § 15201; see also *Dixon*, *supra*, 30 Cal.App.4th at p. 743 ["Essential to CEQA proceedings is the public comment and review process; its purpose is to inform those who ultimately make important decisions regarding the environment."].) Notably, "the 'privileged position' that members of the public hold in the CEQA process . . . is based on a belief that citizens can make important contributions to environmental protection and on notions of democratic decision-making." (*Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.*

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[3] Once an applicant files an EAF with the City Department of Planning, the City will prepare and release for public comment an Initial Study and Notice of Preparation. (14 Cal. Code Regs. § 15063, subd. (a)–(b).) If the Initial Study shows that the proposed project may have a significant effect on the environment, CEQA requires the lead agency to prepare an Environmental Impact Report (an "EIR") where no other previously prepared EIR would adequately analyze the project at hand. (*Ibid.*)

Document received by the CA 2nd District Court of Appeal.

(1986) 42 Cal.3d 929, 936, quoting Selmi, *The Judicial Development of the California Environmental Quality Act* (1984) 18 U.C. Davis L.Rev. 197, 215–216.) Thus, the filing of an EAF and related environmental-review documents are unquestionably protected petitioning activity.

Given the purpose and effect of CEQA review, it is unsurprising that courts have found statements made in connection with the CEQA process to be entitled to anti-SLAPP protection. (See, e.g., *Dixon*, *supra*, 30 Cal.App.4th at p. 742 [statements made in connection with CEQA proceedings were matters of public concern and thus fall under the anti-SLAPP statute]; accord *Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 15 ["[D]evelopment of the [project], with potential environmental effects such as increased traffic and impaction on natural drainage, was clearly a matter of public interest"].)

Likewise, Plaintiffs have never disputed that lobbying public officials in connection with a potential development project under government review reflects the exercise of protected free speech and petitioning rights. In *DuPont Merck Pharm. Co. v. Superior Court* (2000) 78 Cal.App.4th 562, the court held that "Defendant's lobbying and other activities seeking to influence the decisions of regulatory and legislative bodies falls within" subdivision (e)(1) of Code of Civil Procedure section 425.16—namely, "any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law." (*Id.* at p. 566; see also, e.g., *FCC v. League of Women Voters of California* (1984) 468 U.S. 364, 405

Document received by the CA 2nd District Court of Appeal.

[acknowledging that "the right to lobby is constitutionally protected"].)

4. The trial court's analysis of step one was legally and logically flawed.

The trial court rejected anti-SLAPP protection under step one, concluding that Plaintiffs' claims did not arise from an act taken in furtherance of protected activity. This was error in multiple respects.

The court adopted Plaintiffs' theory that "the case focuses on the MOU," not the filing of the EAF—and that while "[t]he EAF is evidence of [Berggruen's] breach," it is merely "collateral, incidental activity among thousands of other activities involved in developing the project." (1 RT 15:14–20.) As Plaintiffs put it, courts must "look at the principal thrust, the gravamen, and the core of the case … , which here is whether the MOU is binding." (1 RT 15:21–25, 26:27–27:5.) The court agreed with Plaintiffs that although the EAF is "the triggering event" for "why we're here," "that does not take [this case] into the SLAPP context [because] that's not the bas[i]s for why we're here. We're really talking about the MOU." (1 RT 2:16–3:5.)

In analyzing step one in this manner, the trial court overlooked that all of Plaintiffs' claims hinge on protected petitioning and lobbying activity. As explained above, the filing of environmental-review documents and related lobbying activities are the *only affirmative conduct* that Berggruen is alleged to have undertaken. These protected acts are the only basis for Berggruen's purported "breach" of the MOU and its supposed "interference"

Document received by the CA 2nd District Court of Appeal.

with the MOU, the reason it was allegedly "unjustly enriched," and the only asserted basis for a "ripe" controversy warranting declaratory relief. (See Sections IV(D) and VII(A)(2), *ante*.)

In *Navellier v. Sletten* (2002) 29 Cal.4th 82, the California Supreme Court rejected the very same methodology the trial court employed here. In *Navellier* (as here), the plaintiff alleged a claim for breach of contract. Although the alleged act of "breach" was itself protected conduct (the defendant filing a counterclaim in court), the plaintiff insisted that it was merely bringing "a garden variety breach of contract" claim. (*Id*. at p. 91, quotation marks omitted.)

In concluding that step one of the anti-SLAPP inquiry was satisfied, the Court in *Navallier* identified the same "logical flaw" that underlies the trial court's analysis in this case—namely, the "false dichotomy between actions that target 'the formation or performance of contractual obligations' and those that target 'the exercise of the right of free speech.' A given action, or cause of action, may indeed target both." (*Navallier, supra,* 29 Cal.4th at p. 92, citation omitted.) In *Navellier*, as here, "conduct alleged to constitute breach of the contract may also come within constitutionally protected speech or petitioning." (*Ibid*.) And of particular relevance here, the Court held that "[t]he anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's activity that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning." (*Ibid*.) Again, the "activity that

Document received by the CA 2nd District Court of Appeal.

gives rise to" Berggruen's purported liability here is all constitutionally protected.

Even more fundamentally, just last year, the California Supreme Court repudiated the "gravamen" or "principal thrust" approach urged by Plaintiffs and adopted by the trial court. In *Bonni*, the Court explicitly rejected the notion that in performing step one of the anti-SLAPP analysis, courts "should consider whether the gravamen of the entire cause of action was based on protected or unprotected activity." (*Bonni*, *supra*, 11 Cal.5th at p. 1011.)[4]

The Court explained that the "gravamen" approach "risk[s] saddling courts with an obligation to settle intractable, almost metaphysical problems about the 'essence' of a cause of action that encompasses multiple claims. The attempt to reduce a multifaceted cause of action into a singular 'essence' would predictably yield overinclusive and underinclusive results that would impair significant legislative policies" underlying the anti-SLAPP statute. (*Bonni*, *supra*, 11 Cal.5th at p. 1011.) As the Court put

[4] Tellingly, Plaintiffs relied below on "gravamen" cases that were distinguishable in any event. (See, e.g., *Wang v. Wal-Mart Real Estate Business Trust* (2007) 153 Cal.App.4th 790, 804–809 [analyzing the "principal thrust" or "gravamen" of a cause of action, rather than the elements of each claim, to determine that certain actions alleged were collateral to the allegations and thus not protected]; *Moriarty v. Laramar Mgmt. Corp.* (2014) 224 Cal.App.4th 125 [stating that to determine whether a cause of action is based on protected petitioning activity, "we look to the 'principal thrust or gravamen of the plaintiff's cause of action.'"].)

Document received by the CA 2nd District Court of Appeal.

it, "at the end of the day, we do not believe the Legislature in enacting the anti-SLAPP statute intended to make the protections of the anti-SLAPP law turn on a plaintiff's pleading choices." (*Ibid.*)

Thus, the trial court should not have set out to divine whether the "essence" or "gravamen" of Plaintiffs' claims was the filing of the EAF and related petitioning activities (as Berggruen contends) or a disagreement about the scope and effect of the MOU (as Plaintiffs contend). "It does not matter that other unprotected acts may also have been alleged within what has been labeled a single cause of action; these are 'disregarded at this stage. [Citation] So long as a 'court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached' with respect to these claims." (*Bonni*, *supra*, 11 Cal.5th at p. 1010.)

What the trial court should have done is "analyze each claim for relief—or each set of acts supplying a basis for relief, of which there may be several in a single pleaded cause of action—to determine whether the acts are protected." (*Bonni*, *supra*, 11 Cal.5th at p. 1010; see also *id*. at p. 1015 [courts must "consider the claim's elements, the actions alleged to establish those elements, and whether those actions are protected."].) Had the trial court properly analyzed step one, the only reasonable conclusion would have been that Berggruen's protected activity supplies the basis for relief in each cause of action—regardless of whether the "essence" or "gravamen" of the case is the EAF or the MOU. Put differently, Berggruen's initiation of the environmental review

Document received by the CA 2nd District Court of Appeal.

process through filing the EAF and related documents, and its alleged lobbying activity in support of its project, are not merely "context" for, or "incidental" or "collateral" to the claims—rather, they "support[]" each claim for recovery and establish the key elements of alleged liability. (*Id*. at p. 1012, quotation marks omitted.) "[B]ut for" Berggruen's protected conduct, "plaintiffs' present claims would have no basis." (*Navallier*, *supra*, 29 Cal.4th at p. 90.)

In short, the trial court erred in analyzing step one of the anti-SLAPP inquiry. Even though the court correctly recognized that Berggruen's protected conduct was the "triggering event" for all of the claims in the complaint, the court erroneously declined to proceed to step two because it found the "gravamen" of the claims had more to do with the MOU than the protected conduct. This Court should reverse.

B. Plaintiffs did not and cannot establish a probability of success under step two of the anti-SLAPP analysis.

The trial court did not reach the second step of the anti-SLAPP analysis, where the burden shifts to the plaintiff "to establish a reasonable probability that it will prevail on its claim in order for that claim to survive dismissal." (*Makaeff v. Trump Univ., LLC* (9th Cir. 2013) 715 F.3d 254, 261.) Should this Court elect to proceed to step two—instead of remanding with instructions for the trial court to address step two in the first instance—it should hold that Plaintiffs have failed to meet their burden.

1. The MOU does not give rise to any viable claim against Berggruen.

Document received by the CA 2nd District Court of Appeal.

As an initial matter, Plaintiffs cannot establish a likelihood of success because they can't show that Berggruen is bound by the MOU. (1 CT 51–52, ¶ 57.) The MOU is a contract between MOSMA, MCA, and C&C. Berggruen did not sign the MOU, had no notice of it when it purchased the Monteverdi Property, and never agreed to be bound by it or to assume its obligations. Nor is the MOU a covenant running with the land or an equitable servitude because MOSMA never recorded it.

a. Berggruen is not bound by the MOU.

Berggruen is not a party to the MOU, it had no actual or constructive notice of the MOU when it purchased the Monteverdi Property, and it never consented to be bound by the MOU or assume its obligations. So Berggruen is not bound by the MOU.

"An essential element of any contract is 'consent.'" (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 811, quoting Civ. Code, § 1550.) Consent, in turn, must be (1) "free," (2) "mutual," and (3) "[c]ommunicated by each to the other." (Civ. Code, § 1565.) Here, there is no evidence that Berggruen ever communicated to anyone its intent or consent to be bound by, or to assume C&C's obligations under, the MOU—a contract to which it was indisputably not a party and whose terms it had no knowledge of. Further, while consent may be implied in certain limited circumstances (see Civ. Code, § 1589), those circumstances are not present here because Berggruen had no notice of the MOU's terms.

First, there is no evidence that Berggruen affirmatively or

Document received by the CA 2nd District Court of Appeal.

expressly consented to be bound by the MOU. To the contrary, Berggruen is not one of the parties listed on the MOU itself, and Berggruen didn't sign it—nor is there a written assignment of the MOU to Berggruen. (2 CT 404, 407.)

The MOU is also not referenced in the Purchase Agreement relating to the Monteverdi Property.[5] Although Paragraph 13 of the Purchase Agreement required C&C to deliver "[o]riginals (or copies thereof) of any and all documents in [its] possession relating to the Property" (3 CT 708, ¶ 13), there is no evidence that C&C ever delivered a copy or the original of the MOU to Berggruen. (2 CT 548–549.)

Further, Berggruen's obligation under Paragraph 8(b) of the Purchase Agreement to "assume and comply with all obligations for or relating to the ownership and use of the Property" was expressly subject to Paragraph 6(g), which obligated C&C to terminate "any and all agreements and/or contracts relating to the Property, which Purchaser has not *affirmatively elected to assume*." (3 CT 704, ¶ 8(b); 3 CT 702, ¶ 6(g).) Again, there is no evidence that Berggruen, the purchaser, ever "affirmatively elected to assume" C&Cs's obligations under the MOU.

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[5] The only connection between Berggruen and C&C at the time of the Purchase Agreement was that of two parties negotiating an agreement at arm's length. (Compare *Citizens Suburban Co. v. Rosemont Dev. Co.* (1966) 244 Cal.App.2d 671, 677 [finding an assumption of obligations under a contract where there was overlap in ownership or management between the previous party to the contract and the party alleged to have assumed the contract].)

Document received by the CA 2nd District Court of Appeal.

Second, there is no evidence that Berggruen impliedly consented to be bound by the MOU—because it had no notice of the MOU when it purchased the Monteverdi Property. "While an assumption of obligations may be implied from the acceptance of benefits under a contract, that is so only '*so far as the facts are known, or ought to be known, to the person accepting*.'" (*Unterberger v. Red Bull* (2008) 162 Cal.App.4th 414,421, quoting Civ. Code, § 1589, italics added.) Although Plaintiffs claim they made vague references to the MOU in a meeting with Nicholas Berggruen in 2014, they do not claim they provided a copy of the MOU to Mr. Berggruen, which makes any vague references irrelevant. (See, e.g., *UFCW & Emps. Benefit Tr. v. Sutter Health* (2015) 241 Cal.App.4th 909, 931 n.13 [finding that a party did not assume a contract under section 1589 where they did not receive a copy of the agreement]; *Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes* (2010) 191 Cal.App.4th 435, 462 [finding that a developer did not assume a contract under section 1589 where the Town withheld information concerning a federal agency's reservations concerning the proposed project].) In any event, Plaintiffs' testimony that they *alluded to* the MOU is inadmissible hearsay. (Evid. Code, § 1200.)[6]

[6] As of the filing of Berggruen's reply brief below, Plaintiffs still had not submitted a complete copy of the MOU. The version attached to the FAC refers to the Reduced Density Plan "as depicted in Exhibit A." (2 CT 404.) But Exhibit A is not attached to the Complaint, the FAC, or any other filed document. Instead, Plaintiffs attached to the complaint and FAC a tentative tract map signed in 2003 (1 CT 38; 1 CT 67), and

Document received by the CA 2nd District Court of Appeal.

In sum, Berggruen did not expressly or impliedly agree to by bound by the MOU.

b. The MOU does not run with the land.

The MOU also is not a covenant running with the land. For a covenant to run with the land, the instrument containing the covenant must be "recorded in the office of the recorder of each county in which such land or some part thereof is situated," and "[t]he land of the covenantor which is to be affected . . . , and the land of covenantee to be benefited, [must be] particularly described." (Civ. Code, § 1468, subd. (a), (d).) Further, the covenant must "touch and concern" the land, "which means it must affect the parties as owners of the particular estates in land or relate to the use of land." (*Self v. Sharafi* (2013) 220 Cal.App.4th 483, 488; see also Civ. Code, § 1468, subd. (c).) Here, the MOU satisfies none of these requirements.

First, it is undisputed that the MOU was *never* recorded. (2 CT 557, 562–599.) Nor could it have been. The MOU expressly

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they attached a map signed in 2004 to a supporting declaration (4 CT 900–901). Obviously, neither the 2003 map nor the 2004 map would have been attached to the MOU when executed in 1999. Yet, Plaintiffs consistently represented to the trial court that these maps, dated years after the MOU, were originally attached to it. (1 CT 44, ¶ 23; 4 CT 987.) Plaintiffs improperly submitted what they claim to be the complete version of the MOU only on October 9, 2020, four days after Berggruen filed its reply in support of the motion to strike. (4 CT 896, 902, 954.) Berggruen could not have been on notice of the terms of the MOU when Plaintiffs and their counsel apparently did not have a complete copy of it and instead attempted to pass off two *different* documents during this litigation.

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permitted facsimile signatures, which does not satisfy the recordation requirements. (2 CT 562–599; see Gov. Code, § 27201, subd. (b)(1) ["Each instrument, paper, or notice shall contain *an original signature or signatures*"], italics added.) This suggests that the parties never intended for the MOU to "run with the land."

Second, the MOU contains no legal description of the burdened or benefitted land. Thus, it does not satisfy the requirement that both the benefited and the burdened land be "particularly described." (Civ. Code, § 1468, subd. (a).)

Finally, the MOU does not "touch and concern" the land because it does not impose *any* restrictions on future development on the land. Instead, it imposed only *three* obligations on *C&C*—to "withdraw . . . its Vesting Tentative Tract Map," to "file a new vesting tentative tract map," and to "dismiss with prejudice its lawsuit against the City of Los Angeles." (2 CT 404. ¶¶ 1–2.) None of these provisions restricted the future development of the land by nonparties to the MOU.

c. The MOU is not an equitable servitude.

The MOU is also not binding on Berggruen as an equitable servitude. Courts created the concept of an equitable servitude to enforce covenants running with the land that do not strictly comply with the statutory requirements, but where equity dictates that such a covenant should be enforced. (*Riley v. Bear Creek Planning Comm.* (1976) 17 Cal. 3d 500, 510–511.) Critically, however, a restrictive covenant is enforceable as an equitable servitude *only* if the person purportedly "bound the restrictions had

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notice of their existence." (*Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361, 375, 379.)

Here, Berggruen had no notice of the MOU before acquiring the Monteverdi Property—it was never recorded, no declaration of the restriction was ever recorded, there is no reference to the MOU in the grant deed, and it was never brought to Berggruen's attention. (2 CT 549; 2 CT 562–599.) In fact, even if there were evidence that Berggruen had seen the MOU (there is no such evidence because Berggruen didn't see it), that would not have put Berggruen on notice of Plaintiffs' claims because the MOU does not, on its face, prevent a successor from building the kind of project that Berggruen envisions. (2 CT 404–406; see Civ. Code, § 1468, subd. (c).)

2. The MOU does not create a permanent restriction on development.

Even if, contrary to the analysis above, Berggruen were somehow bound by the MOU, Plaintiffs' causes of action would still fail because the MOU does not create a permanent restriction on the development of the Adjacent Land. The core premise of Plaintiffs' claims is that the MOU limits the development of the Property to the Reduced Density Plan. (1 CT 52–53, ¶¶ 58, 60; 1 CT 55. ¶ 74.) But the MOU imposes no such restriction.

As noted above, the MOU imposed only three obligations on C&C—to "withdraw . . . its Vesting Tentative Tract Map," to "file a new vesting tentative tract map," and to "dismiss with prejudice its lawsuit against the City of Los Angeles." (2 CT 404, ¶¶

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1–2.) It is undisputed that C&C did all three things. It withdrew the Vesting Tentative Tract Map. (1 CT 141–142.) It dismissed the Lawsuit. (2 CT 544.) And it filed the new vesting tentative tract map in 2004, which the City approved in 2006. (1 CT 134–139.) The MOU imposed no other restrictions on the development of the Adjacent Land.

To the contrary, the MOU expressly provided that C&C could, "in its discretion, re-commence the processing of any development map it chooses for the Property" "in the event MOSMA or MCA violates any of the requirements of this MOU." (4 CT 406, ¶ 6.) And Paragraph 7 of the MOU gave C&C the unilateral right to "terminate" the MOU "if [it] determines in good faith costs or conditions . . . make the Reduced Density Plan economically or otherwise infeasible." (4 CT 406, ¶ 7.) These provisions confirm that there was no intent to permanently limit the development of the Adjacent Land exclusively to the Reduced Density Plan.

3. MOSMA cannot recover because it breached the MOU.

To prevail on its claims for breach of contract, breach of the duty of good faith and fair dealing, and intentional interference with contract, MOSMA must prove that it performed its obligations under the MOU.[7] But since MOSMA breached the MOU, it cannot establish a likelihood of success on these claims.

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[7] (See, e.g., *Careau & Co. v. Sec. Pac. Bus. Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388; *Otworth v. Southern Pac. Transportation Co.* (1985) 166 Cal.App.3d 452, 458; *Redfearn v. Trader Joe's Co.* (2018) 20 Cal.App.5th 989, 997.)

Document received by the CA 2nd District Court of Appeal.

The MOU required MOSMA to "endorse and agree with the development of the Property in accordance with the Reduced Density Plan." (2 CT 404–405, ¶ 3.) It further provided that decisions related to the emergency access road, and "the proximity of the development to Canyon 8 landfill[,] and to methane" were left to the City, and that MOSMA would not support, finance, or participate in any challenge to the City's decisions on these matters. (2 CT 404–405, ¶ 3(b).) Finally, although MOSMA reserved the right to challenge limited aspects of the Project, it agreed that it would not challenge the City's decisions regarding these specific matters. (2 CT 405, ¶ 4.)

MOSMA plainly breached these provisions. On August 12, 2019, MOSMA sent a letter to the City, stating that no project would have access to Stoney Hill Road unless a separate access agreement is reached between MOSMA and Berggruen, essentially seeking to give MOSMA veto power over Berggruen's ability to implement the Reduced Density Plan. (2 CT 302–303.) And on December 5, 2019, MOSMA sent a letter to the City challenging the City's approval of the Final Map, as well as the related grading permits issued by the City. (2 CT 332–337.)

Then, on December 19, 2019, only days after Berggruen filed the anti-SLAPP motion, MOSMA filed a Petition for Writ of Mandate against the City and Berggruen, challenging the City's approval of the Final Map for the Reduced Density Plan. (3 CT 793–802.) In direct breach of its obligations under the MOU, MOSMA's lawsuit challenged the City's approval of grading per-

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mits related to the Reduced Density Plan on the basis of the project's proximity to the landfill and the existence of the landfill's methane collection system. (2 CT 334, 404, ¶ 3(b), 405, ¶ 4, 406, ¶ 6.)

By opposing the Reduced Density Plan, MOSMA breached the MOU and therefore, as a matter of law, cannot prevail on its causes of action.

4. Berggruen received no benefit, and MOSMA suffered no damages.

MOSMA cannot establish a likelihood of success on its claims because Berggruen received no benefit and MOSMA has suffered no damages. To prevail on its claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and intentional interference with contract, MOSMA must prove that it suffered some injury as a result of Berggruen's alleged conduct. (See, e.g., *Careau, supra*, 222 Cal.App.3d at p. 1388; *Otworth, supra*, 166 Cal.App.3d at p. 458; *Redfearn, supra*, 20 Cal.App.5th at p. 997.) And to prevail on its claim for unjust enrichment, MOSMA must prove that Berggruen was unjustly enriched at MOSMA's expense. (See *Lyles v. Sangadeo-Patel* (2014) 225 Cal.App.4th 759, 769.)

As of Berggruen's filing of the motion to strike, no permits had been approved, no work had begun, and no approvals had been issued with respect to the development of the Berggruen Project. (2 CT 549.) In fact, there is no guarantee that the Berggruen Project will ever be approved or built. MOSMA's alleged injury is thus wholly speculative and conjectural. (Cal. Civ. Code

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§ 3301 ["No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin."]; see also *Piscitelli v. Friedenberg* (2001) 87 Cal. App. 4th 953, 989 ["It is black-letter law that damages which are speculative, remote, imaginary, contingent or merely possible cannot serve as a legal basis for recovery."], citation omitted.)

MOSMA suggests that Berggruen "benefited" because MOSMA did not oppose the new tentative tract map in 2004 (1 CT 57), but this makes no sense. Berggruen did not purchase the land until *2014*. (2 CT 549.) So any purported "value" added to the land as a result of submitting the map in 2004 (and its approval in 2006) would have already been reflected in the price that Berggruen paid in 2014.

5. Plaintiffs' claim for declaratory relief regarding Stoney Hill Road fails.

Plaintiffs also cannot establish a likelihood of success on their request for a declaration that Berggruen is "not entitled to use Stoney Hill Road for ingress or egress, and [has] no easement (express or implied) or other right to use the road." (1 CT 58.)

First, access rights to Stoney Hill Road were expressly reserved in January 2010. (See 2 CT 373–386 [Private Street Case No. 1404/1404-M-1, Resolution to Vacate No. 09-1401043 recorded as Instrument No: 20100135911 on January 29, 2010].) Stoney Hill Road was a public street until 2009, when the City vacated it. (2 CT 373.) The City engineer's report described the adjacent parcels utilizing Stoney Hill Road and expressly

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acknowledged that although the Adjacent Land (the listed address of which is 2050 Stoney Hill Road) was vacant, it had been "proposed for development under Tract No. 53072." (2 CT 383.) Based in part on the City Engineer's Report, the City's Advisory Agency[8] imposed multiple conditions that had to be satisfied before the street vacation could become effective. (2 CT 389–392.) The conditions included that (a) "a minimum 50-foot wide private street be provided from Mountaingate Drive to serve this site, together with 20-foot radius easement return at the intersection with Mountaingate Drive," and (b) "the owners of the property record a covenant and agreement stating that private ingress and egress easements over the private street area will be granted to owners of all properties currently using the public street portion of Stoney Hill Road being vacated . . . for access." (2 CT 389.)

Second, when the City approved the Final Map in 2019, access rights were expressly reserved and/or granted pursuant to a Covenant and Agreement dated as of May 1, 2009 (executed and recorded on September 11, 2009). It stated that "Ingress and egress via Stoney Hill Road is provided by the Covenant and Agreement dated as of May 1, 2009 . . . ." (1 CT 149, 154; 2 CT 398–400.) The Covenant and Agreement requires that a "private ingress and egress easement over the private street area will be

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[8] The City's Director of Planning is designated as the Advisory Agency for the City. (L.A. Mun. Code § 17.03.) The Advisory Agency is authorized to "approve, conditionally approve, or disapprove Tentative Maps of proposed subdivisions [and] private streets and such maps as are provided for herein . . . ." (*Id.* at subd. (A).)

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granted to owners of all properties currently using the public street portion of Stoney Hill Road being vacated under Engineering File E1401043 for access." (2 CT 399.) The City also reserved, and excepted from the vacation, express rights for utilities and a 30-foot-wide public emergency access easement over Stoney Hill Road (including the one-foot strip directly abutting the Adjacent Land). (2 CT 383.) Importantly, the easement granted was not limited to the owners of lots in Tract 42481. Rather, it was broadly granted to *all properties* using the public street area being vacated. And as noted above, the City engineer's report expressly referenced 2050 Stoney Hill Road (the Adjacent Land) and pending Tract 53072 (the Reduced Density Plan) as an adjacent use. (*Ibid.*) Thus, the Adjacent Land was included among the properties that were granted access rights over Stoney Hill Road.

Finally, the Adjacent Land possesses the right to access Stoney Hill Road as a result of the long-established common law doctrine of abutter's rights. The abutter's right is a private access easement that exists separately from the right of all members of the public to use public streets. (See *Bacich v. Board of Control of California* (1943) 23 Cal.2d 343, 349–350.) *Bacich* makes clear that the purpose of an abutter's easement is to give consideration to the purpose of the property, and that an abutter's easement goes beyond accessing the street "immediately in front of the property." (*Id.* at pp. 352–353; see also *People v. Russell* (1957) 48 Cal.2d 189, 195 [an abutter's easement is "more extensive than a mere opportunity to go into the street immediately

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in front of one's property"].)

Moreover, because the abutter's right exists as a special, private easement to use an abutting street, the subsequent vacation of that street does not diminish the abutting owner's right of access. The Legislature codified this principle in Streets & Highways Code section 8352, which provides that vacation of a street, highway, or public service easement "does not affect a private easement or other right of a person . . . in, to, or over the lands subject to the street, highway, or public service easement, regardless of the manner in which the private easement or other right was acquired."

Here, the City approved the Reduced Density Plan in 2006, with the express understanding that access to the subdivision would be provided over Stoney Hill Road, including the one-foot strip dedicated for the future street. (2 CT 383.) Although the City completed vacation proceedings for the street and future street two years later, it could not (and from the record it is clear, did not intend to) extinguish the abutters-rights easement granted by virtue of the adjacency of the Reduced Density Plan subdivision. (See *Bacich, supra*, 23 Cal.2d at pp. 349–350.)

VIII. CONCLUSION

For these reasons, the Court should reverse the trial court's order denying Berggruen's anti-SLAPP motion.

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Respectfully submitted,

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CERTIFICATION OF WORD COUNT

Pursuant to rule 8.204(c)(1) of the California Rules of Court, the undersigned hereby certifies that this opening brief contains 11,689 words, as counted by the Microsoft Word word-processing program, excluding the tables, this certificate, the verification, and the signature blocks.

DATED: February 16, 2022

Katarzyna Ryzewska

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