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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

MOUNTAINGATE OPEN SPACE MAINTENANCE ASSOCIATION; CREST/PROMONTORY COMMON AREA ASSOCIATION,

Plaintiffs,

v.

MONTEVERDI, LLC, a California limited liability company; BERGGRUEN INSTITUTE, a California non-profit organization; and CASTLE & COOKE CALIFORNIA, INC., a California corporation; and DOES 1-10,

Defendants.

CASE NO. 19STCV33839

DEFENDANT BERGGRUEN INSTITUTE AND MONTEVERDI, LLC'S NOTICE OF MOTION AND MOTION TO STRIKE PLAINTIFFS' FIRST AMENDED COMPLAINT PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 425.16; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO STRIKE

[Declaration of Katarzyna Ryzewska, Declaration of Dawn Nakagawa, Declaration of Benjamin Saltsman, Declaration of Jonathan Lonner, and Request for Judicial Notice Filed Concurrently herewith]

Hearing
Date: March 24, 2020
Time: 8:30 A.M.
Location: Courtroom 7D
Judge: Hon. Rupert A. Byrdsong
Reservation: 427522902268

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on March 24, 2020, at 8:30 A.M. in Courtroom 7D of the Superior Court of the State of California for the County of Los Angeles, Defendant Berggruen Institute ("Berggruen") and Monteverdi, LLC ("Monteverdi") (collectively, the "Berggruen Defendants") will and hereby do move this Court, pursuant to California Code of Civil Procedure Section 425.16, for an order striking the Complaint of Plaintiff Mountaingate Open Space Maintenance Association ("MOSMA") and the Crest/Promontory Common Area Association ("Crest/Promontory") (collectively, "Plaintiffs").

This Motion is made on the grounds that Plaintiffs' Complaint is a meritless "SLAPP" claim (Strategic Litigation Against Public Participation) that is barred by California's anti-SLAPP statute. Plaintiffs' Complaint was a response to the filing of an Environmental Assessment Form ("EAF") with the City of Los Angeles (the "City"), which is the first step in causing the City to initiate the California Environmental Quality Act ("CEQA") process. As a matter of law, Plaintiffs' causes of action, all of which are based on the filing of the EAF, come within the protections of California Code of Civil Procedure Section 425.16, the anti-SLAPP statute, because they arise from written or oral statements made in connection with a governmental proceeding, and because such statements were made in a public forum in connection with an issue of public interest. (See Code Civ. Proc., § 425.16, subd. (e); see also *Dixon v. Superior Court* (1994) 30 Cal.App.4th 733, 742 [holding that statements made in connection with CEQA proceedings were matters of public concern and thus fall under the anti-SLAPP statute].)

Plaintiffs' lawsuit is meritless and should be stricken by the Court because Plaintiffs cannot meet their burden of establishing that they will prevail on their claims.

First, the Berggruen Defendants are not parties to (or otherwise bound by) the Memorandum of Understanding ("MOU") entered into between MOSMA, Castle & Cooke California, Inc. ("Castle & Cooke") and the Mountaingate Community Association ("MCA"), and as a result, MOSMA cannot establish a likelihood of success on its causes of action for declaratory relief regarding the MOU, declaratory relief regarding equitable servitude, breach of the MOU, breach of the duty of good faith and fair dealing, and unjust enrichment.

Second, the MOU cannot reasonably be read to impose a permanent restriction on the development of the property, and for this additional reason, MOSMA cannot establish a likelihood of success on its causes of action for declaratory relief regarding the MOU, declaratory relief regarding equitable servitude, breach of the MOU, breach of the duty of good faith and fair dealing, intentional interference with contract, and unjust enrichment.

Third, MOSMA cannot establish a likelihood of success on its causes of action for breach of the MOU, breach of the duty of good faith and fair dealing, and intentional interference with contract because MOSMA itself has breached the MOU.

Fourth, MOSMA cannot establish a likelihood of success on its causes of action for breach of the MOU, breach of the duty of good faith and fair dealing, intentional interference with contract, and unjust enrichment because the Berggruen Defendants have received no benefits, and because MOSMA has suffered no damages.

Finally, Plaintiffs cannot establish a likelihood of success on their request for a declaration that the Berggruen Defendants are allegedly not entitled to use Stoney Hill Road for ingress or egress, and allegedly have no easement (express or implied) or other right to use the road, because: (1) express access rights were reserved by the City as a condition to the vacation of Stoney Hill Road, (2) express access rights were agreed to and/or granted pursuant to a Covenant and Agreement by the owners of the land, and (3) the common law doctrine of abutter's rights gives a landowner whose property abuts a vacated street the special, private right to access their property from that street.

Plaintiffs' lawsuit is classic SLAPP. The Berggruen Defendants hereby request that the Court strike Plaintiffs' claims and the accompanying demands for damages and other relief recited in the Prayer.

This Motion is based on this Notice of Motion and Motion; the Declaration of Katarzyna Ryzewska, Declaration of Dawn Nakagawa, Declaration of Benjamin Saltsman, Declaration of Jonathan Lonner; Defendants' Request for Judicial Notice; the complete files and records in this action; and on such further evidence and argument that is presented prior to or at hearing on this matter.

The Berggruen Defendants seek an order striking Plaintiffs' Complaint with prejudice, and awarding attorneys' fees and costs to the Berggruen Defendants pursuant to California's anti-SLAPP law's mandatory attorneys' fees clause for prevailing defendants.

DATED: December 13, 2019

Respectfully submitted,
GIBSON, DUNN & CRUTCHER LLP

By: */s/ James P. Fogelman*
James P. Fogelman

Attorneys for Defendants,
Monteverdi, LLC and Berggruen Institute

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I. INTRODUCTION

The Complaint of Plaintiffs Mountaingate Open Space Maintenance Association ("MOSMA") and the Crest/Promontory Common Area Association ("Crest/Promontory") (collectively, "Plaintiffs") is a meritless "SLAPP" suit that should never have been filed and that should promptly be dismissed under California's anti-SLAPP statute. Plaintiffs are seeking damages and injunctive relief from Monteverdi, LLC ("Monteverdi") and the Berggruen Institute (the "Berggruen Institute") (collectively, the "Berggruen Defendants") following the filing of an Environmental Assessment Form ("EAF") with the City of Los Angeles (the "City") relative to a potential development project. The filing of an EAF is the first step in causing the City to initiate the review process required by the California Environmental Quality Act ("CEQA"), "the fundamental purpose of [which] is to ensure 'that environmental considerations play a significant role in governmental decision-making.'" (*Fullerton Joint Union High School Dist. v. State Bd. of Education* (1982) 32 Cal.3d 779, 797, quoting *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 263.)

The Berggruen Institute is dedicated to the development and promotion of long-term answers to the challenges of the 21st Century. To further its mission, the Berggruen Institute is seeking to build a world-class campus in Los Angeles, at a site in the eastern portion of the Santa Monica Mountains just north of the Getty Center. The Berggruen Instituted has retained the Pritzker Prize-winning architecture firm of Herzog & de Meuron to design the campus, which will be built on previously graded areas, thereby limiting topographic changes. Indeed, the design will follow the existing contours of the mountain ridge and make use of infrastructure that is already in place. The surrounding landscape will not only be undisturbed, but public hiking trails will be maintained and enhanced and approximately 415 of the 447 acres will be preserved for open space.

The merits of the Berggruen Defendants' plans can and should be debated in the CEQA review process. Plaintiffs, like any other member of the public, will have the opportunity to participate in that process. But that is not enough for Plaintiffs, who are determined to be the only voice in the process, drowning out the City and the broader public in favor of their private interests. Indeed, Plaintiffs' goal in filing this lawsuit is quite clear—to spread disinformation about the Berggruen Defendants' plans, to tie up the Berggruen Defendants in litigation, and to delay or prevent the City's commencement of

the CEQA process. Simply put, their goal is to "obtain an economic advantage," not "to vindicate a legally cognizable right." (*Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 891, citations omitted.) The "lack of merit is not of concern to [Plaintiffs] because [Plaintiffs] do[] not expect to succeed in the lawsuit, only to tie up [the Berggruen Defendants'] resources for a sufficient length of time to accomplish [their] underlying objective." (*Ibid.*) And as "long as [the Berggruen Defendants] [are] forced to devote [their] time, energy and financial resources to combating the lawsuit, [their] ability to combat [Plaintiffs] in the political arena is substantially diminished." (*Ibid.*)

A special motion to strike is subject to a two-prong analysis. The first prong requires a showing that Plaintiffs' causes of action arise from protected activity covered by the anti-SLAPP statute. That is the case here. All of Plaintiffs' causes of action against the Berggruen Defendants are based in whole or in part on their submission of the EAF to the City Department of Planning. The filing of an EAF is plainly a "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," and a "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." (Code Civ. Proc., § 425.16, subd. (e)(2)-(3); see also *Dixon v. Superior Court* (1994) 30 Cal.App.4th 733, 742 [holding that statements made in connection with CEQA proceedings were matters of public concern and thus fall under the anti-SLAPP statute].) As such, the anti-SLAPP statute squarely applies.

The second prong requires Plaintiffs to establish with admissible evidence a probability of prevailing on each element of their causes of action. Plaintiffs cannot meet their burden for a host of reasons. Among other things, the Berggruen Defendants are not parties to (or otherwise bound by) the Memorandum of Understanding ("MOU") entered into between MOSMA, Castle & Cooke California, Inc. ("Castle & Cooke") and the Mountaingate Community Association ("MCA"), and the MOU cannot reasonably be read to impose a permanent restriction on the development of the property.

For all of these reasons and those set forth below, the Berggruen Defendants' Motion should be granted and Plaintiffs' causes of action against the Berggruen Defendants should be stricken.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Castle & Cooke Acquires and Seeks to Develop the Adjacent Land

In 1996, Castle & Cooke acquired the property at issue (the "Adjacent Land"). (First Amended Compl. ("FAC") ¶ 17.) Castle & Cooke worked for a number of years to develop the Adjacent Land, but faced a number of challenges from the City and MOSMA.[1] (FAC ¶¶ 17-20.) On July 22, 1998, Castle & Cooke filed a lawsuit against the City, *Castle & Cooke California, Inc.* v. *The City of Los Angeles,* et al. (LASC Case. No. BS052418) (the "Lawsuit"). (Declaration of Katarzyna Ryzewska, Ex. B.) Castle & Cooke sought a writ of mandate directed at the City to set aside a community plan update and a negative declaration, and to comply with CEQA requirements. (*Ibid.*) MOSMA intervened on behalf of the City and negotiated a settlement of the lawsuit. (FAC ¶ 21.)

B. Castle & Cooke and MOSMA Execute the MOU

On October 4, 1999, MOSMA, MCA, and Castle & Cooke entered into the MOU. (Ryzewska Decl., Ex. A (MOU).) The MOU required Castle & Cooke to (a) withdraw from further consideration an application for the development of 117 homes, (b) file a new vesting tentative tract map for the City to process with 29 homes (the "Reduced Density Plan"), and (c) dismiss the Lawsuit. (*Id.* ¶¶ 1-2.) Each of these obligations was met: Castle & Cooke withdrew the 117 home application in 2000, dismissed the lawsuit in 1999, and filed the Reduced Density tentative tract map on February 19, 2004 and obtained approval of the Reduced Density Plan by the Los Angeles City Council in August of 2006. (Declaration of Jonathan Lonner, Exs. C (Tentative Tract Map 53072), B (City Council Tentative Tract Map Approval), D (Tentative Tract Map 52428 Termination).) In turn, the MOU required MOSMA to (a) endorse the Reduced Density Plan, provided the City approved, (b) agree that questions, conditions and approvals concerning the project shall be decided by the City, (c) negotiate in good faith towards an agreement on the maintenance and disposition of the open space land, (d) not support, finance, or participate in any effort, including without limitation any litigation, that seeks to

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[1] MOSMA is a common interest association responsible for the oversight and management of the common and open space in Mountaingate. (FAC ¶ 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. (*Id.* ¶ 10; see also Mountaingate Brentwood Website <https://mountaingate.la/history-of-mountaingate> (as of Nov. 21, 2019).)

prevent Castle & Cooke from developing the property in accordance with the Reduced Density Plan, or which challenges any final decision of the City, and (e) acknowledge Castle & Cooke's position that it needs to develop the Property in a financially feasible manner. (Ryzewska Decl., Ex. A ¶¶ 3-5.) The MOU also provided that if (1) MOSMA breached the MOU, Castle & Cooke could re-commence the processing of any development plan it chose (*id.* ¶ 6.), and (2) all approvals necessary for the development of the Reduced Density Plan are not received despite Castle & Cooke's good-faith efforts, or Castle & Cooke determines in good faith that costs or conditions arising or resulting from such approvals make the Reduced Density Plan economically or otherwise infeasible, Castle & Cooke may terminate this MOU. (*Id.* ¶ 7.) Importantly, the MOU was never recorded in the Official Records of Los Angeles County. (Declaration of Benjamin Saltsman, ¶ 3; Ex. B (Title Report).)

C. Monteverdi Acquires and Seeks to Develop a Portion of the Adjacent Land

The Berggruen Institute is multi-disciplinary, multi-cultural scholarly institute which develops ideas to reshape political and social institutions in the face of a changing social and political landscape. (Declaration of Dawn Nakagawa ¶ 2.) In 2014, Monteverdi, an affiliate of the Berggruen Institute, acquired a portion of the Adjacent Land from Castle & Cooke (the "Monteverdi Property"), while Castle & Cooke, through its subsidiary C&C Mountaingate, Inc. ("C&C Mountaingate"), retained the remainder of the Adjacent Land (the "Castle & Cooke Property"), but reserving for Monteverdi an option to purchase the land at a later date. (*Id.* ¶ 3.) The Monteverdi Property includes the majority of the lots contemplated by the Reduced Density Plan. (*Ibid.*) Although MOSMA now argues that the MOU is a covenant running with the land, MOSMA never bothered to record it or draft it in a manner that allow it to meet the requirements for recordation under California law. (Nakagawa Decl. ¶ 4; Saltsman Decl., Ex. B.)

In 2014, the Berggruen Institute approached MOSMA about their plans to develop a center to study social issues (the "Scholars' Campus"). (Nakagawa Decl. ¶ 6.) By building the Scholars' Campus in Los Angeles, the Berggruen Instituted hoped to advance the position of Los Angeles as a world center for ideas. (*Id.* ¶ 5.) At the time, the Berggruen Institute was optimistic that the parties could work together to develop plans that would be agreeable to everyone involved. (*Id.* ¶ 6.)

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 the intention to create a private educational forum where distinguished scholars can interact with thought leaders. (Nakagawa Decl. ¶ 5.) Public hiking trails will be maintained and enhanced and provide access to the Institute campus. (*Id.* Ex. A, at p. 8.) The plans evolved over a period of time, with input from various entities, including MOSMA.

In May of 2019, Monteverdi and C&C Mountaingate requested that the City approve the recordation of Final Map 53072 prior to expiration of the Approved Tentative Map 53072 (the "Final Map"). (Lonner Decl., Ex. E (Final Map).) The City Council approved the Final Map in July 1, 2019 and it was recorded in the Official Records of Los Angeles County shortly thereafter. (*Id.* ¶ 5.) The Final Map reflected the Reduced Density Plan (as modified at the request of Castle & Cooke in 2009), and subdivided the Adjacent Land into legal lots that can be conveyed to end users. (*Id.*, Ex. E.)

On July 31, 2019, the Berggruen Defendants filed an EAF with the City, providing information on the potential environmental impact of the Scholars' Campus and marking the beginning of the City's CEQA review process. (*Id.* Ex. F (2019 EAF).) On August 8, 2019, MOSMA sent a letter to Castle & Cooke and the Berggruen Defendants, stating that the filing of the EAF was a breach of the MOU. (Saltsman Decl., Ex. A, at p. 1.) On September 20, 2019, MOSMA filed the instant action. Shortly thereafter, MOSMA began a letter-writing campaign to spread misinformation about the project and send a message to the City to halt the CEQA process, lest the City and Monteverdi be embroiled in costly litigation. (Lonner Decl., Ex. H (Sept. 26, 2019, Ltr. to City).)

As of the filing of this motion, no permits have been issued for, and no work has begun on, the proposed Scholars' Campus because those permits cannot be issued until the City's CEQA process is completed, and the project is subject to noticed public hearings and review. (Nakagawa Decl. ¶ 7.)

D. Stoney Hill Road Is Essential to the Development of the Reduced Density Plan

Stoney Hill Road is located near Mountaingate and abuts against the Monteverdi Property.[3]

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[2] The 447-site includes the entire area covered by the Reduced Density Plan, including the land retained by Castle & Cooke and the Monteverdi Property.

[3] Plaintiff Crest/Promontory is an association that owns Stoney Hill Road, and is responsible for its management and maintenance. (FAC ¶ 52.)

(*Id.* ¶ 8.) As approved by the City, the homes in the Reduced Density Plan, use Stoney Hill Road for day-to-day access.[4] (*Ibid.*) At the time that the Reduced Density Plan was approved by the City, Stoney Hill Road was a publicly dedicated street that extended to the Monteverdi Property over a one-foot strip of property that had been offered for dedication to the City for street purposes. In 2009, after the tentative map was approved, and at the request of MOSMA, the City vacated Stoney Hill Road (including the one-foot strip of the road that had been offered for dedication), thereby converting it from a public to a private road. (Lonner Decl., Ex. J (Vacation Resolution).) Prior to vacating the road, the City imposed conditions to preserve access for all "lots with direct frontage on Stoney Hill Road and other lots using Stoney Hill Road for access to Mountaingate Drive." (Lonner Decl., Ex. K (Instrument No: 20100135911).) In satisfaction of these conditions, the owners of the road recorded a covenant promising to grant a "private ingress and egress easement . . . to owners of all properties currently using the public street portion of Stoney Hill Road being vacated. . . ." (Lonner Decl., Ex. M (Instrument No. 20091392785).) 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 Monteverdi Property). (*Ibid.*)

III. LEGAL STANDARD

California's anti-SLAPP statute provides for a special motion to strike a complaint where the complaint arises from an act in furtherance of a person's right of petition or free speech. (Code Civ. Proc., § 425.16, subd. (b)(1).) The anti-SLAPP statute is unique in that it requires, at the outset of a case, that the plaintiff present evidence sufficient to demonstrate a probability that it will prevail on its claim. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 61.)

Courts conduct a two-step inquiry in deciding an anti-SLAPP motion. (Code Civ. Proc., § 425.16, subd. (b); *Equilon*, *supra*, 29 Cal.4th at p. 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).) Such acts include "written or oral statement or writing" made

[4] As part of the CEQA process, Monteverdi has indicated in the EAF that it intends to develop a new access road to the Scholars' Campus and create a new emergency access road that would be made available to MOSMA's residents. (Lonner Decl., Ex. F.)

before, or in connection with an issue under consideration or review by a "legislative, executive, or judicial body, or any other official proceeding authorized by law," or in a "place open to the public or a public forum in connection with an issue of public interest," or "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." (*Id.*, § 425.16, subd. (e).)

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, 613-14.) 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.)

IV. ARGUMENT

A. Plaintiffs' Causes of Action Are Based on Protected Petitioning Activity

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.) "Legislative history materials respecting the origins of section 425.16 indicate the statute was intended broadly to protect, *inter alia*, direct petitioning of the government and petition-related statements and writings—that is, 'any written or oral statement or writing made before a legislative, executive, or judicial proceeding' or 'in connection with an issue under consideration or review.'" (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1113-1114, quoting Code Civ. Proc., § 425.16, subd. (e)(1), (2).) Thus, "a plaintiff cannot frustrate the purposes of the SLAPP statute through a pleading tactic of combining allegations of protected and nonprotected activity under the label of one 'cause of action.'" (*Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 308; see also *Ramona Unified School District v. Tsiknas* (2005) 135 Cal.App.4th 510, 519-520 ["a plaintiff cannot avoid operation of the anti-SLAPP statute by attempting, through artifices of pleading, to characterize an action as a *garden variety* tort claim when in fact the liability claim is predicated on protected speech or conduct," italics in original].)

Here, Plaintiffs filed this action in direct response to the Berggruen Defendants' submission of the EAF to the City Department of Planning. The submission forms the basis of Plaintiffs' causes of

action. (See FAC ¶¶ 39, 41, 45, 49, 51.) Indeed, all of Plaintiffs' causes of action reference either the filing of the EAF and/or the development plans reflected therein. (See *id.* ¶¶ 67, 69, 85, 92.)

The submission of the EAF was plainly a "written or oral statement or writing" made before, or in connection with an issue under consideration or review by, a "legislative, executive, or judicial body, or any other official proceeding authorized by law." (Code Civ. Proc., § 425.16, subd. (e)(1), (2).) CEQA is a California statute passed in 1970. (*Neighbors for Smart Rail v. Exposition Metro Line Constr. Auth.* (2013) 57 Cal.4th 439, 466.) It requires public agencies to inform the public and public officials of any significant effect on the environment of proposed projects. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 442; Cal. Pub. Res. Code § 21000; 14 Cal. Code Regs. § 15002, subd. (a), 15003, subd. (b)-(e).)

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.) Once an applicant files the 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 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.*) "Public participation is an 'essential part of the CEQA process.'" (Cal. Admin. Code, tit. 14, § 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."].) Indeed, "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.* (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 is plainly protected petitioning activity.

Further, there can be no dispute that the building of the Scholars' Campus and the related CEQA

review process is a matter of public concern. (Code Civ. Proc., § 425.16, subd. (e)(3)-(4); *Dixon*, *supra*, 30 Cal.App.4th at p. 742 [holding that statements made in connection with CEQA proceedings were matters of public concern and thus fall under the anti-SLAPP statute]; *Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 15 [holding that statements made in connection with CEQA proceedings, stating that the "development of the [project], with potential environmental effects such as increased traffic and impaction on natural drainage, was clearly a matter of public interest."].) As a result, any causes of action arising out of the submission of the EAF are subject to an anti-SLAPP Motion.

Accordingly, because Plaintiffs' causes of action are based on protected petitioning activity, the burden shifts to Plaintiffs to establish a probability of prevailing on their claims. As set forth below, Plaintiffs cannot meet this burden.

B. Plaintiffs Cannot Establish a Probability of Success on the Merits

Under the second prong of the anti-SLAPP inquiry, 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.) Courts consider not only the "substantive merits of the plaintiff's complaint," but also "all available defenses . . . including, but not limited to constitutional defenses." (*Traditional Cat Assn., Inc. v. Gilbreath* (2004) 118 Cal.App.4th 392, 398.) Plaintiffs cannot meet their burden of proving a likelihood of success.

1. The Berggruen Defendants Are Not Bound by the MOU

MOSMA cannot establish a likelihood of success on its causes of action for declaratory relief regarding the MOU, declaratory relief regarding equitable servitude, breach of the MOU, breach of the duty of good faith and fair dealing, and unjust enrichment because it cannot show that the MOU is binding on the Berggruen Defendants. (FAC ¶¶ 57-58.)

First, the Berggruen Defendants are not parties to the MOU. The parties to the MOU are MOSMA, MCA, and Castle & Cooke. (Ryzewska Decl., Ex. A.)

Second, the MOU is not a covenant running with the land. A covenant only runs with the land when the land that is burdened by and the land that benefits from the covenant are "particularly described in the instrument containing such covenants." (Civ. Code, § 1468, subd. (a).) The MOU contains *no* legal description of the burdened or benefitted land. Moreover, the MOU does not "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).) The MOU only required that Castle & Cooke file a new, modified, vesting tentative tract map with the City, and by its terms places no ongoing restrictions on the "use, repair, maintenance, or improvement of" the Adjacent Land. (Ryzewska Decl. Ex. A; Civ. Code, § 1468, subd. (c); compare *Self, supra*, 220 Cal.App.4th at p. 486 ["Under the heading 'Restriction[,]' the deed stated: 'A consideration of this sale is that no buildings will be erected now or at any future date on the [property retained].'"].) Finally, a restrictive covenant runs with the land only if "the instrument containing the covenant is recorded." (*Scaringe v. JCC Enterprises, Inc.* (1988) 205 Cal.App.3d 1536, 1544; see also Civ. Code, § 1468, subd. (d).) Here, the MOU was never recorded. (Saltsman Decl. ¶ 3; Ex. B.) Thus, the MOU is not a covenant running with the land and not binding on the Berggruen Defendants.

Third, the MOU is not binding on the Berggruen Defendants as an equitable servitude. The concept of an equitable servitude was created by the courts 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.) The first issue is whether "the person bound by the restrictions had ***notice***" of a restriction. (*Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361, 375, 379, emphasis added.) Here, the Berggruen Defendants had no notice of the MOU prior to 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 the Berggruen Defendants did not know about it, nor was it brought to their attention. (Nakagawa Decl. ¶ 5; Saltsman Decl. Ex. B.) Further, even if the Berggruen Defendants had seen the MOU at the time (which they did not), it would not have put them on notice of MOSMA's claims because it does not, on its face, prevent a successor from building the kind of project that the Berggruen Defendants envision. (Ryzewska Decl. Ex. A; see Civ. Code, § 1468, subd. (c).) Finally, a failure to "enforce the restrictions would [not] produce an inequitable result" because there are no restrictions to enforce. (*MacDonald Properties, Inc. v. Bel-Air Country Club* (Ct. App. 1977) 72 Cal.App.3d 693, 700.) Thus, the MOU is not enforceable as an equitable servitude.

2. The MOU Does Not Create a Permanent Restriction on Development

MOSMA's causes of action for declaratory relief regarding the MOU, declaratory relief regarding equitable servitude, breach of the MOU, breach of the duty of good faith and fair dealing, intentional interference with contract, and unjust enrichment fail because the MOU does not create an ongoing, permanent restriction on the development of the Adjacent Land. The crux of MOSMA's complaint is the allegation that the MOU limits development of the Adjacent Land solely to the Reduced Density Plan. (FAC ¶¶ 58, 60, 63, 74.) But the MOU imposes no such restriction.

First, the MOU imposes only ***three*** obligations on Castle & Cooke—to "withdraw from further consideration or processing 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." (Ryzewska Decl., Ex. A ¶¶ 1, 2.) Castle & Cooke fully performed its obligations. It withdrew the originally filed Vesting Tentative Tract Map. (Lonner Decl., Ex. D.) It dismissed the Lawsuit. (Ryzewska Decl. Ex. C (Lawsuit Dismissal).) And it filed the new vesting tentative tract map in 2004, which the City approved in 2006. (Lonner Decl., Ex. C.) Nowhere in the MOU is there any other requirement on Castle & Cooke, let alone one that permanently restricts the development of the land to the Reduced Density Plan.

Second, even assuming Castle & Cooke or the Berggruen Defendants have breached the MOU by proposing new development plans (they have not), MOSMA's only remedy would be to oppose those plans by way of, for example, the CEQA process. The MOU is clear—*if* Castle & Cooke seeks approval of the Reduced Density Plan, *then* MOSMA must not oppose, and *if* Castle & Cooke seeks approval of a different plan, *then* MOSMA may oppose. (Ryzewska Decl., Ex. A ¶¶ 4, 6.) Specifically, Paragraph 6 provides that if Castle & Cooke pursues a different development plan, MOSMA may oppose "any other development plan Castle & Cooke chooses for the Property." (*Id.* ¶ 6.) MOSMA has no other remedy under the MOU.

Third, the MOU expressly provides that Castle & Cooke may terminate the MOU. Specifically, Paragraph 7 of the MOU provides Castle & Cooke "may terminate this MOU" "if [it] determines in good faith costs or conditions . . . make the Reduced Density Plan economically or otherwise infeasible." (*Id.* ¶ 7.) Moreover, MOSMA has already (erroneously) asserted in its August 12 letter to the City that no project can have access to Stoney Hill Road unless a separate access agreement is

reached between MOSMA and the Berggruen Defendants, and that "the Crest/Promontory Common Area Association and its associated Mountaingate community associations will not agree to provide any access to the proposed Berggruen Project over the Stoney Hill Road private street." (Lonner Decl., Ex. G, emphasis in original.) Thus, Plaintiffs have publically declared their intention to block the Berggruen Defendants and Castle & Cooke from constructing the Reduced Density Plan, and Castle & Cooke (and the Berggruen Defendants, to the extent the MOU applied to them (which is does not)) have the right to terminate the MOU on this separate and independent basis. As a result, the MOU does not preclude the Berggruen Defendants, from pursuing other development plans.

3. The Only Party that Has Breached the MOU is MOSMA

MOSMA cannot establish a likelihood of success on its causes of action for breach of the MOU, breach of the duty of good faith and fair dealing, and intentional interference with contract because it breached the MOU.[5] In May 2019, Monteverdi and C&C Mountaingate requested the approval of the Final Map, which reflected the Reduced Density Plan submitted through the Tentative Map. (Lonner Decl., Ex. E.) Under the terms of the MOU, MOSMA was obligated to "endorse and agree with the development of the Property in accordance with the Reduced Density Plan." (Ryzewska Decl., Ex. A ¶ 3.) Yet, on August 8, 2019, MOSMA sent a letter to Castle & Cooke and the Berggruen Defendants, stating that the recordation of the Final Map, which reflected the Reduced Density Plan, "occurred without compliance with the conditions of the Tentative Tract Map." (Saltsman Decl., Ex. A, at pp. 4-5.) And 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 the Berggruen Defendants, essentially providing MOSMA with full veto power over the Berggruen Defendants' ability to implement even the Reduced Density Plan. (Lonner Decl. Ex. G, at pp. 2-3.)

Most recently, MOSMA committed yet another breach of the MOU by sending a letter to the City on December 5, 2019 challenging the City's approval of the Final Map for the Reduced Density plan, as well as the related grading permits issued by the City. (*Id.*, Ex. I (Dec. 5, 2019 Ltr).)

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[5] To prevail on its causes of action 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. (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.)

Section 3(b) of the MOU provides that decisions related to emergency access road, "the proximity of the development to Canyon 8 landfill[,] and to methane" were left to the City and MOSMA agreed not to support, finance or participate in any effort to challenge the City's final decisions on these matters. (Ryzewska Decl., Ex. A ¶ 3, subd. (b)(i)-(iv).) Paragraph 4 reinforces this obligation by indicating that MOSMA reserves the right to challenge limited aspects of the Project *but that MOSMA may not challenge the aspects of the City's decision enumerated above.* (*Id.* ¶ 4.) In direct breach of its obligations, MOSMA's letter challenges the City's approval of grading permits 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, by stating that the "Planning Department and LEA Acted Improperly in Approving Grading Permits and the Final Tract Map Without Requiring Compliance with Condition 113." (Lonner Decl. Ex. I, at p. 3.)

Thus, because MOSMA has breached the MOU, its causes of action for breach of the MOU, breach of the duty of good faith and fair dealing, and intentional interference with contract fail. Further, because MOSMA breached the MOU, the Berggruen Defendants are entitled to commence "the processing of any development plan [they choose] for the Property." (Ryzewska Decl., Ex. A ¶ 6.)

4. The Berggruen Defendants Have Received No Benefit, and MOSMA Has Suffered No Damages

MOSMA cannot establish a likelihood of success on its causes of action for breach of the MOU, breach of the duty of good faith and fair dealing, intentional interference with contract, and unjust enrichment because the Berggruen Defendants have received no benefits, and because MOSMA has suffered no damages.[6] The only action taken to date by the Berggruen Defendants relating to the development of the Scholars' Campus has been the submission of the EAF, which is only the first step in the CEQA review process. (Nakagawa Decl. ¶ 7.) No permits have been approved, no work has begun, and no approval has been issued by the City. (*Ibid.*) There is no guarantee that the Scholars'

[6] In order to prevail on its causes of action 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 damages. (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.) In order to prevail on its cause of action for unjust enrichment, MOSMA must prove that the Berggruen Defendants were unjustly enriched at MOSMA's expense. (See *Lyles v. Sangadeo-Patel* (2014) 225 Cal.App.4th 759, 769.)

Campus will ever be approved or built, let alone that its construction will cause any "damage" to MOSMA. MOSMA's damages allegations are wholly speculative and conjectural.[7]

5. Plaintiffs' Cause of Action for Declaratory Relief regarding Stoney Hill Road Fails

Finally, Plaintiffs cannot establish a likelihood of success on their request for a declaration that the Berggruen Defendants are "not entitled to use Stoney Hill Road for ingress or egress, and have no easement (express or implied) or other right to use the road." (FAC ¶ 91.)

First, express access rights were reserved as a condition to the street vacation pursuant to Private Street Case No. 1404/1404-M-1, Resolution to Vacate No. 09-1401043 recorded as Instrument No: 20100135911 on January 29, 2010. (Lonner Decl., Ex. K.) Stoney Hill Road was a public street until 2009, when it was vacated by the City. (*Id.* at p. 1.) The City Engineer's Report described the adjacent parcels utilizing Stoney Hill Road and expressly acknowledged that while the adjacent 2050 Stoney Hill Road Property was vacant, it had been "proposed for development under Tract No. 53072." (*Id.* at p. 11.) Based in part on the City Engineer's Report, the Advisory Agency imposed 13 conditions that had to be satisfied before the street vacation could become effective. (Lonner Decl., Ex. L, at pp. 2-5.) In relevant part, the conditions included that (1) "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 (2) "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." (*Id.* at p. 2.)

Second, in satisfaction of these conditions, express access rights were reserved and/or granted pursuant to a Covenant and Agreement dated as of May 1, 2009 that was executed as of, and recorded, on September 11, 2009 as Instrument No. 20091392785. (Lonner Decl., Ex. M.) The Covenant and

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[7] MOSMA's suggestion that the Berggruen Defendants somehow "benefited" because MOSMA did not oppose the submission of the new tentative tract map in 2004 does not make any sense. (FAC ¶ 88.) The Berggruen Defendants did not purchase the land until 2014. (Nakagawa Decl. ¶ 3.) Any "value" added to the land as a result of the submission of the map in 2004 and approval of the map in 2006 would have been reflected in the purchase price paid by the Berggruen Defendants in 2014. Further, the Berggruen Defendants are not pursuing the development plan reflected in the 2006 map and, thus, do not stand to benefit from its approval.

Agreement requires that a "private ingress and egress easement 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 under Engineering File E1401043 for access." (*Id.* at p. 2.) 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 Monteverdi Property). (*Id.* at p. 4) 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. As noted above, the Engineer's Report expressly referenced the 2050 Stoney Hill Road Property and pending Tract 53072 as an adjacent use. (Lonner Decl., Ex. K, at p. 11.) Thus, the 2050 Stoney Hill Road Property was included among the properties that were granted access rights over Stoney Hill Road.

Third, the 2050 Stoney Hill Road Property possesses the special right to access Stoney Hill Road as a result of the long-established California common law doctrine of abutter's rights, which gives a landowner whose property abuts a street the special, private right to access their property from that street. The abutter's right is a distinct 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.) 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. This principle was expressly codified in California 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, Vesting Tract Map No. 53072 was approved in 2006 by the City with the express understanding that access to Tract 53072 would be provided over Stoney Hill Road, including the one-foot strip dedicated for the future street. (Lonner Decl., Ex. K, at p. 11.) 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 Tract 53072. (*Bacich*, *supra*, 23 Cal.2d at pp. 349–350.)

V. CONCLUSION

For all of the foregoing reasons, the Berggruen Defendants respectfully request that the Court strike Plaintiffs' Complaint with prejudice, and award attorneys' fees and costs to the Berggruen Defendants pursuant to California's anti-SLAPP law's mandatory attorneys' fees clause for prevailing defendants.

Dated: December 13, 2019

GIBSON, DUNN & CRUTCHER LLP

By: */s/ James P. Fogelman*
James P. Fogelman

Attorney for Monteverdi, LLC and Berggruen Institute

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MOUNTAINGATE OPEN SPACE MAINTENANCE ASSOCIATION vs MONTEVERDI, LLC, A CALIFORNIA LIMITED LIABILITY COMPANY, et al.

Case Number: 19STCV33839 Case Type: Civil Unlimited Category: Other Breach of Contract/Warranty (not fraud or negligence)

Date Filed: 2019-09-20 Location: Stanley Mosk Courthouse - Department 28

Reservation

Case Name:
MOUNTAINGATE OPEN SPACE MAINTENANCE ASSOCIATION vs MONTEVERDI, LLC, A CALIFORNIA LIMITED LIABILITY COMPANY, et al.

Case Number:
19STCV33839

Type:
Special Motion to Strike under CCP Section 425.16 (Anti-SLAPP motion)

Status:
RESERVED

Filing Party:
Berggruen Institute (Defendant)

Location:
Stanley Mosk Courthouse - Department 28

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1

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Fees

Description	Fee	Qty	Amount
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Credit Card Percentage Fee (2.75%)	1.65	1	1.65
TOTAL			**$61.65**

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Amount:
$61.65

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