B308496

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION 2

MOUNTAINGATE OPEN SPACE MAINTENANCE ASSOCIATION, ET AL.,

Plaintiffs-Respondents,

v.

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

Defendants-Appellants.

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

RESPONDENTS' BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

There are no interested entities or parties to list in this Certificate per California Rules of Court, Rule 8.208.

Dated: August 18, 2022

Respectfully submitted,

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS (CONT'D)

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (CONT'D)

Page(s)

TABLE OF AUTHORITIES (CONT'D)

Page(s)

Statutes

Other Authorities

I. INTRODUCTION

This is not a SLAPP lawsuit. The claims at issue concern whether Appellants Monteverdi LLC and Berggruen Institute (collectively "Appellants") are bound to a longstanding 1999 Memorandum of Understanding ("MOU") that restricts the development of their property to a 29 home "Reduced Density Plan." The lawsuit arises from Appellants' repudiation of the MOU and decision to develop a massive institute "project" that is incompatible with the surrounding area. Accordingly, Respondents Mountaingate Open Space Maintenance Association ("MOSMA") and Crest/Promontory Common Area Association (collectively "Respondents") filed a complaint seeking a declaration that despite Appellants' repudiation and claim to the contrary, the MOU is binding. Resolution of that or any other claim in the complaint does not depend on whether Appellants engaged in protected activity.

Appellants' contention that Respondents' claims arise solely out of their filing a single preliminary Environmental Assessment Form ("EAF") deliberately misconstrues the actual allegations in the complaint. Respondents' causes of action relating to the MOU *do not even mention the EAF* and in no way rely on it.

The complaint only contains two brief references to the EAF. In each instance, the reference is used merely as *evidence* of the scope of Appellants' project and the dispute between the parties, not as a basis for

liability. These minimal allegations cannot be cherry-picked or plausibly construed to form the entire basis of the complaint, which is not about the EAF at all, but which clearly does arise from Appellants' acts of repudiating the MOU and disputing that it applies to them. Case law is clear that a plaintiff can allege protected activity as collateral *evidence* without being subjected to the SLAPP statute. Allegations of this sort of "incidental" or "collateral" protected activity do not support an anti-SLAPP motion.

Appellants also assert that the trial court relied on a flawed analysis by evaluating the "gravamen" of Respondents' claims. The trial court did not state that its decision was based on the gravamen of the complaint. It did, however, correctly find that Respondents' claims arise from a dispute over the applicability of the MOU *and not* the filing of the EAF. (RT 2:16-3:5; 20:7-21:3.) That conclusion should be affirmed.

Moreover, Appellants have never argued that Respondents' claims concerning the repudiation and applicability of the MOU arise from protected activity. They have only ever argued that that purported claims based on the EAF would. Accordingly, at most, only claims relating to the EAF would be subject to the SLAPP analysis. Respondents' other claims (which are its only claims) cannot be stricken.

Nor can Appellants prevail under the second prong of the anti-SLAPP test. To satisfy that prong, Respondents only must show *minimal*

merit, and some evidence to support their claims. Respondents submitted substantial evidence that Appellants knew about the MOU prior to closing their acquisition, agreed in the purchase agreement acquiring the property to assume and comply with its obligations, accepted its benefits by finalizing a tract map the MOU provided the right for, and then, *right after* that was done, told Respondents that they would no longer comply with the MOU. Appellants are bound by the MOU because they assumed it, are successors based on their acceptance of its benefits, and because the MOU operates as an equitable servitude. Despite Appellants' misleading arguments to the contrary, for 23 years, Respondents have fully complied with the MOU and they continue to do so.

The evidence also demonstrates that the intent of the MOU was to restrict future use of the property to the 29 home Reduced Density Plan. Appellants' owner Nicolas Berggruen is a billionaire seeking to build a massive project, on top of other homes, in clear violation of a longstanding agreement. Public relations lip-service aside, the project is out of character with the residential community, would create environmental, traffic, aesthetic, fire safety and other harms, and is strongly opposed in the community. It is exactly what the MOU was designed to prevent.

In addition to the claims concerning the MOU, the complaint seeks to resolve a dispute over whether Appellants have access to Stoney Hill Road, a private street owned by the members of the Respondent

associations. Appellants' argument that Respondents' declaratory relief claim regarding the private street arises out of protective activity is demonstrative of their abuse of the SLAPP statute. The complaint only refers to the EAF as *evidence* of the dispute regarding access to the street. Respondents' claim, however, arises from *actual dispute* over access, not anything relating to an incidental communication in the EAF evidencing the dispute. In no way does this claim "arise from protected activity" and Appellants' argument to the contrary is frivolous. In any event, Appellants' motion regarding this claim fails under the second prong of the anti-SLAPP test as well. Stoney Hill Road is a private street. Appellants were never granted an easement over it, never had access directly from it, and do not have any right to use it for their project.

II. STATEMENT OF FACTS

Mountaingate is a master-planned hillside residential community. It contains 300 single-family homes in a unique, hillside, low density setting. For many years, defendant Castle & Cooke California, Inc. ("Castle & Cooke") sought to expand Mountaingate to nearby land (the "Property"), initially trying to add over 180 homes and then 117. (Declaration of Robert Rieth in support of Plaintiffs' Opposition to Defendant's Motion to Strike First Amended Complaint, filed on September 29, 2020 ("Rieth Decl."),

¶ 4-7.)[1] In 1998, a dispute arose over the use of the land. (*Id*.) Ultimately, Castle & Cooke and MOSMA negotiated an agreement to settle the future use of the property once and for all: the MOU. (1 CT 62-65.) The MOU memorialized a "Reduced Density Plan" that allowed only 29 homes on the Property (the 29 Home Plan). (*Id*.) The intent of the MOU was to restrict Castle & Cooke and its successors' future development of the Property to only the 29 homes. (Rieth Decl., ¶ 8-10.)

Appellants are owned by Nicolas Berggruen, known as the "homeless billionaire." In August 2014, Mr. Berggruen and his representatives met with MOSMA, including its president Stephen Drimmer, concerning its upcoming acquisition of the Property. (3 CT 665-666, ¶¶ 7-10.) The parties discussed the existence and terms of the MOU, including the fact that it contained the 29 home limitation and Mr. Berggruen's desire to potentially use the land for a project for his Berggruen Institute. (*Id*.) At the time, Mr. Drimmer told Mr. Berggruen that he expected Appellants to comply with the MOU to build the 29 Home Plan and that the MOU limited development of the Property to only the twenty-nine homes which are reflected in the Reduced Density Plan. (*Id*.)

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[1] In Appellants' Notice Designating Record on Appeal, the Declaration of Robert Rieth was designated but the Clerk's Transcript did not include it. Pursuant to Rule of Court 8.155, Respondents are requesting that the Superior Court clerk prepare, certify, and send to this Court a copy of the properly designated but inadvertently omitted declaration.

In response, Mr. Berggruen assured Mr. Drimmer that he would not develop the Adjacent Land or build his project without an agreement from MOSMA. (*Id*.)

Soon thereafter, Appellants closed their acquisition of a portion the Property via a purchase agreement in which Berggruen agreed to "assume and comply with" all obligations relating to the Property (and thus the MOU). (3 CT 695, ¶¶ 2-3; 3 CT 698-722.) Berggruen also obtained an option to acquire the remainder of the Property from Castle & Cooke. (3 CT 673, ¶ 6.)

Subsequently, the parties regularly met to determine if there was an alternative to the 29 Home plan that MOSMA could support. In or around June 2019, Berggruen and Castle & Cooke obtained approval for the "Final Map" reflecting the Reduced Density Plan. (1 CT 144-160.) However, just after obtaining this right, in a meeting at Mountaingate on July 23, 2019, Appellants repudiated the MOU entirely and said they would no longer comply with it but instead would seek to develop their revised project. (3 CT 666-667 (¶¶ 13-14); 3 CT 672 (¶ 3).) At the meeting, Appellants showed MOSMA a new plan for its institute (the "Project"), a massive 225,000 square foot facility with a building nearly 100 feet tall placed close to existing homes, and over 45 residences. (3 CT 666-668, ¶¶ 13-15; 3 CT 672 (¶ 3).). It was a substantial expansion on the project previously discussed. *Id.* Rather than being a residential project consistent with the

character and density of the neighborhood as negotiated for and agreed upon in the MOU, the project Appellants said they were planning to build would include facilities for the Berggruen Institute, including offices, numerous conference facilities (including a large auditorium), buildings up to 95 feet (approximately 10 stories) in height, 46 residences for the Institute's invitees, a heliport for VIPs, and parking for employees and special events. (3 CT 666-667, ¶¶ 13-14.) Much of this would be placed in a dedicated nature open space that MOSMA had negotiated in the MOU would remain undeveloped. (3 CT 667-668, ¶ 15.)

At the meeting, over MOSMA's objections, Appellants told MOSMA that they would not comply with the MOU, were not bound by it, and were going to proceed with the building of the Project instead of the 29 Home Plan, without MOSMA's consent. 3 CT 666-667, ¶¶ 13-14; 3 CT 672 (¶ 3).) The Project would have enormous impacts on the density and environment of the area, would negatively affect home values, would cause traffic and security issues, would develop a natural hillside open space, and would create fire hazards in a "Very High Fire Hazard Severity Zone" of Los Angeles, all contrary to the MOU governing the property. (3 CT 667-668, ¶ 15.) Unable to resolve the issue, MOSMA filed this lawsuit.

III. STANDARD OF REVIEW

The parties agree that the standard of review in this Court for denial of an anti-SLAPP motion is *de novo*.

IV. ARGUMENT

A. Legal Standard For Anti-SLAPP Motions.

Anti-SLAPP motions are decided pursuant to a two-pronged test. Under the first prong, Appellants, as the moving parties, have the burden of establishing that Respondents' claims arose out of protected activity. *Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1061. To make this determination, a court must evaluate whether the complaint contains allegations of protected activity that are asserted as grounds for relief. *Id; Baral v. Schnitt* (2016) 1 Cal.5th 376, 395; *City of Alhambra v. D'Ausilio* (2011) 193 Cal.App.4th 1301. The targeted claim must amount to a "cause of action" in the sense that it is alleged to justify a remedy. *Ibid.*

Although a Court should not evaluate an entire "mixed" cause of action alleging both protected and not protected activity based on its overall gravamen "[a] court may consider the 'gravamen' of a claim to evaluate whether a particular act or series of acts supplies an element or simply incidental context…." *Ibid.,* citing B*onni v. St. Joseph Health System* (2021) 11 Cal.5th 995, 1011. "Assertions that are 'merely incidental' or 'collateral' to the activity alleged to support the claim are not subject to section 425.16." *Bonni v. St. Joseph Health System, supra,* at p. 1011.

Moreover, "[i]f a cause of action contains multiple claims and a moving party fails to identify how the speech or conduct underlying some

of those claims is protected activity, it will not carry its first-step burden as to those claims." *Bonni v. St. Joseph Health System, supra,* at 1011.

If the first prong is established for any claims, then with respect to those claims only, the responding party must demonstrate a "probability of prevailing" under the second prong. (*Id.*) To demonstrate a probability of prevailing, the responding party only need to make a *prima facie* case and demonstrate that their claims have "minimal merit." *Navellier v. Sletten* (2002) 29 Cal.4th 82, 88-94. Similar to the summary judgment standard, a court should not weigh the evidence, "but accept as true all evidence favorable to the plaintiff and evaluate the defendant's evidence only to determine if it has defeated the evidence submitted by the plaintiff as a matter of law." *City of Alhambra v. D'Ausilio*, *supra*, 193 Cal.App.4th at pp. 1306-1307.

B. Respondents' Claims Do Not Arise Out of Protected Activity.

1. Respondents' Claims Arise Out Of A Dispute Regarding The MOU And Appellants' Repudiation Of It; They Do Not Arise From, Or Even Mention, The EAF.

Appellants' entire argument under the first prong of the anti-SLAPP test is that Respondents' First Amended Complaint (the "Complaint") is based on the filing of the EAF, and only the EAF. This is nonsense, and "attempts to read out of the complaint the allegations that are actually at its center" in an effort to fit the complaint into Appellants' "preferred

contention regarding protected speech." *See Ratcliff v. The Roman Catholic Archbishop of Los Angeles* (2022) 79 Cal.App.5th 982, 1009-1010. It is abundantly clear that Respondents' claims arise out of Appellants' repudiation and anticipatory breach of the MOU and the associated dispute regarding whether it binds them. The Complaint only briefly mentions the EAF as *evidence* describing the scope of Appellants' Project. (1 CT 47-48.) It does not seek to block the EAF or allege that it provides grounds for relief. (1 CT 51-59.)

In their brief, by selectively quoting and rearranging allegations from the Complaint, and then deducing what they contend the Complaint must mean instead of what it actually says, Appellants manufacture their own version of Respondents' claims. They implausibly argue that the *only act* giving rise to Respondents' claims was the filing of the EAF. This is plainly wrong. The Complaint alleges affirmative acts having nothing to do with EAF as the basis for its claims. These acts include (i) Appellants' repudiation of the MOU and (ii) Appellants disputing that the MOU binds them as successors to Castle & Cooke. (*see* 1 CT 45, ¶ 29; 47, ¶ 37; 51-53 ¶ 57, 60, 63.) Appellants completely ignore these allegations. Specifically, among multiple other similar allegations, the Complaint alleges that:

> ….[Appellants] are the successors in interest to Castle & Cooke and the MOU, and/or are assignees of the MOU, and are bound by the MOU to develop and use the Adjacent Property in accordance with the approved Reduced Density Plan. Plaintiff is informed and believes that Monteverdi and

> Berggruen dispute that they are bound by the MOU and the obligations thereunder. (1 CT 47, ¶ 37.)

(*See also* 1 CT 51-52, ¶ 57.) (alleging that Appellants deny that "the MOU is binding on Monteverdi and Berggruen [Appellants] as successors and/or assigns of Castle & Cooke"); (1 CT 44-45, ¶ 24; 45, ¶ 29; 52, ¶ 60; 53, ¶ 63) (alleging that Appellants deny they are bound by the MOU).

The declarations Respondents submitted in the trial court further evidence these acts of repudiation and the existence of the dispute between the parties. They demonstrate that the dispute arose and Appellants repudiated the MOU *before* they filed the EAF. (3 CT 666-777 [stating that at a meeting in Mountaingate in July 2019 Appellants affirmatively stated that they were not going to comply with the MOU, were not bound by it, and were going to build the Project instead]; *see also* 3 CT 672 (¶ 3).) The fact that the dispute concerns whether the MOU binds Appellants and not the EAF is further evidenced by the arguments in this very lawsuit. For example, in the extensive arguments regarding the merits of Respondents' claims for the second prong of the anti-SLAPP test, extensively dispute and focus on whether Appellants are bound by the MOU as Castle & Cooke's successors, and whether the MOU creates an equitable servitude or restricts their use of the Property, but not the filing of the EAF. This underscores the absurdity of Appellants' claim that it is the only thing that matters.

Also for example, the Complaint repeatedly alleges that the MOU

"restricts the future use of the Adjacent Land by limiting its development to 29 residential homes…" (1 CT 44, ¶ 23.) It alleges that in entering into the MOU, "It was the intent of the parties that Castle & Cooke, and any of its successors and assigns, would be obligated by the MOU to only develop the Adjacent Land in accordance with the Reduced Density Plan." (1 CT 44-45, ¶ 24.) Nowhere do Respondents allege that the MOU restricts the filing of the preliminary EAF form. Likewise, the Complaint discusses the actual use of the land and the impact of the Project, not the EAF. It describes how Appellants' Project "is inconsistent with the density and character of the community" and how it would create significant environmental preservation, hillside protection, fire safety, traffic, security and other issues, as well as harm property values. (1 CT 48-49, ¶¶ 41-43.) It further alleges that "The development and operation of the Berggruen Project would conflict with the development limitations of the MOU" and that it "would introduce an incompatible, out of scale, high intensity, non-residential use directly in the midst of a permanent public open space in a Very High Fire Hazard Severity Zone." (1 CT 48, ¶ 41.) None of these allegations reference the EAF or filings with the City.

The First through Sixth Causes of Action in the Complaint do not *even mention* the EAF.[2] If Respondents' claims relied on the EAF, they

[2] The Seventh Cause of Action relating to use of Stoney Hill Road mentions the EAF but only as evidence that Appellants contend they have

would have alleged the EAF as grounds. However, the Complaint contains only two brief mentions of it. (1 CT 47-48, ¶ 39; 51, ¶ 54.) The allegations are merely presented as *evidence* of the scope of Appellants' plans for the Project and the dispute concerning access to Stoney Hill Road. (*Id*.) They do not assert that the EAF provides grounds for relief or that the filing of it breached the MOU. Such "incidental" or "collateral" activity used to provide evidence for a claim—even if it is protected speech—does not support a SLAPP motion. *Bonni v. St. Joseph Health System, supra*, 11 Cal.5th at p. 1011. As discussed below, a plaintiff can allege protected activity as evidence of a claim without subjecting that claim to the SLAPP statute. *Ibid*; *Wang v. Wal-Mart Real Estate Business Trust* (2007) 153 Cal.App.4th 790, 809.

While Appellants are correct that the gravamen test cannot be used to evaluate a mixed cause of action as a whole, as the Supreme Court recently ruled, a court may consider the "gravamen" of a claim to evaluate whether a particular act is simply incidental context when the principal thrust concerns non-protected activity. *See Bonni v. St. Joseph Health System, supra*, at p. 1011. Here, the Complaint focuses on the dispute

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access over that road, and plainly not as the basis for any claim. (1 CT 58, ¶ 92.) That cause of action seeks a declaration that Appellants have no right to Stoney Hill Road, it does not challenge any petitioning activity. Appellants' argument that therefore the entire cause of action arises from protected activity is frivolous. (1 CT 58-59, ¶¶ 90-95.) None of the other causes of action mention the EAF whatsoever.

regarding whether the MOU binds Appellants, and only contains a brief reference to the EAF as evidence of the scope of the proposed Project.

Finally, although Appellants contend the EAF "triggered" this lawsuit, even if that were true, "the mere fact an action was filed after protected activity took place" or that it was "triggered by" or in response to protected activity, has no bearing on whether it challenges protected activity. *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76; *City of Alhambra v. D'Ausilio*, *supra*, 193 Cal.App.4th at p. 1307.

2. Respondents' Claims Do Not Depend On The MOU.

Relying on *Navallier v. Sletten*, *supra*, 29 Cal.4th at p. 90, Appellants repeatedly argue that "but for" their filing of the EAF, Respondents' claims would have no basis. This is nonsense. Respondents' claims are based on (i) the parties' dispute over whether the MOU applies to Appellants and (ii) Appellants' repudiation of the MOU, something that initially occurred even prior to the filing of the EAF. (3 CT 666-667.) They have nothing to do with the EAF. In contrast, in the *Navellier* case relied on by Appellants, the only act alleged to support the claims was the filing of a lawsuit, which is clearly protected activity. *Navellier*, *supra*, at p. 90.

Respondents' claims exist and are ripe regardless of the EAF. Code of Civil Procedure section 1060 specifically states that a party may obtain

declaratory relief to resolve a dispute even before there is a breach of the contract or alleged restriction. *Ibid.* ("The declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought.") The existence of the dispute concerning the applicability of the MOU provides grounds to pursue a claim for declaratory relief whether or not a breach has occurred.[3] *Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634, 647 (declaratory relief can be used as a means of settling controversies between parties to a contract regarding the nature of their contractual rights and obligations even before a breach occurs). Declaratory relief is also available to test the enforceability of covenants or servitudes against a property before, and regardless of whether, the restriction is violated. *Ross v. Harootunian* (1967) 257 Cal.App.2d 292, 294; *Lincoln Sav. & Loan Assn. v. Riviera Estates Assn.* (1970) 7 Cal.App.3d 449, 462-464 (a declaratory relief action affirming the trial court's enforcement of restrictions on use of land as equitable servitudes).

With respect to Respondents' contract related claims, repudiation of an agreement, standing alone, constitutes a breach of the agreement even

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[3] Respondents seek a declaration that the MOU binds Appellants, which is the focus of the Complaint. (1 CT 51-53, ¶¶ 56-63.) The relief sought for Respondents' claims, which are pursued alternatively where appropriate, are a declaration that the MOU binds Appellants, specific performance, and/or any available damages. (1 CT 59.)

before there is an actual breach. *Howard S. Wright Construction Co. v. BBIC Investors, LLC* (2006) 136 Cal.App.4th 228, 243. Therefore, Appellants' repudiation (or anticipatory breach) is sufficient to support Respondents' claims relating to the MOU.

3. Each Of Respondents' Individual Causes Of Action Do Not Arise Out Of Protected Activity.

First Cause of Action For Declaratory Relief Relating to The MOU. The First Cause of Action in the Complaint seeks declaratory relief: (1) "that the MOU is binding on Monteverdi, and thus Berggruen, as a successor or assignee of [Castle & Cooke]" and (2) "that the MOU obligates Monteverdi, Berggruen and/or [Castle & Cooke] to, among other things, limit development of the Adjacent Land to the Reduced Density Plan in accordance with the MOU." (1 CT 51-52, ¶¶ 56-58.) It does not in any way arise out of, or *even reference* the EAF.[4] (*Id*.)

As discussed above, this cause of action arises from the dispute over whether the MOU binds Appellants in light of their repudiation and anticipatory breach. (1 CT 51-52, ¶¶ 56-58.) The fact that the EAF may lurk in the background does not mean the cause of action arises from it.

Appellants also argue this cause of action can only arise the EAF

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[4] The fact that a cause of action generally incorporates allegations by reference cannot be used to show it "arises out of" protected activity. *Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 930.

because that is only act that is "ripe" for a dispute.[5] *First*, this argument is a logical fallacy. Even if the cause of action is not ripe (it is), that does not mean it must be read to include some other activity.

Second, as discussed above, the Complaint alleges other activity that did take place, namely Appellants' repudiation of the MOU and the dispute over the MOU's applicability. (1 CT 53-56, ¶¶ 64-79.) As discussed above, that repudiation and resulting dispute are sufficiently ripe, as a claim for declaratory relief concerning a contract can be, and often is, brought even before there is a breach. *Meyer v. Sprint Spectrum L.P.*, *supra*, 45 Cal.4th 634 at p. 647 (declaratory relief can be used as a means of settling controversies between parties to a contract regarding the nature of their contractual rights and obligations even before a breach occurs). Code of Civil Procedure section 1060 specifically states that a party may obtain declaratory relief to resolve a dispute even before there is a breach of the alleged restriction. *Ibid.* ("The declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought."); *see* also *Ross v. Harootunian*, *supra*, 257 Cal.App.2d 292 at p. 294 (declaratory relief is available to test the enforceability of covenants or servitudes against a property before, and regardless of whether, the restriction is violated).

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[5] Appellants never argued that ripeness is a grounds under the second prong and are not asserting as much here.

Appellants cite *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 for the proposition that declaratory relief claims based on protected activity are subject to anti-SLAPP protection. *Equilon* involved a declaratory relief claim directly challeging the propriety of a Proposition 65 notice sent to the Attorney General which is protected activity. The declaratory relief claims in this case concern a dispute over the applicability the MOU, not Appellants' alleged communicative activity. For example, in *City of Alhambra*, the Court found that even though the plaintiff sought a judicial declaration regarding the applicability of a contract that would bar the defendant's participation in protests that constituted protected speech, "the [] declaratory relief claim involve[d] an actual dispute between the parties regarding the validity of a contract provision and the parties' rights and obligations under that contract provision. The declaratory relief claim arises from a contract dispute; it does not arise from actions taken by appellant in furtherance of his constitutional rights." *City of Alhambra v. D'Ausilio*, *supra*, 193 Cal.App.4th at p. 1309; *see* also *City of Cotati v. Cashman*, *supra*, 29 Cal.4th at p. 77 (declaratory relief claim not a SLAPP suit). Even though the contract in *Alhambra* may have affected protected activity, that did not mean the declaratory relief claim did as well. In this case, the declaratory relief claims seek a ruling that the MOU binds Appellants. Even if Appellants had not filed the EAF, in light of their repudiation of the MOU and denial that they must comply it, there would

still be a basis to obtain a declaration resolving the dispute over the MOU.

Second Cause of Action for Declaratory Relief Re: Equitable Servitude. The Second Cause of Action also does not reference, rely on, or refer to the EAF. It merely requests a declaration seeking to resolve the dispute whether the MOU applies to Appellants as an equitable servitude. (1 CT 52-53, ¶¶ 59-63.) Whether MOSMA is entitled to a declaration that the MOU is an equitable servitude has nothing to do with the filing of an EAF, and is not based on the EAF. Respondents are not seeking a declaration concerning the EAF. As discussed above, and for the same reasons as the First Cause of Action, this claim is ripe and would exist whether or not the EAF had been filed.

Third Cause of Action For Breach of the MOU And The Covenant of Good Faith And Fair Dealing. Here, MOSMA seeks relief for a breach, or "anticipatory breach," of the MOU. (1 CT 53-54, ¶¶ 64-70; *see also* 1 CT 45 (¶ 29), 47 (¶ 37), 51-53 (¶ 57, 60, 63).) The cause of action *does not reference, rely on, or mention the EAF whatsoever*. Rather, the claim for breach of the MOU concerns Appellants' repudiation and anticipatory breach of the agreement. (*Id*.).[6]

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[6] Appellants also refer to their lobbying activity as protected activity. Nothing in the Complaint alleges liability based on lobbying, nor does any lobbying activity give rise to Appellants' claims. Moreover, allegations regarding lobbying activity were not a basis for Appellants' motion in the trial court and this is was not raised before. (1 CT 100-102.) The argument was therefore waived. *Bank of America, N.A. v. Roberts, supra,* 217

Appellants pose the question of what acts they have taken other than filing the MOU. The answer is simple: The acts they have taken are their repudiation of the contract and denial that it binds them. *See* 1 CT 45 (¶ 29), 47 (¶ 37), 51-53 (¶ 57, 60, 63); *see also* 3 CT 666-667, ¶¶ 13-14; 3 CT 672 (¶ 3) [evidence of the anticipatory breach/repudiation and dispute].) This repudiation/anticipatory breach constitutes a breach. *Howard S. Wright Construction Co. v. BBIC Investors, LLC*, *supra*, 136 Cal.App.4th at p. 243.

Notwithstanding the fact that the EAF had been filed, the cause of action alternatively pleads a breach "and/*or* imminently soon anticipatory anticipates to breach," demonstrating that it is not necessarily based on a breach already occurring. (1 CT 53, ¶ 67.) The allegation that Appellants are "seeking" to develop the Property does not refer to the EAF. (*Id*.) The fact that Appellants are seeking to develop the Property contrary to the MOU reflects Appellants' intent not to comply with the MOU and denial that it binds them. That intent and denial are the conduct at issue and anticipatory breach, not an incidental preliminary communication with the City that merely is evidence of Appellants' intent. In fact, separate and apart from the EAF and before it was even filed, the repudiation and fact that Appellants were seeking to develop the Property were revealed to

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Cal.App.4th at pp. 1398-1399 (a party may not advance arguments on appeal not made to the trial court).

Respondents when Appellants presented them with the plans they prepared for the Project and stated the would no longer comply with the EAF. (3 CT 666-667.) Thus, even had the EAF not been filed, this cause of action would still exist.[7]

Fifth Cause of Action For Intentional Interference. Respondents' Fifth Cause of Action for intentional interference seeks relief based on

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[7] Appellants cite a sentence in a letter relating to a mediation in which they assert that Respondents' claim the EAF and Project was a breach of the MOU. First, the letter is subject to the mediation privilege and is not admissible for any purpose. The letter, titled "Request for Mediation," states that it was in connection with and pursuant to a mediation agreed to in Section 5 of the MOU. It is therefore is privileged and should not be considered. Evid. Code section 1119. The privilege applies broadly to any "communications that are …for the purpose of or 'pursuant to' the mediation." *Cassel v. Superior Court* (2011) 51 Cal.4th 113, 129 (citations omitted). The privilege is not limited to communications made only "in the course of" a mediation and applies to communications outside of a mediation. *Ibid.* "[A]any "writing" is shielded by the privilege if that "writing" was prepared in connection with a mediation." *Ibid.* at p. 125. The letter cited by Plaintiffs was "for the purpose" and pursuant to the mediation and prepared "in connection" with it. The privilege applies broadly to protect communications such as this one intended to further mediations.

In any event, the letter was sent before the Complaint was filed and the single, vague sentence at issue does not negate the detailed allegations, legal theories, or causes of action alleged in the Complaint. It simply references Appellants' plans to develop the property reflected in the EAF, as contradicting the MOU. Appellants also cite a letter from August 2019 in which they claim Respondents' demanded that the City not process the EAF until after MOSMA grants access over Stoney Hill Road. The letter states nothing of the sort, but merely that the Appellants' contention that they have access over Stoney Hill Road must be corrected to be accurate. The letter notably does not contend the EAF is barred by the MOU or should be blocked, just that before it proceeds, it should be corrected to reflect the fact that the Project does not have access over Stoney Hill Road.

Appellants' efforts to cause Castle & Cooke to breach the MOU by using Castle & Cooke and its adjacent property to assist in the development of the Project. (1 CT 56-57, ¶¶ 83-84.) It does not reference, refer or relate to the EAF in any way. (*Id*.) The allegations reflect the fact that the claim only arises from Appellants' acts of "acquiring the Monteverdi Property with the intent to develop the land contrary to the MOU, Monteverdi and Berggruen intended to cause Castle & Cooke to act in bad faith in breach of the covenant of good faith and fair dealing required under the MOU, and to disrupt and interfere with the contractual obligations of Castle & Cooke under the MOU," and the fact that Appellants "arranged with Castle & Cooke for use of the Castle & Cooke Property in order to aid in, and allow for, the development of the Berggruen Project." (*Id*.) The claim arises from Appellants' actions that caused Castle & Cooke to breach the MOU or the covenant of good faith and dealing thereunder. It has nothing to do with the EAF and the filing of the EAF is not alleged or even argued to have any effect on Castle & Cooke.

Sixth Cause of Action For Unjust Enrichment. In this cause of action, MOSMA asserts that Appellants were unjustly enriched yet have refused to provide the benefits of the MOU. (1 CT 87, ¶¶ 88-89.) This has nothing to do with protected activity or the EAF and nothing in the cause of action alleges it does.

The cause of action alleges that Appellants have rejected their

obligations under the MOU. (*Id*.) Appellants only briefly address this cause of action by implausibly deducing that notwithstanding the actual allegations, the alleged "rejection" must be, and only can be, the filing of the EAF. Again, this is nonsense. Appellants' "rejection" of the obligations under the MOU was their denial that "the MOU is binding on Monteverdi and Berggruen [Appellants] as successors and/or assigns of Castle & Cooke" and repudiation of the MOU. (*see e.g.,* 1 CT 51-52, ¶ 57.) The allegation is not referring to a single communication (especially one to a third party) indirectly reflecting that rejection.

Seventh Cause of Action For Declaratory Relief re: Stoney Hill Road. Respondents' Seventh Cause of Action seeks a declaration that Appellants do not have rights to use Stoney Hill Road, a private street owned by Appellants' homeowners. (1 CT 58-59, ¶¶ 90-95.) There is clearly a dispute regarding whether Appellants have access to the street separate and apart from the EAF. Appellants communicated their position that they assert access even before the EAF was filed, and continue to assert even in this brief they have access. (3 CT 672-3 (¶ 4).) Clearly this is a ripe dispute that cannot be stricken simply because the EAF is mentioned.

Although as *evidence* of this dispute Respondents mention that Appellants asserted in the EAF that they have access to the street, Appellants' *communication* with the City is not what provides any element of the claim. (1 CT 58, ¶ 92.) The cause of action seeks to resolve the

dispute over whether Appellants in fact have access to the private street—not whether they have liability for communicating the contention. Even if the EAF alerted Respondents to this issue (it did not), or the complaint was filed in response to it, that does not mean the claim arises from that conduct. *City of Cotati v. Cashman*, *supra*, 29 Cal.4th at p. 77; *City of Alhambra v. D'Ausilio*, *supra,* 193 Cal.App.4th at p. 1307.

As the court held in *Alhambra*, in evaluating a declaratory relief claim "[w]hile [the] protected speech activities may have alerted the [plaintiff] that an actual controversy existed….the speech itself does not constitute the controversy." *Id.* at p. 1308. The same analysis applies here. The speech in EAF is not the dispute, whether Appellants have access rights over Stoney Hill Road is. Indeed, it is clear from the parties' arguments in this case that separate and apart from any communication in the EAF, there is a significant dispute regarding access over Stoney Hill Road.

4. The EAF Is Only Alleged As Collateral Evidence Of The Scope Of The Project and Dispute; It Is Not The Basis For Respondents' Claims.

As the trial court correctly found, this case concerns the parties' rights under the MOU, not the EAF. The brief references in the Complaint to the EAF are incidental and merely *evidence* of the scope of Appellants' Project. The EAF is never alleged to be the basis for Respondents' claims.

"[T]here is a difference between allegations that supply the elements of a claim and allegations of incidental background." *Ratcliff v. The Roman*

Catholic Archbishop of Los Angeles, supra, 79 Cal.App.5th 982 at p. 1003 (citing *Bonni v. St. Joseph Health System*, *supra*, 11 Cal.5th at p. 1012.) Allegations of protected activity that are incidental or collateral to the primary conduct, or that are pled as *evidence* of liability, do not give rise to a SLAPP lawsuit where the liability is based on non-protected activity. *Bonni v. St. Joseph Health System, supra*, 11 Cal.5th at p. 1011; *Graffiti Protective Coatings, Inc. v. City of Pico Rivera* (2010) 181 Cal.App.4th 1207, 1214–1215; *see* also *Wang v. Wal-Mart Real Estate Business Trust*, *supra*, 153 Cal.App.4th at p. 809. *Wang* is instructive. In *Wang*, the plaintiff (Wang) alleged that Wal-Mart breached an agreement promising Wang street access by applying for a permit to close the street at issue. Wal-Mart filed a SLAPP motion arguing the claims arose from its permit application. The court held that the permit application was collateral to, and evidence of, use of the property. It noted, "Wang [] should be able to plead *wrongful* acts by defendants, then attempt to prove them with *evidence* about alleged misconduct that occurred behind the scenes…." *Ibid.* at p. 808. Although the Court in *Wang* addressed the gravamen of the cause of action which is not the proper way to evaluate whether an entire cause of action arises from protected activity, its finding that the permit applications were evidence of the breach and collateral to it is nonetheless instructive.

Moreover, contrary to Appellants' arguments that the gravamen of a

claim cannot be considered, the gravamen of a claim is relevant to determine whether a particular act is the basis for a claim, or merely evidence of or collateral to the challenged activity. The Supreme Court recently ruled, "[a] court may consider the 'gravamen' of a claim to evaluate whether a particular act or series of acts supplies an element or simply incidental context when the principal thrust concerns non-protected activity." *See Bonni v. St. Joseph Health System, supra*, 11 Cal.5th at p. 1011. Here, the focus of the Complaint is the dispute over whether the MOU binds Appellants and Appellants' repudiation of it, not whether the single act of filing one of many preliminary forms creates liability. *See*, e.g., *Ratcliff v. The Roman Catholic Archbishop of Los Angeles*, *supra*, 79 Cal.App.5th at pp. 1005-1006 (noting that the defendant in that case went "to great lengths to overlook the actual allegations" in the complaint, and instead was "cherry-picking allegations of litigation conduct, and, without support, suggesting that they are the only allegations"). If, as Appellants' insist, the filing by a defendant of a preliminary forms brings any lawsuit concerning a development within the anti-SLAPP statute, then such motions would be inevitable in most land use disputes as parties regularly must file forms prior to developing property.

Appellants' contention that the trial court improperly relied on the gravamen analysis is not correct. The trial court did not issue a written decision. It never ruled that due the gravamen of the claims, the entire

complaint should not be struck. Nor would that necessarily be error as the "gravamen" of a cause of action can be used to determine if certain allegations within it are merely incidental evidence, or are the basis for a claim for relief. *Bonni v. St. Joseph Health System, supra*, 11 Cal.5th 995 at p. 1012 ("we do not suggest that every court that has continued to label its approach a gravamen test even after *Baral* has erred"). The trial court did nonetheless find that the Complaint was not "attacking petitioning activity," and that the EAF is not the basis for the Complaint but that the Complaint arose from "rights under the MOU." (RT 2:16-3:5; 20:7-21:3.)

5. At Most, The Court Can Only Strike Claims Relating To The EAF; Any Other "Claims" Should Not Be Subject To The SLAPP Analysis Because Appellants Have Not Challenged Them.

Even if Appellants were correct that some "claim" the Complaint arise from the filing of the EAF (it does not) only that claim and aspect of the Complaint would be subject to the anti-SLAPP statute. As the Supreme Court recently held, "[if] a cause of action contains multiple claims and a moving party fails to identify how the speech or conduct underlying some of those claims is protected activity, it will not carry its first-step burden as to those claims. The nonmovant is not faced with the burden of having to make the moving party's case for it." *Bonni v.St. Joesph Health System, supra*, 11 Cal.5th 995 at p. 1011. Any claims based on unprotected activity or that were not raised as grounds for the motion are disregarded and not

analyzed under the SLAPP test. *Baral v. Schnitt, supra*, 1 Cal.5th 376 at p. 396. Accordingly, if this Court were to determine that certain causes of action are mixed and are in part based on the EAF (they are not) the remaining claims relating to any non-protected activity or acts the moving party did not challenge, including those relating to repudiation and applicability of the MOU, Stoney Hill Road and any other issues identified above, could not be struck. *Bonni v. St. Joseph Health System, supra*, 11 Cal.5th 995 at 1011. Those claims should not even evaluated under the second prong. *Id.*; *Baral v. Schnitt, supra*, 1 Cal.5th 376 at p. 396.

Neither in this Court nor in the Trial Court did Appellants identify any other claims or argue that they arise from protected activity. *See Bonni v. St. Joseph Health System, supra*, at p. 1011 (failure of a moving party to identify how any claim arises from protected activity means that it has failed to meet its burden as to those claims); (1 CT 86-109; Appellants' Opening Brief.) Despite the allegations in the Complaint, Respondents' clear explanation of their claims, and even the trial court's ruling agreeing as to the nature of the claims, Appellants never argued, and still do not argue, that a claim relating to repudiation of the MOU, whether the MOU generally binds Appellants, or whether they have access to Stoney Hill Road arise from protected activity. Those claims plainly do not. Appellants merely argued that the Complaint *only* arises from the EAF. (Opening Brief at pp. 23-38.) They waived any arguments beyond that and

simply cannot strike those aspects of the Complaint regardless of any decision relating to the EAF. *Bonni v.St. Joesph Health System, supra*, 11 Cal.5th 995 at p. 1011; *Bank of America, N.A. v. Roberts* (2013) 217 Cal.App.4th at 1398-1399 (arguments not raised are waived)

C. Respondents Demonstrated A Likelihood Of Success Under The Second Prong Of The Anti-SLAPP Test.

1. Respondents' First And Third Causes of Action Regarding The MOU.

a. The MOU Binds Appellants.

Respondents' First Cause of Action is for declaratory relief that Appellants are bound by the MOU as Castle & Cooke's successors. The Third Cause of Action is for breach of the MOU based on Appellants' repudiation of it.[8] In response to these causes of action Appellants make various arguments why they are not bound by the MOU. There is more than sufficient evidence, and certainly more than the minimal standard under an anti-SLAPP motion, supporting Respondents' claim that Appellants assumed it.[9]

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[8] As discussed above, a declaratory relief claim is available to resolve a controversy regarding the scope and applicability of a contract. Cal. Code Civ. Proc., section 1060. Such a claim "may be brought to establish rights once a conflict has arisen, or…as a prophylactic measure before a breach occurs." *Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 898.

[9] Appellants argue that the MOU does not "run with the land" like a recorded document might. Respondents are not contending that the MOU

First, Appellants assumed the MOU when they entered into Purchase Agreement to acquire the Property. (3 CT 698-721 [the "Purchase Agreement"].) In Section 8(b) of the Purchase Agreement entitled, "Purchaser's Assumptions of Obligations," Appellants agreed that, as of the closing, they "shall assume and comply with….all obligations for or relating to the ownership and use of the Property." (3 CT 704, ¶ 8(b).) Such obligations include the MOU, which expressly states that it is binding on Castle & Cooke's successors and assigns, and that it governs "the future development" of the Property. (1 CT 62; 64, ¶8].)

Appellants argue that Section 8(b) of the Purchase Agreement negates their assumption of the MOU because it states that it is subject to Section 6(g). (3 CT 702-703, ¶ 6(g).) Section 6(g) merely contains a *warranty by Castle & Cooke* that it would terminate contracts relating to the property unless Appellants "otherwise consented or approved," or assumed the contract. However, Castle & Cooke *did not* terminate the MOU. (3 CT 664-665.) Nor is there any evidence that Appellants did not consent or approve the MOU. Regardless, under the terms of the Purchase Agreement, Castle & Cooke did not breach this warranty because Appellants had knowledge of the MOU prior to closing, and waived any claims about it. (3 CT 665-666 [Appellants had knowledge of the MOU.]); 3 CT 702-703, ¶ 6

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runs with the land, but that the MOU was assumed and serves as an equitable servitude (which is different and does not require recordation).

[knowledge by Appellants of a breach of a warranty waives the breach]); 3 CT 707-708, ¶ 12; 3 CT 701, ¶ 5(b).) Even if there were a breach of this provision, it would only mean that Appellants can sue Castle & Cooke for breach of this warranty, but that does not negate—and has not negated—the fact that they agreed to assume Respondents' rights.

Second, Appellants are bound by the MOU because acceptance of the benefits of a contract by a successor binds that successor to its obligations. *Citizens Suburban Co. v. Rosemont Development Co.* (1966) 244 Cal.App.2d 666, 675-677l; Civil Code, section 1589. Similarly, Civil Code section 3521 provides the Court the ability to apply the equitable principle that "[h]e who takes the benefit must bear the burden." *Edmonds v. County of Los Angeles* (1953) 40 Cal.2d 642, 653. In *Citizens Suburban*, the court held a clause in a contract binding successors and assigns, like the one in the MOU, eliminates any need for an express assumption of burdens (which Appellants did here anyway). *Citizens Suburban Co. v. Rosemont Development Co.*, *supra*, at pp. 675-676.

Appellants clearly accepted the benefits of the MOU. By entering into the MOU, Respondents agreed that they would support and not challenge the plan to build the 29 homes. That promise provided, and continues to provide, support and avoidance of litigation over that plan. Appellants acknowledge that, in 2006, Castle & Cooke obtained otherwise unavailable approval for the Tentative Map and that Appellants purchased

the property with those rights intact.[10] (1 CT 96-97; 1 CT 128-132.) Appellants also admit that, in June 2019, they obtained City approval of the "Final Map," which solidified Appellants right to develop and sell lots, and prevented those rights from expiring. (1 CT 98:7-12.) Because of the MOU, Respondents did not object. *See* (3 CT 666.) Based on Respondents' agreement in the MOU, Appellants obtained valuable entitlements, which were about to expire. This is an enormous benefit and value. If the Project does not get built, Appellants can sell the Property with the rights in the Final Map intact, or build homes and sell them individually without submitting to the arduous process that took Castle & Cooke decades. If Appellants truly saw zero value in it, it would not have sought approval of the Final Map. Also, as another benefit, Appellants have asserted that easements allegedly granted under the Final Map give it hugely beneficial rights to access the Project via Stoney Hill Road. (1 CT 96-97.)

Appellants next argue that they could not impliedly assume the MOU

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[10] Appellants assert, without evidence, that this value was already reflected in the purchase price. Regardless of what they paid, Appellants accepted the benefits of the agreement by being transferred the rights to the Property allowed by the MOU and finalizing it in June 2019. Appellants redacted the purchase price in the Purchase Agreement, and have not submitted any evidence as to the market value. (3 CT 699, ¶ 2.) Moreover, the fact that they paid for the Property does not mean they have not benefitted from the 2019 tract map, or that the appreciation of any value of the profit available in the Property due to the MOU.

because they did not have notice of it. Contrary to Appellants' contention, there is sufficient evidence that Appellants impliedly consented to be bound by the MOU. (3 CT 665-666.) Stephen Drimmer, the president of MOSMA, met with Nicolas Berggruen and other representatives in August 2014 prior to the closing of the acquisition. (3 CT 665-666.) At the time, Mr. Drimmer told Mr. Berggruen that Castle & Cooke had an agreement with MOSMA to limit use of the Property to the 29 homes in the Reduced Density Plan which was binding on Appellants. (3 CT 665-666.) He explained the core terms of the agreement and, in the chance they did not already have notice, put Appellants on notice that it existed. The purchase was not final until September after the "Feasibility Period," during which time Appellants could terminate the deal for any reason. (3 CT 701, ¶ 5(b).) After being told of the MOU and its restrictions, Appellants' subsequently closed the Purchase Agreement and agreed to "assume and comply with . . . all obligations for or relating to the ownership and use of the Property." (3 CT 704, ¶ 8(b).)

Appellants argue in passing that Mr. Drimmer's statements to Appellants without explanation. However, Mr. Drimmer's statements to Mr. Berggruen are not hearsay. They are his own statements and they are not offered to prove the truth of the statement that the MOU exists, but to establish that Appellants had notice of the MOU's obligations. (*Taylor v. Centennial Bowl, Inc.* (1966) 65 Cal.2d 114, 125 [hearsay rule does not

apply when evidence offered for notice rather than truth].)[11]

Appellants correctly acknowledge that a person may impliedly assume obligations known to that person when accepting benefits under a contract under Civil Code section 1589. However, Appellants then go off-track by inventing the requirement that they only could have had notice of the MOU's obligations as a result of MOSMA sharing a copy of the MOU. Instead, each case they cite involves parties that had no advance notice of the obligation at issue and not this heightened form of notice. *See Unterberger v. Red Bull North America, Inc.* (2008) 162 Cal.App.4th 414, 420-421 (there was no evidence a subsidiary ever assumed a parent's purported contractual obligation, so subsidiary was not bound by obligation); *UFCW & Employers Benefit Trust v. Sutter Health* (2015) 241 Cal.App.4th 909, 931, footnote 13 (where party seeking to enforce a contract conceded that the other party had not been aware of the contractual obligations at issue, the obligations were not binding); *Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes* (2010) 191 Cal.App.4th 435, 462 (there was no evidence that party knew of grant assurances when it

[11] Appellants argue that there is confusion over the attachment to the MOU constituting the Reduced Density Plan and that a final copy was never submitted. That is not true. Respondents' declarations confirmed the exhibit, explained what it was and submitted copies. (*see e.g.,* Rieth Decl. ¶7, Ex. A; 4 CT 896-901; 4 CT 902-914.)

entered into a contract, so there was no consent to them and they could not be enforced against it).

Appellants do not submit any evidence that they did not have notice and submitted nothing to contradict Mr. Drimmer's account of events. The only evidence Appellants cite that they did not have notice is Dawn Nakagawa's declaration that just "to her knowledge," Appellants were not aware of the MOU. (2 CT 548-549.) She does not explain how she would know or even if she would know. Her sparse and unfounded statement is directly contradicted by Mr. Drimmer's declaration, which must be taken as true for purposes of a SLAPP motion. As Mr. Drimmer testified, she also was not at the August 2014 meeting and would not be privy to the notice provided at that time. (3 CT 666.) She does not even state that she was involved with the Project at that time. Appellants also cite a title report showing the MOU was not recorded, but that does not negate the fact that Appellants were informed of the MOU through other means.

In addition, Appellants currently have notice of the MOU and still have an option to purchase the remainder of the Property from Castle & Cooke, which Appellants plan to use for their Project. (3 CT 673-674; 3 CT 673; 1 CT 97.) With respect to the optioned land, there is no question Appellants had actual notice of the MOU before it has acquired it and therefore binds Appellants with respect to their use of that land.

b. The MOU Restricts Future Development Of The Property.

The purpose and intent of the MOU was to limit development of the Property to the 29 homes in the Reduced Density Plan. (Rieth Decl., ¶ 8-10.) It states upfront that it is the agreement of the parties "relating to *future* development of the property…" and required pursuit of the Reduced Density Plan. (1 CT 62); *see also* Civ. Code, section 1068 ("If the operative words of a grant are doubtful, recourse may be had to its recitals to assist the construction."). The only reasonable reading of this language is that the MOU was intended to limit the use of the Property to the Reduced Density Plan. There would be no point in requiring Castle & Cooke to file the 29 home plan if it could then ignore it, withdraw it, or simply pursue an entirely different project. For 16 years until Appellants intervened, nothing other than the agreed upon plan was considered. (3 CT 665.)

The MOU also limits when Appellants can build a different development. (1 CT 64, ¶¶ 6-7.) Appellants falsely assert that Section 6 of the MOU permits them to pursue a different development at any point, which MOSMA can then oppose. Section 6 directly contradicts this argument. It states that "in the event" MOSMA breaches the MOU, only *then* can Appellants proceed with any development it chooses. (1 CT 64, ¶ 6.) Section 6 continues that *if* Appellants exercise that "remedy" in response to MOSMA's breach, *then* MOSMA can oppose the new

development. (*Id*.) Because this section specifically lists the circumstances when Appellants can proceed with a different development (which is referenced only as a "remedy"), the contract must be read to confine Appellants' option to do so to the specifically enumerated circumstances. A different reading would render the terms "in the event" and "remedy" (if not the entire section) meaningless surplusage, a result that must be avoided. *In re Marriage of Nassimi* (2016) 3 Cal.App.5th 667, 688 (contracts must be read as a whole, to give effect to all terms and to avoid surplusage).

Appellants also falsely claim that Section 7 of the MOU supports their interpretation because it allows it to terminate the MOU. Appellants again gets it backwards. This section limits their right to terminate to two situations: (i) if approvals for the Reduced Density Plan are not obtained, or (ii) if, after the approvals are obtained, the Reduced Density Plan becomes infeasible. (1 CT 64, ¶ 7.) If the MOU did not limit development to the Reduced Density Plan, there would be no purpose in restricting the termination right to the two situations when it could not be developed. The fact that termination is only allowed if the Reduced Density Plan could not proceed indicates the MOU was intended to limit Appellants to that plan. Any other reading would make the issue of the feasibility of and approvals for the plan meaningless. Moreover, the continuation of the termination right *after* approvals are obtained demonstrates that the parties intended an ongoing obligation with respect to development of the Property after the

plan was filed. This negates Appellants' argument that its only obligation was to file the plan, after which its obligations ceased.

To the extent there is an ambiguity, at the time the MOU was executed, both parties intended that the MOU was binding on Castle & Cooke *and its successors and assigns* to limit development of the Property to the Reduced Density Plan, and no other projects. (Rieth Decl., ¶ 8-10.) A contemporaneous memorandum from the time of the MOU summarized the agreement as follows: "Castle & Cooke agrees that there will be no further development of the Mountaingate property." (*Id.*, Ex. B.)

c. MOSMA Did Not Breach And Was Excused From Performance Of The MOU.

Appellants argue that Respondents breached the MOU by sending letters and filing a writ petition, each of which Appellants deeply misconstrue. None of these things challenge Final Map or Reduced Density Plan as Appellants' baldly represent. Appellants first argue that on August 12, 2019, MOSMA sent a letter to the City pointing out that Appellants were not entitled to access Stoney Hill Road for the Project. (1 CT 300 – 2 CT 303.) First, the letter does not breach the MOU because the MOU says nothing about road access. Second, the letter merely states that two other homeowners associations—but not MOSMA—would not provide access to the "proposed Berggruen Project" via Stoney Hill Road. The MOU did not give Appellants any rights relating to their Project. Moreover, the letter

does not refuse access to the *29 homes* contemplated by the Reduced Density Plan which is all that the MOU would arguably require. Finally, the letter affirms MOSMA's compliance with the MOU. It states that MOSMA is willing to give street access if the Reduced Density Plan proceeds and the homes are annexed into the association pursuant to the terms of the MOU.

Appellants also argue, in a misleading way, that MOSMA breached the MOU by challenging the City's approval of the Final Map for the Reduced Density Plan in December 2019 via a petition for writ of mandate and related letter. MOSMA did nothing of the sort. The letter and petition addressed conditions Appellants failed to comply with for the grading permits under the Final Map. MOSMA was not challenging the Final Map, but seeking *compliance* with it, which requires approval of a post-closure plan for the landfill prior to issuing grading permits. (1 CT 162.) That is all the letter and petition address. They do not "oppose the Reduced Density Plan."

The City's issuance of grading permits without prior approval of the post-closure plan has created a serious public safety issue because the landfill, which is adjacent to Mountaingate in a very high risk fire area, generates toxic and highly flammable methane gas. Insisting on compliance with the Map conditions is expressly reserved to MOSMA in Section 4 of the MOU, which specifically confirmed MOSMA has the right to "object

and challenge" the implementation of the Reduced Density Plan, under CEQA or otherwise, where such objection focused on, among other things, "safety related to methane management" and "grading." (1 CT 63, ¶ 4.) Such decisions were not left to the City. MOSMA's letter and petition were entirely consistent with its retained rights under Section 4. Indeed, nothing in the MOU bars MOSMA's conduct, and Section 3 upon which Appellants rely does not even govern post-closure plans. Regardless, even if there was a breach, given that MOSMA only sought compliance with one condition of over 113, it was not material and would not justify Appellants' breach.

Moreover, even if MOSMA did breach the MOU (which it did not), it was excused from performance because, as of July 23 2019, prior to each of these letters, Appellants had already repudiated the MOU. (3 CT 666-667; 3 CT 672.) After Appellants repudiation and anticipatory breach, MOSMA no longer needed to comply with the MOU; it could breach the agreement and still sue to enforce it. *See*, e.g., *Ferguson v. City of Cathedral City* (2011) 197 Cal.App.4th 1161, 1169.

d. Remaining Elements Of The First And Third Cause Of Action.

MOSMA can also prove the remaining elements of its third cause of action for breach of the MOU. MOSMA has performed all of its obligations under the MOU and has repeatedly told Appellants it will honor it. (3 CT 664-665.) As discussed above, MOSMA is also excused from

doing so. Appellants breached the MOU by repudiating it in July 2019 at meetings with MOSMA and thereafter. (3 CT 666-667; 3 CT 672.) Repudiation occurs when one party "….makes a positive statement to the other party indicating that he will not or cannot substantially perform his contractual duties." *Gold Mining & Water Co. v. Swinerton* (1943) 23 Cal.2d 19, 29.

Appellants argue that MOSMA cannot prevail because it has not been damaged. First, as discussed above, MOSMA does not need to show damages for its declaratory relief claims and can sue before there is an actual breach. Second, MOSMA is entitled to seek specific performance of the contract, regardless of any actual damages. *Real Estate Analytics, LLC v. Vallas* (2008) 160 Cal.App.4th 463, 476-77. Section 6 of the MOU expressly allows specific performance. The MOU was intended to limit development to avoid safety, aesthetic and environmental harms, things that cannot be remedied by money. (1 CT 62-65.) Third, MOSMA has already been damaged by the negative effect on property values resulting from the repudiation and the significant time and costs of dealing with Appellants efforts to pursue the Project, and will experience additional aesthetic, safety, traffic and environmental harms if the Project continues. (3 CT 667-668.) Finally, even if MOSMA could not show it suffered actual *monetary* damages or is entitled to any of the other alternative remedies it pled, it is still entitled to nominal damages which are enough to prevail. Cal. Civ.

Code section 3360; *Avina v. Spurlock* (1972) 28 Cal.App.3d 1086, 1088.

To the extent MOSMA does not show Appellants' conduct breached the MOU directly, Appellants had an implied duty of good faith and fair dealing not to injure MOSMA's right to receive the benefits of the MOU. *Andrews v. Mobile Aire Estates* (2005) 125 Cal.App.4th 578, 589. The intent of the MOU was to limit future development of the Property. (Rieth Decl., ¶ 8-10.) By refusing to adhere to the Reduced Density Plan, Appellants are denying Respondents the core benefit of its bargain.

2. Second Cause of Action For Declaratory Relief Re: Equitable Servitude.

Under the doctrine of equitable servitudes, "[e]ven though a covenant does not run with the land, it may be enforceable in equity against a transferee of the covenantor who takes with knowledge of its terms under circumstances which would make it inequitable to permit him to avoid the restriction." *Marra v. Aetna Constr. Co*. (1940) 15 Cal.2d 375, 378. Thus if a landowner agrees to limit use of his or her land in order to benefit neighbors, those pre-agreed limitations are enforceable against subsequent owners as equitable servitudes. *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal.4th 361, 379.

Appellants argue that there is no equitable servitude because they did not have notice of the MOU. As discussed above, that is not true. (*see e.g.,* 3 CT 665-666.) Respondents specifically told Appellants about the MOU

and its restrictions and believe Appellants likely knew about the agreement anyway. (*Id*.)

With respect to the equitable servitude claim, the 2014 meeting with MOSMA and history of the tract also put Appellants on inquiry and constructive notice of the MOU. *Mullin v. Bank of America* (1988) 199 Cal.App.3d 448. Constructive notice can create an equitable servitude. *MacDonald Properties, Inc. v. Bel-Air Country Club* (1977) 72 Cal.App.3d 693, 700.

Appellants also argue that they did not have notice because the MOU does not prevent successors from developing the property, and there are no inequities because there is no agreement to enforce. The scope of the MOU is addressed above, and the inequities are clear. MOSMA negotiated and relied on the 29 home plan. Its residents have expected this to be in place and moved to, bought property in, and made a home in the community based in part on it. (3 CT 664-665; 667-668.) The proposed project would create negative aesthetic impacts, overtake open space the community uses, create fire and security risks, noise issues (helipad), block views and result in massive construction and traffic. (*Id*.) Appellants knew of the restrictions, knew MOSMA would enforce it, knew it bound them as a successor, yet acquired the property anyway accepting all obligations under it. An equitable servitude is entirely appropriate.

3. Fifth and Sixth Causes of Action.

Appellants hardly mention MOSMA's Fifth and Sixth Causes of Action. The fifth is for intentional interference, the elements of which include: (1) a valid contract with a third party; (2) defendant's knowledge of it; (3) defendant's intentional acts designed to induce a breach or disruption of it; (4) breach or disruption; and (5) resulting damage. *Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1129. Most of these elements have been discussed above. In sum, Appellants are refusing to adhere to the Reduced Density Plan and plans to use Castle & Cooke's land for their Project, thereby putting Castle & Cooke in breach of the MOU and covenant of good faith and fair dealing, and disrupting Castle & Cooke's ability to comply.

For the Sixth Cause of Action for unjust enrichment, MOSMA must only show a receipt of a benefit by Appellants and unjust retention of it at MOSMA's expense. *Lectrodryer v. Seoulbank* (2000) 77 Cal.App.4th 723, 726. MOSMA supported and did not object to the Reduced Density Plan, and relied on it for 20 years. (3 CT 664-665; 667-668.) As discussed above, Respondents knowingly accepted the benefits of the MOU but now state they will refuse to provide the return performance.

4. Seventh Cause of Action For Declaratory Relief Regarding Stoney Hill Road.

Respondents' Seventh Cause of Action seeks a declaration resolving

whether Appellants are entitled to use Stoney Hill Road, which it concedes is private property owned by Respondents' members. (2 CT 373-386; 3 CT 668.) Respondents seek to vindicate their right to exclude others as codified in Civil Code section 654.

Appellants claim to an "abutter's" easement fails because the Property never abutted Stoney Hill Road. Stoney Hill Road became a private street in 2009. (2 CT 373-386.) Prior to that, it was a public street separated from Appellants property by a strip of land known as a "future street," that was not part of the public street and was separately vacated from the public street. (2 CT 367-371; 373-386 [at Recommendation C], 388-396; 1 CT 144-160 [containing map showing where the future street terminates, as described in the other exhibits].) Appellants' property abutted this "future street," not Stoney Hill Road. (*Id.*) Appellants rely on *Bacich v. Board of Control* (1943) 23 Cal.2d 343, 349-350, which notes that abutter's easements only attach to public streets. Thus, the fact that Appellants' land may now abut the private street does not give it an easement. In addition, abutter's rights only include the customary uses, which here would be for access to undeveloped land and *residential* uses, not commercial uses such as the Project and its conferences. *People v. Russell* (1957) 48 Cal.2d 189, 195. An abutter's right can also be waived or abandoned. Streets and Highways Code, section 8352(b). For 10 years, neither Appellants nor Castle & Cooke challenged or objected to the private

nature of the road or sought to maintain access, and therefore have waived any right. (3 CT 668.)

Appellants next argue that they are entitled to an easement by virtue of the 2019 Final Tract Map, and stemming from covenant granted when Stoney Hill Road was vacated in 2009 (2 CT 398-400.) However, that covenant was simply an agreement with the City that "private ingress and egress easement over the private street area *will* be granted to all properties currently using the public street portion of Stoney Hill Road being vacated…" (2 CT 398-400 [emphasis added].) It does not specifically grant Appellants (or Castle & Cooke) anything. They did not have an easement, and Appellants have not shown one was actually granted to it. (3 CT 668.) The covenant pertained only to the homeowners who depended upon access to the nearest public street via Stoney Hill Road. It did not benefit Appellants (or Castle & Cooke) because they did not rely on Stoney Hill Road for public street access. (3 CT 668.)

Moreover, the covenant did not, and was not intended to, apply to Castle & Cooke (or Appellants). Appellants submitted no evidence that Castle & Cooke was then using or dependent Stoney Hill Road. It was not, and other roads give Appellants access to the Property, including Sepulveda Boulevard and Canyonback Road. In its June 30, 2008 decision, the City's Deputy Advisory Agency identified the address of every lot fronting the street and that the private street would serve. (2 CT 388-396.) *Appellants'*

property is not included in the address list, and for good reason: because of the future street, it never had frontage on or took legal access from Stoney Hill Road. Finally, on December 17, 2009, the City confirmed that all of the conditions of the Private Street Map had been complied with even though Castle & Cooke was never actually granted an easement. (2 CT 398-400.)

Appellants argue that the Tentative Map was approved with the "understanding" that access would be provided over Stoney Hill Road. This, of course, is not the same as actually granting access and does not create an easement. In any event, any such access granted would be access for the 29 homes, not the Project.

Finally, Appellants argue that an Engineer's Report from 2010 expressly gave them access rights because it referenced 2050 Stoney Hill Road, and referred to it as an "adjacent use." The report cited does not reference that address as having access but merely identifies properties adjacent to the "vacated" area. Appellants property was mentioned because it abutted the *future street*, which also happened to be a "vacated area." (2 CT 388-396.). Nor, in any event, do Appellants demonstrate why any such grant provide access beyond the proposed 29 Home Plan.

MOSMA stands willing to honor its agreement in the MOU to negotiate with Appellants in good faith towards annexation of the 29 homes to the relevant associations, and thus allow street access. (3 CT 668-669.) Appellants cannot, however, obtain the benefits of the MOU such as access

to the 29 homes via Stoney Hill Road without accepting annexation to the appropriate homeowners' association and the obligations incumbent on their members.

V. CONCLUSION

For the foregoing reasons, the Court should deny Appellants' appeal and affirm the trial court's denial of Appellants' anti-SLAPP motion.

Dated: August 18, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Brief, for Respondents Mountaingate Open Space Maintenance Association and Crest/Promontory Common Area Association, complies with California Rule of Court 8.204. The brief is proportionally spaced using 13-point Times New Roman font and contains 11,044 words according to Microsoft Office Word 2010.

Dated: August 18, 2022

Respectfully submitted,

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 10100 Santa Monica Blvd., Suite 2200, Los Angeles, CA 90067.

On August 18, 2022, I served the foregoing document described as: **RESPONDENTS' BRIEF** on the interested parties below, using the following means:

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Hon. Rupert Byrdsong
[*Case No. 19STCV33839*]

☒.**BY ELECTRONIC TRANSMISSION** via e-filing through TrueFiling, to the email addresses set forth above.

☒ **BY UNITED STATES MAIL** I enclosed the document in a sealed envelope or package addressed to the respective address of the party stated above and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid at Los Angeles, California.

☒ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on August 18, 2022, at Los Angeles, California.

Valent Manssourian _____ */s/ Valent Manssourian*
[Print Name of Person Executing Proof] [Signature]