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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

DANIEL BORGSTROM, Plaintiff and Respondent, v. MARGY WILKINSON et al., Defendants and Appellants.	A132296 (Alameda County Super. Ct. No. RG11555942)

INTRODUCTION

Plaintiff Daniel Borgstrom, a listener-sponsor member of the nonprofit radio station KPFA 94.1, filed this shareholder's derivative lawsuit alleging defendants Margy Wilkinson, Conn Hallinan, Daniel Siegel, and Malcolm Burnstein breached a fiduciary duty of undivided loyalty owed to both KPFA and its owner, the Pacifica Foundation (Pacifica), by organizing a competing fundraiser meant to leverage Pacifica into reviving a recently eliminated radio program while maintaining positions as elected members of the KPFA Local Station Board (LSB). Defendants subsequently filed a special motion to strike the complaint under California Code of Civil Procedure section 425.16,[1] also known as an anti-SLAPP (strategic lawsuit against public participation) motion. In support of the motion, defendants contend that their fundraising efforts were protected activities in connection with an issue of public interest. The trial court denied defendant's motion finding that defendants failed to satisfy their burden on the first prong

[1] All statutory references are to the Code of Civil Procedure unless otherwise stated.

of the statute because the fundraising activity was "merely incidental" to the overall gravamen of plaintiff's complaint. The defendants timely appealed the denial of their motion to strike. We conclude that the trial court erred in its determination that defendants' fundraising activities were "merely incidental" to the overall gravamen of the cause of action. To the contrary, plaintiff's claim "arises from" defendants' protected activity. Nevertheless, because we conclude that plaintiff has demonstrated a probability of prevailing on the claim, we affirm the trial court's denial of defendants' motion.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff filed this shareholder's derivative suit in January 2011. The allegations in the complaint are as follows: KPFA 94.1 FM is a nonprofit Bay Area radio station owned and operated by Pacifica. Pacifica is a national charitable nonprofit foundation that owns five total radio stations.[2] Pacifica's corporate structure enables the national Board of Directors to delegate specific duties and responsibilities to an LSB at each of their five stations to oversee local matters. Pacifica and their LSB's are governed by the amended and restated bylaws of the Pacifica Foundation (bylaws).

The complaint further alleges that in November 2010, Pacifica terminated KPFA's popular "Morning Show" and terminated several KPFA employees due to financial problems. In December 2010, KPFA held a five day on-air fundraiser in order to raise revenue lost from KPFA mismanagement. The station continued to ask for donations on-air following the fundraiser per its standard practice. At the same time, defendants initiated and participated in a competing campaign to raise money under the name "Save KPFA." "Save KPFA" encouraged KPFA listeners to donate to the competing fundraiser instead of directly to KPFA, with the stated goal to raise $80,000 in order to bring back the terminated employees and revive the "Morning Show." Pacifica's Board of Directors did not authorize the "Save KPFA" fundraiser. Members of the Pacifica Board related to

[2] Pacifica also owns KPFK in Los Angeles, KPFT in Houston, WPFW in Washington D.C., and WBAI in New York.

plaintiff that, due to financial constraints, Pacifica could not take the action against defendants themselves. Pacifica, however, is not opposed to the shareholder's suit.

The complaint states two causes of action. First, plaintiff alleges defendants breached their fiduciary duty of undivided loyalty owed to KPFA and Pacifica by creating "Save KPFA" and participating in the competing fundraiser. Second, plaintiff alleges defendants' competing fundraiser amounted to intentional interference with Pacifica and KPFA's prospective economic advantage. In late January 2011, plaintiff dismissed the second cause of action,[3] leaving only a single cause of action for breach of the fiduciary duty of undivided loyalty.

Plaintiff requested compensatory damages, interest lost on damages, punitive damages for defendants' malicious conduct, recovery of costs due to the suit, and any further relief the court deemed proper.

In February 2011, defendants filed a motion to strike the complaint under section 425.16. Defendants supported this motion by contending that (1) the anti-SLAPP statute applied because plaintiff's complaint arose from defendants' protected activity in connection with an issue of public interest, and (2) plaintiff could not show a probability of prevailing on its claim because plaintiff failed to follow the proper procedures for instigating the suit and the suit would likely fail on the merits.

On June 1, 2011 the trial court determined that the defendants failed to satisfy the first prong of the SLAPP statute. The trial court's order states, in pertinent part: "Defendants have failed to make the threshold showing that the challenged allegations arise from activity that is protected under CCP § 425.16 [subd.] (b)(1) and (e). Although there may be allegations in this cause of action that constitute protected activity such as nonprofit fundraising, such activity as described appears "merely incidental" to the overall gravamen of the [c]omplaint alleging unprotected activity in the form of intentional breach of loyalty." On June 13, 2011 defendants timely appealed the denial of their motion to strike the claim pursuant to section 904.1, subdivision (a)(13).

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[3] The reason for the dismissal is unknown.

DISCUSSION

A. Applicable Standards of Law

Resolving an anti-SLAPP motion is "[a] two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made [by defendant], it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. . . ." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.)

An appeal from an order granting or denying a motion to strike is reviewed on a de novo basis. (*Overhill Farms, Inc. v. Lopez*, (2010) 190 Cal.App.4th 1248, 1258.) The court must consider the pleadings, and supporting and opposing affidavits upon which the liability or defense is based. (*Id*.) In addition, where the trial court ruled against defendants on prong one, we may proceed to evaluate the merits of the remaining issues on prong two since they are subject to independent review. (*Roberts v. Los Angeles County Bar Assn.* (2003) 105 Cal.App.4th 604, 615-616; See generally *Wallace v. McCubbin* (2011) 196 Cal.App.4th 1169, 1195 [an appellate court may "remand the matter to the trial court to conduct the second-prong analysis"] (*Wallace*).)

B. Analysis

Defendants contend the trial court erred in its determination that plaintiff's claim did not "arise from" protected activity. Defendants further contend that plaintiff failed to establish a probability of prevailing on the merits of the claim. Thus, defendants request that we reverse the trial court's order denying the motion. We discuss each of defendants' arguments more fully below.

1. Plaintiff's Claim "Arises From" Defendants' Protected Activity

Defendants contend plaintiff's claim "arises from" protected activities—namely their "Save KPFA" fundraising drive.[4] Plaintiff argues the trial court correctly determined the protected activities are "merely incidental" to the overall gravamen or thrust of the complaint. We agree with defendants on this point.

In assessing whether a claim "arises from" protected activities or if those activities are "merely incidental" to the claim, the focus of the inquiry "is whether the plaintiff's cause of action itself was ***based on*** an act in furtherance of the defendant's right of petition or free speech." (*City of Cotati v. Cashman*, (2002) 29 Cal.4th 69, 78 (*City of Cotati*), emphasis added.) To prevail on the first prong of the anti-SLAPP analysis, defendant must show "that the ***act*** underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e) . . . . [Citation]" (*Id.* emphasis added.) *City of Cotati* explained the focus here is on the "activity or facts [that] underlie the City's cause of action . . ." (*Id.* at p. 79.) In *Navellier v. Sletten* (2002) 29 Cal.4th 82 (*Navellier*), the California Supreme Court reiterated that, when evaluating the first prong, the "anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning." (*Id.* at p. 92.)

Likewise, for anti-SLAPP purposes, the gravamen of a complaint is "defined by the *acts on which liability is based*, not some philosophical thrust or legal essence of the cause of action." (*Wallace, supra,* 196 Cal.App.4th at p. 1190.) Thus, as stated by the *Wallace* court, "an alleged act is incidental to a claim . . . only if the act is not alleged to be the basis of the liability." (*Wallace, supra,* 196 Cal.App.4th at p. 1183; see also *Haight Ashbury Free Clinics, Inc. v. Happening House Ventures* (2010) 184 Cal.App.4th

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[4] The parties do not dispute that fundraising is a protected activity. (See *Village of Schaumburg v. Citizens for a Better Environment* (1980) 444 U.S. 620, 632 [finding that charitable appeals for funds are within the protection of the First Amendment].) Defendants' fundraising activity is therefore "conduct in furtherance of the exercise of the constitutional right of . . . free speech." (§ 425.16, subd. (e)(4).) Where the parties disagree is whether plaintiff's claim "arises from" defendants' fundraising activity.

1539, 1550 [holding that whether a cause of action is subject to a motion to strike turns on whether the gravamen of the cause of action targets protected activity].) *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658 (*Peregrine*) explained that in assessing the first prong of the anti-SLAPP motion, an appellate court must "examine the specific acts of wrongdoing plaintiffs allege . . ." in order to determine if plaintiff's claim is "based in significant part . . ." on defendants' protected activity. (*Id*. at pp. 671, 675.)

Applying these legal standards here, it's apparent the gravamen of the complaint is completely intertwined with defendants' protected activity. In plaintiff's complaint, the "Save KPFA" fundraiser alone is alleged to have caused the economic harm to Pacifica, meaning plaintiff asserted the fundraiser as the sole basis of defendants' liability. In other words, the fundraising activity did not trigger the cause of action; it is instead the *fundamental basis* for the filing of the complaint itself. (*Cashman, supra,* 29 Cal.4th at p. 80.) Accordingly, defendants have satisfied their burden by demonstrating that plaintiff's cause of action "arises from" the protected activity and that activity is not "merely incidental" to the allegations in the cause of action.[5]

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[5] We reject plaintiff's suggestion that defendants failed to meet their burden because the breach of the fiduciary duty occurred at the precise moment defendants "abandoned" or switched allegiances from KPFA and Pacifica to "Save KPFA." First, in plaintiff's complaint he nowhere alleges this to be the basis for his cause of action. Amending of a complaint after the filing of a motion to strike is expressly disallowed. (see *Salma v. Capon* (2008) 161 Cal.App.4th 1275, 1294 [holding that allowing amendment of a complaint after the motion but before the court ruled would undermine the purpose of the SLAPP statue]; see also *Simmons v. Allstate Ins. Co* (2001) 92 Cal.App.4th 1068, 1073 [holding that the complaint cannot be amended after a trial court has decided on the motion].) Second, we decline to extend the theoretical time frame of the "abandonment" allegation outside of the context of attorney-client relationships. (e.g. *Benasra v. Mitchell Silberberg & Knupp LLP* (2004) 123 Cal.App.4th 1179, 1189 [first prong of anti-SLAPP motion not satisfied because breach occurred when attorney abandoned the old client]; *Freeman v. Schack* (2007) 154 Cal.App.4th 719, 732 [the activity giving rise to the asserted liability was the undertaking to represent a party adverse to plaintiff's interests].) Plaintiff cites no case law, and we cannot find any, that extends that principle to the officer-corporation relationship. In addition, we have already questioned "the *Benasra* decision's focus on the theoretical time that a breach of duty occurs, as opposed to the

2. Plaintiff has Demonstrated a Probability of Prevailing on the Claim

Having concluded that plaintiff's claim arises from defendants' protected fundraising activity, we turn our attention to the second prong of the SLAPP analysis, whether plaintiff demonstrated a probability of prevailing on his breach of fiduciary duty claim. Plaintiff asserts that the LSB members owe a fiduciary duty of undivided loyalty to Pacifica. Defendants respond by contending that, as "nominal" board members of KPFA, they owe no duty to Pacifica. In addition, they contend the LSB has no power to control the management of the local station, the budget, or programming, and thus cannot be said to have a legally recognized fiduciary relationship with its owner, Pacifica. Both parties rely upon the bylaws of the Pacifica Foundation in support of their contentions.

"In order to establish a probability of prevailing on the claim (§ 425.16, subd. (b)(1)), a plaintiff responding to an anti-SLAPP motion must ' "state[ ] and substantiate[ ] a legally sufficient claim." ' [Citation.] Put another way, 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." [Citations.] In deciding the question of potential merit, the trial court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant (§ 425.16, subd. (b)(2)); though the court does not *weigh* the credibility or comparative probative strength of competing evidence, it should grant the motion if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim. [Citation.]" (*Wilson v. Parker, Covert & Chidester*, (2002) 28 Cal.4th 811, 821.) In order for plaintiff to prevail, he "must produce *admissible evidence* from which a trier of fact could find in the plaintiff's favor, as to every element the plaintiff needs to prove at trial and at least one element of

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specific allegations of wrongdoing in the operative complaint." (*Peregrine, supra,* 133 Cal.App.4th at p. 674.) Finally, even if we accept the "abandonment" allegation, the cause of action would still be supported by both protected (fundraising) and unprotected ("abandonment") activity. It would be highly likely, for the purposes of the first prong of the SLAPP statute, that plaintiff's claim would still be based in significant part on the protected activity.

any applicable affirmative defense." (*Wallace, supra,* 196 Cal.App.4th at p. 1206.) In conducting our assessment of prevailing on the merits, we must be mindful, however, that "[p]recisely because the statute (1) permits early intervention in lawsuits alleging unmeritorious causes of action that implicate free speech concerns, and (2) limits opportunity to conduct discovery, the plaintiff's burden of establishing a probability of prevailing is not high." (*Overstock.com, Inc. v. Gradient Analytics, Inc.*, (2007) 151 Cal.App.4th 688, 699.)

The elements of a breach of the fiduciary duty of undivided loyalty are: (1) a fiduciary relationship between plaintiff and defendants; (2) the defendants knowingly acted against plaintiff's interests in connection with a transaction; (3) the plaintiff did not give informed consent to defendant's conduct; (4) the plaintiff was harmed; and (5) the defendants' conduct was a substantial factor in causing harm. (CACI No. 4102.)

According to the second prong evaluation requirements of *Wallace*, plaintiff initially has the burden of establishing a probability of prevailing as to each element of the cause of action. (*Wallace, supra,* 196 Cal.App.4th at p. 1206.) Initially, plaintiff must establish a probability that the LSB members here owe a fiduciary duty to Pacifica. California law defines a fiduciary relationship as " 'any relation existing between parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises where a confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interest of the other party without the latter's knowledge or consent . . . .' "] (*Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 29.)

In the context of corporate structure and officer-corporation relationships, an officer owes a fiduciary duty to the corporation as a matter of law when that officer exercises some discretionary authority in the management of the corporation. (*GAB Business Services, Inc. v. Lindsey & Newsom Claim Services, Inc.* (2000) 83 Cal.App.4th 409, 420 (*GAB*), disapproved of on other grounds in *Reeves v. Hanlon* (2004) 33 Cal.4th

1140, 1148.) However, fact-finding is still required to determine "[w]hether a particular officer participates in management." (*GAB, supra,* 83 Cal.App.4th at p. 421.) The *GAB* court explained that "in most cases this test will be easily met. And, as in all legally recognized fiduciary relationships, once this factual prerequisite is established, the law imposes a fiduciary duty." (*Ibid.*) In *GAB*, the plaintiff established that the defendant, a former high-ranking officer of GAB Business Services, participated in some management activities while at GAB. The court explained that, despite defendant lacking the authority to take unilateral actions such as hiring or firing, the threshold of mere participation was easily met and therefore the officer had a fiduciary duty to the company. (*Id.* at p. 422.)

Here, the record supports a finding that plaintiff has a probability of prevailing on the fiduciary duty element of the claim. The introductory paragraph to article seven, section three of the bylaws states that "[e]ach LSB, acting as a standing committee of the Foundation's Board of Directors, shall have the following powers, duties and responsibilities related to its specific radio station,[6] *under the direction and supervision of the Foundation's Board of Directors*." (Bylaws, art. 7, § 3, emphasis added.) These duties include reviewing and approving the station's budget, screening and selecting a pool of candidates for both the General Manager and Program Director positions, and initiating the process to fire the General Manager. (*Id.* at paragraphs A, B, D, and E.) In addition, paragraph M requires the LSB's "[t]o exercise all of its powers and duties with care, *loyalty*, diligence and sound business judgment consistent with the manner in which those terms are generally defined under applicable California law." (Bylaws, art. 7, § 3, par. M.)

If plaintiff can establish that defendants exercised the powers granted to them in the bylaws, specifically in paragraphs A, B, D, and E, then he could establish defendants

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[6] Defendants interpret the reference to the local radio station in the introduction to mean they only owe a duty to KPFA, not Pacifica. However, when viewed in context, the bylaws clearly demonstrate that Pacifica has created LSB's in general to act as a standing committee to their Board of Directors and is, at all times, under the direction and supervision of that Board.

had a fiduciary duty to Pacifica and KPFA under paragraph M.[7] As *GAB* explained, an officer need not have unilateral authority over certain actions, such as hiring and firing of employees, in order for a fiduciary duty to be imposed as a matter of law because the question of participation in management is a question of fact. (*GAB, supra,* 83 Cal.App.4th at p. 422.) Defendants' argument that LSB members are nothing more than "nominal" officers with no management authority is not supported by any of the pleadings or evidence they submitted.[8] To the contrary, plaintiff has presented competent evidence which establishes defendants likely owe a fiduciary duty of loyalty to Pacifica.

In addition, the record amply supports a finding that plaintiff is likely to prevail on each of the elements necessary to establish his breach of fiduciary duty claim. In regards to the second element, the record supports a finding that defendants knowingly initiated and supported the fundraiser to resuscitate a program Pacifica already cancelled. The third element, which requires a lack of consent given for defendants' conduct, is likewise met. Declarations submitted by plaintiff explain that no one from the Pacifica corporate governance gave informed consent to defendant LSB members participating in the "Save KPFA" fundraiser. Finally, the "Save KPFA" fundraiser was a substantial factor in causing actual harm to Pacifica in that defendants raised over $61,000 in contributions, funds that were diverted from KPFA's own fundraiser.[9] Plaintiff therefore has demonstrated a probability of prevailing on the elements of his claim.

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[7] In addition to the bylaws, plaintiff submitted declarations made by current Pacifica Board members and plaintiff himself that explain defendant Daniel Siegel, who was previously counsel for Pacifica, addressed LSB's on multiple occasions explaining that the elected LSB members primarily owed a fiduciary duty to Pacifica, not the local radio station or the listeners.

[8] Defendants' submitted their declarations to establish they never owed a duty to Pacifica. However, the declarations in fact demonstrate that each LSB member knew that they possessed significant management authority over their local station.

[9] Specifically, "Save KPFA" solicited donations from active KPFA donors and listeners, sending letters and other advertisements directly to their homes during KPFA's fundraiser and continued fundraising efforts. These letters induced potential donors to give to "Save KPFA" by stating that 100% "Save KPFA" donations would go to KPFA whereas a smaller percentage of funds donated directly to KPFA would go to KPFA

3. Defendants' Defenses do not Defeat Plaintiff's Claim

Defendants assert three defenses in response to plaintiff's claim. First, defendants contend that their fundraising activities are defensible under the business judgment rule. Second, defendants claim that plaintiff failed to follow the proper procedure in instigating a shareholder's derivative suit. Third, defendants argue that plaintiff failed to follow the proper procedure in instigating a suit against volunteer officers or directors of a nonprofit organization. We address each potential defense in turn and find plaintiff has demonstrated a probability of prevailing notwithstanding defendants' assertion of these defenses.

The business judgment rule "establishes a presumption that directors' decisions are based on sound business judgment, and it prohibits courts from interfering in business decisions made by the directors in good faith and in the absence of a conflict of interest." (*Everest Investors 8 v. McNeil Partners* (2003) 114 Cal.App.4th 411, 430 (*Everest*).) However, "[a]n exception to this presumption exists in circumstances which inherently raise an inference of conflict of interest." (*Ibid.*) Accordingly, "[t]he business judgment rule does not shield actions taken without reasonable inquiry, with improper motives, or as a result of a conflict of interest." (*Ibid.*) Here, while defendants have no personal economic interest in the "Save KPFA" fundraiser, defendants' withholding of these funds from KPFA contingent upon bringing back the "Morning Show" raises an inference of a conflict of interest that precludes a determination that the business judgment rule defeats plaintiff's claim. Plaintiff need only establish a probability of prevailing over each defense, and he has reached that relatively low bar here.

Second, defendants contend that plaintiff has no standing to sue on behalf of Pacifica because he failed to follow the proper procedure for instigating a shareholder's derivative action pursuant to California Corporations Code, section 800, subdivision

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because Pacifica would take a "levy." The letters explained however, that the funds would only be transferred contingent upon KPFA "doing the right thing." Any funds diverted from KPFA to "Save KPFA" caused economic harm to KPFA and Pacifica. To date, no funds received by "Save KPFA" have been turned over to KPFA or Pacifica.

(b)(1) and (2) (section 800). Section 800 requires a plaintiff to specifically allege in the complaint "plaintiff's efforts to secure from the board such action as plaintiff desires, or the reasons for not making such effort." (§ 800, subd. (b)(2).) Plaintiff must further allege that he "has either informed the corporation or the board in writing of the ultimate facts of each cause of action against each defendant or delivered to the corporation or the board a true copy of the complaint which plaintiff proposes to file." (*Ibid.*)

Plaintiff need not comply with the requirements of section 800 if he demonstrates "such a demand on the board would have been futile." (*Shields v. Singleton* (1993) 15 Cal.App.4th 1611, 1618.) "The test for proving demand futility is whether the facts show a reasonable doubt that (1) the directors are disinterested and independent, and (2) the challenged transaction was otherwise the product of a valid exercise of business judgment." (*Oakland Raiders v. National Football League* (2001) 93 Cal.App.4th 572, 587 (*Oakland Raiders*).) In *Oakland Raiders*, the court explained "[t]he proof must be of 'facts specific to each director from which [the trier of fact] can [find a reasonable doubt] that that particular director could or could not be expected to fairly evaluate the claims of the shareholder plaintiff.' " (*Id.*) Here, Pacifica's Board could not be expected to fairly evaluate the claims because even if they were to consider them, they could not afford to take action regardless. Plaintiff submitted declarations from Pacifica's Board of Directors and counsel stating that Pacifica would not be taking the action due to financial constraints of the company and that many board members in fact supported plaintiff's action. Plaintiff also sent a copy of the complaint to Pacifica. This evidence, we conclude, is sufficient to establish that such a demand on the board would have been futile and that he has demonstrated a probability of substantiating the futility exception to the section 800 requirements.

Last, defendants argue that plaintiff cannot bring this cause of action because, prior to filing the complaint, plaintiff was required to request an order from the court pursuant to section 425.15, subdivision (a). Section 425.15, subdivision (a) states, in pertinent part, "[n]o cause of action against a person serving without compensation as a director or officer of a nonprofit corporation described in this section, on account of any

negligent act or omission by that person within the scope of that person's duties as a director acting in the capacity of a board member, or as an officer acting in the capacity of, and within the scope of the duties of, an officer, shall be included in a complaint or other pleading unless the court enters an order allowing the pleading that includes that claim to be filed after the court determines that the party seeking to file the pleading has established evidence that substantiates the claim." (emphasis added.) The language of section 425.15 makes clear that statute only applies to negligent acts or omissions. Plaintiff's breach of fiduciary duty of undivided loyalty cause of action requires proof that defendants "knowingly acting against plaintiff's interests in connection with a transaction." (CACI No. 4102.) Patently, section 425.15, subdivision (a) does not apply here as plaintiff's claim is not premised upon any negligent act or omission.

In sum, we conclude that the trial court erred in denying defendants' motion to strike on the grounds that plaintiff's activity did not "arise from" protected activity. However, because plaintiff has demonstrated a probability of prevailing on his breach of fiduciary duty claim, we conclude the trial court correctly denied the motion to strike.

DISPOSITION

The trial court's order denying the motion to strike is affirmed. Each party to bear their own costs on appeal.

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Jenkins, J.

We concur:

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McGuiness, P. J.

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Pollak, J.