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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

PEREGRINE PHARMACEUTICALS, INC.,

Plaintiff and Respondent,

v.

MICHAEL GORMAN,

Defendant and Appellant.

D059655

(Super. Ct. No.
37-2010-00087271-CU-DF-CTL)

APPEAL from an order of the Superior Court of San Diego County, Randa Trapp, Judge. Affirmed.

Defendant Michael Gorman published statements that Eric Swartz, a member of the Board of Directors of plaintiff Peregrine Pharmaceuticals, Inc. (Peregrine), had engaged in insider stock trading, and that Peregrine took actions to cover up Swartz's illegal activity. Peregrine filed an action against Gorman pleading claims for defamation and trade libel. Gorman, after answering the complaint, moved to dismiss the complaint

pursuant to Code of Civil Procedure¹ section 425.16, commonly referred to as the anti-SLAPP (strategic lawsuit against public participation) statute. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57.) The trial court denied Gorman's motion and this appeal followed.

I

FACTUAL BACKGROUND

A. The Parties

Peregrine is a publicly traded biopharmaceutical company managed by a board of directors, one of whom is Swartz. Peregrine's chief financial officer (CFO) is Mr. Lytle, a certified public accountant who has served as Peregrine's CFO since 2002. Mr. Johnson, an attorney, is the chairman of Peregrine's board of directors. Gorman is an individual interested in a number of publicly traded companies, including Peregrine.

B. The Swartz Transactions

Swartz and other members of Peregrine's board of directors periodically purchased shares of Peregrine, and these transactions are public information available on Peregrine's website as well as on NASDAQ.com. Board members of a publicly held company are encouraged to purchase stock in their company to boost shareholder confidence. Swartz periodically purchased shares in Peregrine starting in 2006, before the alleged insider trading transactions, and has continued to do so.

¹ All statutory references are to the Code of Civil Procedure unless otherwise specified.

Peregrine has a comprehensive policy prohibiting insider trading and to ensure it does not occur. Before a board member may acquire Peregrine stock, he or she must complete an "application and approval" form reflecting an intention to buy shares. CFO Lytle then must evaluate the request, confirm the applicant does not possess material nonpublic information, and approve the purchase in advance. On January 6, 2010, Swartz submitted an application to acquire additional stock in Peregrine. Lytle reviewed the application, discussed the application with others (including Johnson), and approved Swartz's application on January 6, 2010. Swartz then began acquiring stock in Peregrine over the next few weeks, purchasing 100,000 shares of Peregrine stock between January 7, 2010, and February 18, 2010.

As of January 2010 Peregrine had been in discussions with Stason Pharmaceuticals (Stason) for approximately one year to negotiate an agreement for collaborating on the rights to develop Peregrine's tumor necrosis therapy technologies in Asia. A few days after Swartz's application was approved and he had begun acquiring stock, Stason issued a January 11, 2010, press release stating Stason and Peregrine had entered a "non-binding agreement to pursue a collaboration" to develop Peregrine's tumor necrosis therapy technologies in Asia.² Peregrine's evidence below stated a nonbinding

² Gorman argues, apparently for the first time on appeal, that the text of the Stason announcement described Peregrine as Stason's "Strategic Partner," but Stason later altered the text (after Gorman raised the insider trading allegations against Swartz) to describe the relationship as a mere "business opportunity" to protect Swartz. Although *Gorman* made these assertions in *his* internet postings, the record is devoid of any competent evidence that press releases from either Stason or Peregrine during January 2010 described the relationship as a "strategic partnership." The only press release in the

"term sheet" is not a "material" transaction" under federal securities regulations that would require either a press release or any "quiet period" for stock trading by company insiders.³

Although Swartz was generally aware of the discussions with Stason, those discussions had no bearing on his decision to acquire additional stock in Peregrine. Instead, he decided to acquire additional stock because the stock had been trading under \$2 per share in the Spring of 2009 but had shown steady improvement, and Swartz had a high degree of confidence in Peregrine.

C. The Defamatory Postings by Gorman

Starting on January 21, 2010, Gorman (using the pseudonym "Ricardo Lacabeza") began posting anonymous messages on an internet message board entitled RagingBull.com.⁴ Gorman posted the three following statements on January 21, 2010:

record below was from Stason, and that release referred to a "non-binding agreement to pursue a collaboration."

³ Although a final binding agreement with Stason was later reached, it was nearly five months after Swartz's acquisitions that Gorman claimed to have constituted improper insider trading. Moreover, the market appeared unimpressed by the announcement of this *binding* agreement, because Peregrine's shares moved slightly up on the date of the announcement (from \$4.01 to \$4.12 per share) but, within four days of the announcement, had gone down to \$3.74 per share.

⁴ Shortly before Gorman began making the defamatory statements on RagingBull.com, he apparently filed a complaint with the Securities & Exchange Commission. However, Peregrine's complaint did not assert Gorman's statements to the SEC consisted of actionable defamation, and it does not appear Peregrine was aware of the complaint to the SEC when Peregrine filed the complaint for defamation against Gorman. Although Gorman's anti-SLAPP motion argued Peregrine's claims were subject to the anti-SLAPP statute because the claims were based on his statements in his

"Peregrine Director Caught in insider trading scandal!!!!!"

"Peregrine cover-up of Swartz felony!!!!!!!!!!!!!"

"What would you expect from a company that is covering up an insider trading scandal from one of its Directors?"

The following day, Gorman posted another statement on the same website, stating:

"After Director Swartz was exposed trading on insider information Peregrine changed the title to 'Business Opportunities' to make it appear that a deal was not yet complete."

On January 25, 2010, Gorman posted two more statements on the same website, stating:

" ' . . . and possible insider trading violations by Swartz last week.'
[¶] . . . [¶] You didn't mention Peregrine's attempted cover-up of Swartz's illegal trades which were exposed here."

"I wonder who else Swartz tipped off. You don't need to be an insider to benefit from inside information."

Gorman posted two more statements on the same website, stating (on January 31 and February 2, respectively):

" 'After I exposed the crime Peregrine changed the PR announcing the 'Strategic Partner' as a mere "Business Opportunity" in an effort [to] protect Director Swartz.' "

" 'Director Swartz was just caught trading on privileged information' [¶] AND the company was caught covering up for him."

complaint to the SEC (thereby qualifying for protection under § 425.16, subs. (e)(1) & (e)(2)), and that Peregrine could not show probable success on the merits because the statements were absolutely privileged, the trial court rejected that claim, and Gorman does not resurrect that argument on appeal. Accordingly, we do not further consider Gorman's statements to the SEC in evaluating his anti-SLAPP motion.

II

PROCEDURAL BACKGROUND

A. The Complaint

Peregrine's complaint for defamation was based on Gorman's publications on RagingBull.com. Peregrine asserted the accusations were false and defamatory per se and sought damages.

B. The Anti-SLAPP Motion

Gorman moved to dismiss the complaint under the anti-SLAPP statute, asserting the gravamen of Peregrine's claims were based on protected speech because they involved (1) speech in a public forum (the internet) within the meaning of section 425.16, subdivision (e)(3), and (2) speech concerning a public issue (a publicly held company) within the meaning of section 425.16, subdivision (e)(4). Gorman argued the burden therefore shifted to Peregrine to show probable success on the merits, and Peregrine could not meet the burden because the "gist" of the protected speech was true.

Peregrine opposed the anti-SLAPP motion. Peregrine did not claim Gorman had not met his burden for initial coverage of the anti-SLAPP statute. Instead, Peregrine provided evidence to support its argument that it satisfied the second step of the anti-SLAPP statute of showing probable success on the merits. Peregrine argued a prima facie case for defamation had been shown because there was evidence the accusations of illegal insider trading (as well as an alleged cover-up) were false and were statements of opinion rather than fact. Peregrine also argued the statements on which the lawsuit was based did not qualify for the absolute privilege. Finally, it argued there was evidence the

statements did not fall within any qualified privilege under Civil Code section 47, subdivision (c), or, alternatively, there was evidence supporting a finding of malice to defeat the qualified privilege provided by Civil Code section 47, subdivision (c).

The trial court denied Gorman's motion to strike. It first concluded Gorman met his initial burden of showing the complained-of conduct was within the ambit of the anti-SLAPP statute as speech in a public forum and concerning a public issue within the meaning of section 425.16, subdivisions (e)(3) and (e)(4). However, it also concluded Peregrine had satisfied its burden of submitting sufficient competent evidence showing probable success on the merits.⁵ Accordingly, the court denied the motion to strike.

III

THE ANTI-SLAPP LAW

The anti-SLAPP law provides that "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has

⁵ Gorman filed objections to Peregrine's evidence that the trial court overruled in their entirety. Although Gorman peremptorily asserts on appeal these rulings were error, he does so in a conclusory fashion, without legal citation or legal argument, and without any effort to show how the evidentiary rulings were an abuse of discretion. (*Walker v. Countrywide Home Loans, Inc.* (2002) 98 Cal.App.4th 1158, 1169 [standard for review of evidentiary rulings is abuse of discretion].) We therefore treat this argument as waived. (*People v. Stanley* (1995) 10 Cal.4th 764, 793 [" '[E]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration.' "]; *Lyles v. State of California* (2007) 153 Cal.App.4th 281, 285, fn. 3 [refusing to review argument raised in conclusory fashion].)

established that there is a probability that the plaintiff will prevail on the claim."

(§ 425.16, subd. (b)(1).) The purpose of the statute is to encourage participation in matters of public significance by allowing a court to promptly dismiss unmeritorious actions or claims brought to chill another's valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. (*Id.*, subd. (a).)

The anti-SLAPP law involves a two-step process for determining whether a claim is subject to being stricken. In the first step, the defendant bringing an anti-SLAPP motion must make a prima facie showing that the plaintiff's suit is subject to section 425.16 by showing the defendant's challenged acts were taken in furtherance of his or her constitutional rights of petition or free speech in connection with a public issue, as defined by the statute. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 733.)

When the defendant satisfies the first step, the burden shifts to the plaintiff to demonstrate there is a reasonably probability of prevailing on the merits at trial. (§ 425.16, subd. (b)(1).) In this phase, the plaintiff must show both that the claim is legally sufficient and there is admissible evidence that, if credited, would be sufficient to sustain a favorable judgment. (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 823, disapproved on other grounds in *Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at p. 68, fn. 5.; *Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 358.) In making this assessment, the court must consider both the legal sufficiency of, and the evidentiary support for, the pleaded claims, and must also examine whether there are any constitutional or nonconstitutional defenses to the pleaded claims and, if so, whether

there is evidence to negate those defenses. (*Traditional Cat Assn., Inc. v. Gilbreath* (2004) 118 Cal.App.4th 392, 398-399.)

In considering whether a plaintiff has met his or her evidentiary burdens, the court must consider the pleadings and evidence submitted by the parties. (§ 425.16, subd. (b)(1).) However, the court cannot weigh the evidence (*Looney v. Superior Court* (1993) 16 Cal.App.4th 521, 537-538) but instead must simply determine whether the plaintiff's evidence would, if credited, be sufficient to meet the burden of proof. (*Wilcox v. Superior Court, supra*, 27 Cal.App.4th at pp. 823-825 [standard for assessing evidence is analogous to standard applicable to motions for nonsuit or directed verdict].)

On appeal, we review de novo the trial court's ruling on the motion to strike. (*Bernardo v. Planned Parenthood Federation of America* (2004) 115 Cal.App.4th 322, 339.)

IV

ANALYSIS

Both parties agree on appeal that Gorman satisfied the first step of showing the alleged actionable conduct was within the parameters of section 425.16, subdivisions (e)(3) and (e)(4), and therefore the burden shifted to Peregrine to show probable success on the merits. Gorman raises two arguments on appeal to support his claim that the trial court erroneously concluded Peregrine had satisfied its burden of showing probable success on the merits. First, Gorman claims Peregrine did not provide evidence that, if credited, would have shown Gorman's statements were false. Second, he asserts Peregrine did not provide evidence that, if credited, would have shown Gorman's

statements did not qualify for the conditional privilege under Civil Code section 47, subdivision (c), or that Gorman had forfeited the privilege because of malice.⁶ We examine Gorman's arguments seriatim.

A. Evidence of Falsity

Gorman accused Swartz of acquiring Peregrine stock based on material inside information, and accused Peregrine of covering up Swartz's illegal activity. There was evidence that, if credited, showed those statements were false.

There was evidence below that, if credited, showed Gorman's first accusation—that Swartz acquired Peregrine stock based on material inside information—was false. Swartz's declaration explained he was motivated to seek approval to purchase, and thereafter to acquire, Peregrine stock during the relevant period because Peregrine's stock had steadily improved in value since the spring of 2009 and he wanted to demonstrate his confidence to shareholders that Peregrine stock would continue to improve in value. Swartz was generally aware of the discussions between Stason and Peregrine, but those discussions (which had been ongoing for approximately

⁶ Gorman also asserts, for the first time on appeal, the court should have granted his anti-SLAPP motion because Gorman defamed Swartz rather than Peregrine, and therefore Peregrine lacked standing to bring claims for defamation. We do not consider claims not raised below. (*Ernst v. Searle* (1933) 218 Cal. 233, 240-241.) Moreover, even if Gorman could raise this claim at this late date, the defamatory statements directly accuse Peregrine of wrongdoing ("Peregrine cover-up of Swartz felony!!!!!!!!!!!!"), as well as accusing a board member of criminal conduct as a member of Peregrine board (" 'Director Swartz was just caught trading on privileged information' "). Peregrine has standing to pursue claims of defamation for libelous accusation leveled against itself and against its directors written in direct relation to the trade or business of the corporation. (*Washburn v. Wright* (1968) 261 Cal.App.2d 789, 793-795.)

one year) had no bearing on his decision. Additionally, CFO Lytle's declaration explained (1) he had reviewed Swartz's application for approval and determined Swartz had *no* material insider information prior to his purchases during the relevant period, (2) a *nonbinding* term sheet is not a material transaction requiring either a press release or a quiet period for trading by company insiders, and (3) a *binding* agreement was not signed with Stason until many months *after* Swartz's stock purchases were completed.

There was also evidence that, if credited, would show Gorman's second accusation--that Peregrine covered up Swartz's alleged criminal conduct--was also false. Mr. Johnson, Peregrine's Chairman of the Board, confirmed Peregrine made no effort to cover up Swartz's stock purchases, but instead immediately filed the required documents with the SEC and posted the information on Peregrine's website. The documentary evidence below confirmed Swartz's purchases were fully and timely disclosed by Peregrine, and it appears Gorman learned of the stock purchases *from* these public filings. Although Gorman's "cover-up" charge is based on Gorman's assertion that Peregrine (in response to Gorman's inquiries and his internet charges of insider trading) *changed* the description of the Stason agreement from a "Strategic Partner[ship]" to a mere "business opportunity" to "downplay the significance of the relationship between Stason and Peregrine," the record is devoid of any evidence that anyone (either Stason or Peregrine) ever described the agreement as a strategic partnership, or that *Peregrine* had any control over (or even input into) *Stason's* January 2010 press release describing the negotiations as having resulted in a "non-binding agreement to pursue a collaboration."

B. Evidence Negating the Conditional Privilege

Gorman alternatively asserts Peregrine did not show probable success on the merits because there was no evidence showing Gorman's statements were not privileged under Civil Code section 47, subdivision (c).

The Common Interest Privilege.

Civil Code section 47 provides: "A privileged publication or broadcast is one made: [¶] . . . [¶] (c) In a communication, without malice, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent" The common interest privilege provides a conditional privilege against defamatory statements made without malice on subjects of mutual interest. (*Noel v. River Hills Wilsons, Inc.* (2003) 113 Cal.App.4th 1363, 1368.) When malice is shown, the privilege is not merely overcome, it never arises. (*Ibid.*) However, if the privilege does arise, malice is a complete defense. (*Id.* at p. 1369.)

In the case of the common interest privilege, although malice cannot be inferred solely from the fact the communication was made (Civ. Code, § 48), malice may be inferred when the charge is false, is libelous *per se*, and the defendant publishes it without having reasonable cause for believing it to be true. (*Harris v. Curtis Publishing Co.* (1942) 49 Cal.App.2d 340, 349.) The malice necessary to defeat the qualified "common interest" privilege is "actual malice." The requisite actual malice can be established by a showing the publication was motivated by hatred or ill will toward the plaintiff or, alternatively, by a showing that the defendant lacked reasonable grounds for

belief in the truth of the publication and therefore acted in reckless disregard of the plaintiff's rights. (*Sanborn v. Chronicle Pub. Co.* (1976) 18 Cal.3d 406, 413.) However, the lack of reasonable grounds requires more than mere negligence. Malice is shown only when the negligence amounts to a reckless or wanton disregard for the truth, so as to imply a willful disregard for, or avoidance of, accuracy. (*Noel v. River Hills Wilsons, Inc., supra*, 113 CalApp.4th at pp. 1370-1371.)

Analysis

Gorman argues that, because the subject statements were posted on an internet message board "used by investors and other persons who tracked Peregrine stock," the statements were made "to a person interested therein . . . by one who is also interested" within the meaning of the conditional privilege under Civil Code section 47, subdivision (c)(1). However, the "common interest" privilege is not a boundless privilege applying to statements on matters of general concern to an undefined audience, because the "word 'interested' as used in the statute refers to a more direct and immediate concern. That concern is something other than mere general or idle curiosity of the general readership of newspapers and magazines." (*Rancho La Costa, Inc. v. Superior Court* (1980) 106 Cal.App.3d 646, 664-665.) To the contrary, our Supreme Court explained the common interest privilege under the common law was intended to extend the privilege "to a narrow range of private interests. The interest protected [is] private or pecuniary; the relationship between the parties [is] close, e.g., a family, business, or organizational interest; and the request for information must have been in the course of the relationship." (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 727.) *Brown* concluded the

legislative history of Civil Code section 47, subdivision (c), "indicates the Legislature intended to codify the narrow common law privilege of common interest, not to create any broad news-media privilege." (*Ibid.*)

On this record, there is evidence from which a jury could conclude an essential precondition to the common interest privilege--that the statements were made by a person interested to another person interested--is absent here. Although the messages were posted on an internet site under the category of Peregrine, there was no evidence either that Gorman had any private or pecuniary interest in Peregrine or in the allegations of insider trading, *or* that the audience for that site was *limited* to persons having a private or pecuniary interest in Peregrine or in the allegations of insider trading.⁷ Although Gorman and his audience may well have had some general interest in Peregrine, a jury

⁷ For this reason, Gorman's reliance on *Institute of Athletic Motivation v. University of Illinois* (1980) 114 Cal.App.3d 1 is inapposite. There, a professor wrote a letter criticizing plaintiff's psychological tests, which claimed to predict athletic ability and were widely employed by amateur and professional athletic organizations, and sent the letter to numerous professional athletic organizations and sports magazines. (*Id.* at p. 4.) The court concluded the jury was properly instructed on the common interest privilege, in part because the letter "was not directed toward the world at large" but was instead sent to a discrete audience "involved as professionals in the field of athletics" (*id.* at p. 12), and in part because the subject matter of the communication "did not involve some private aspect of individual or corporate life" but instead involved a matter in which the plaintiff (by marketing and touting the test) had voluntarily "entered the arena of public controversy." (*Id.* at p. 13.) A jury could conclude neither factor is present here, because the subject matter involved a private aspect of Swartz's life, and the statements were made to the world at large regardless of the reader's actual direct interest in Peregrine. Indeed, the *Institute of Athletic Motivation* court specifically noted the jury might reject the privilege because "there was evidence from which the jury might have concluded . . . that he abused the privilege by disseminating the communication to an unreasonably broad group of recipients or by including in his communication statements not reasonably necessary to further the interests which he allegedly sought to protect." (*Id.* at p. 13.) The same observations are applicable here.

could infer such "interest" did not extend beyond a "mere general or idle curiosity of the general readership of [sources of information]" (*Rancho La Costa, Inc. v. Superior Court, supra*, 106 Cal.App.3d at p. 665), which is not the type of communication the common interest privilege is designed to protect. (*Brown v. Kelly Broadcasting Co., supra*, 48 Cal.3d at p. 727; accord, *Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 108-109 [common interest privilege inapplicable where no evidence defendant had any relationship with recipients of defamatory communication or that recipients had requested the information].)

Moreover, even were the predicate "interest" on behalf of the speaker and the audience present, there was some evidence that, if credited, could support a finding of malice justifying the denial of Gorman's anti-SLAPP motion. (*Hailstone v. Martinez* (2008) 169 Cal.App.4th 728, 739-741 [showing of minimal evidence of malice to defeat privilege is all that is required to defeat an anti-SLAPP motion].) Malice must often be inferred, and the trier of fact may examine all of the facts and circumstances surrounding the communications (*Gonsalves v. Asso. etc. Uniao Madeirense* (1945) 70 Cal.App.2d 150, 154), such as the tenor of the statements (*Brewer v. Second Baptist Church* (1948) 32 Cal.2d 791, 799), or the fact the defamatory remarks are exaggerated, overdrawn, or colored to the detriment of plaintiff, or are not stated fully and fairly with respect to the plaintiff. (*McCunn v. California Teachers Assn.* (1970) 3 Cal.App.3d 956, 962.) The privilege also can be lost when a jury could conclude the speaker acted recklessly because he or she lacked reasonable grounds for believing the truth of the publication. (Cf. *Noel v. River Hills Wilsons, Inc., supra*, 113 Cal.App.4th at p. 1375.)

Here, Peregrine submitted some evidence from which a jury could have inferred malice. The tenor of the allegations contained both sensationalized punctuation and opprobrious allegations ("Peregrine Director Caught in insider trading scandal!!!!"; "Peregrine cover-up of Swartz felony!!!!!!!!!!"), and implied (by omission of *who* "caught" this "felony") that authorities had been responsible for leveling these charges, rather than " 'stat[ing] fully and fairly' " (*McCunn v. California Teachers Assn.*, *supra*, 3 Cal.App.3d at p. 962) that it was *Gorman* who believed Swartz was engaged in illegal activity. Moreover, there was some evidence Gorman acted recklessly, and lacked reasonable grounds for believing the truth of his publications. The evidence showed that, in early January 2010, Gorman specifically asked Peregrine about the Stason "partnership agreement" and was told by Peregrine that it was Peregrine's policy "not to comment on rumors" and it was Peregrine's policy (as well as an SEC requirement) "to report all material news promptly, so Peregrine would expect to announce any news concerning a partnering agreement . . . within 24 hours of finalization," and the only press release (from Stason) described it as a "*non-binding* agreement to *pursue* a collaboration." (Italics added.) Nevertheless, Gorman thereafter chose to level these charges without any basis for believing such a nonbinding agreement constituted material information for purposes of insider trading. Additionally, Gorman's penultimate charge--which stated that after he had exposed the crime, "*Peregrine* changed the PR announcing the 'Strategic Partner' as a mere 'Business Opportunity' in an effort [to] protect Director Swartz" (italics added)--appears untethered to *any* factual predicates, because there is no evidence in this

record that Peregrine issued any press release, or that the only party who *did* issue a press release (Stason) ever *changed* the text of the announcement. (See fn. 2, *ante*.)

Because Peregrine carried its burden of submitting some evidence from which a trier of fact could conclude the communications did not qualify for the conditional privilege, either because they were not statements by a person to another person sufficiently closely connected and interested to qualify under section 47, subdivision (c), or because there was evidence of actual malice or reckless disregard for the truth of the statements, the court correctly denied Gorman's anti-SLAPP motion.

DISPOSITION

The order is affirmed. Plaintiffs are entitled to costs on appeal.

McDONALD, J.

WE CONCUR:

NARES, Acting P. J.

O'ROURKE, J.