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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

DANIEL DIAZ,

Plaintiff and Respondent,

v.

RONALD PALMIERI,

Defendant and Appellant.

E062135

(Super.Ct.No. PSC1404700)

OPINION

APPEAL from the Superior Court of Riverside County. David M. Chapman,  
Judge. Affirmed.

Klinedinst, Gregor A. Hensrude, Heather L. Rosing, and Brian P. Murphy for  
Defendant and Appellant.

Vivoli Saccuzzo, Michael W. Vivoli, and Jason P. Saccuzzo for Plaintiff and  
Respondent.

This case involves an alleged violation of rule 3-310(E) of the Rules of Professional Conduct of the State Bar of California<sup>1</sup> arising from a successive conflict of interest. Rule 3-310(E) provides that a successive conflict of interest arises when an attorney accepts employment adverse to a former client (without the written consent of that client) where, by reason of the representation of the former client, the attorney obtained “confidential information material to the employment.”

Defendant and appellant Ronald Palmieri is an attorney who had represented plaintiff and respondent Daniel Diaz and a company called TapouT, LLC (TapouT) in a trademark infringement suit involving a clothing brand Diaz had created and TapouT had purchased (the Hitman Brand). A few years after the trademark infringement case settled, Diaz sued TapouT for breach of fiduciary duty in connection with its sale of, among other things, the Hitman Brand to another company (the TapouT Action). Over Diaz’s objection, Palmieri agreed to represent TapouT in the TapouT action. The trial court granted Diaz’s motion to disqualify Palmieri based on conflict of interest.

After the TapouT Action settled, Diaz sued Palmieri for breach of fiduciary duty and malpractice. Palmieri demurred to Diaz’s complaint and concurrently filed a special motion to strike under the “anti-SLAPP”<sup>2</sup> statute (Code Civ. Proc., § 425.16),<sup>3</sup> arguing

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<sup>1</sup> All further undesignated rule references are to Rules of Professional Conduct of the State Bar of California.

<sup>2</sup> “SLAPP” is an acronym for a strategic lawsuit against public policy.

that Diaz’s claims arose from Palmieri’s defense of the TapouT Action, which is protected petitioning activity.

The trial court overruled the demurrer<sup>4</sup> and ruled that Palmieri could not satisfy the first prong of the anti-SLAPP analysis. Palmieri appeals the court’s ruling on the anti-SLAPP motion, arguing that the court “disregarded multiple controlling cases” and followed the “minority view” in determining that the action did not arise from protected petitioning activity. We affirm.

## I

### FACTUAL AND PROCEDURAL BACKGROUND<sup>5</sup>

#### A. *The Herrera Action*

In 2001, Diaz created the Hitman Brand, a mixed martial arts clothing brand named “Hitman Fight Gear.” In 2007, Diaz sold the Hitman Brand to TapouT and transferred the brand, along with his company, Hitman Fight Gear, LLC, to Fight

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*[footnote continued from previous page]*

<sup>3</sup> All further unspecified statutory references are to the Code of Civil Procedure.

<sup>4</sup> Palmieri filed a petition for writ review of the court’s ruling on the demurrer (case No. E062426), which we ordered to be considered with the instant appeal. The petition will be resolved by separate order.

<sup>5</sup> We take our facts from those alleged by Diaz in his complaint and supporting affidavits. (*Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264, 1267 (*Hylton*).)

Industries, LLC, a company created to hold title to the assets (the Hitman Sale). As part of the transaction, Diaz became an employee and membership interest holder of Fight Industries, LLC.

In 2008, Paul “Hitman” Herrera, a mixed martial arts fighter, sued Diaz, TapouT, and others for trademark infringement alleging that the Hitman Brand infringed on his “Hitman” trademarks (the Herrera Action). Diaz initially hired Wildman Harrold Allen & Dixon, LLP, the law firm that represented him in the Hitman Sale, to represent him in the Herrera Action. However, at TapouT’s suggestion, Diaz agreed that Palmieri, TapouT’s lawyer, would also represent him. In the course of defending the action, Diaz provided Palmieri with the Wildman firm’s complete transactional file from the Hitman Sale, as well as various personal records, including a file relating to his divorce.

In 2010, the Herrera Action settled and the case was dismissed.

B. *The TapouT Action*

In 2011, Diaz sued TapouT and several other defendants for breach of fiduciary duty in connection with the sale of certain assets, including the Hitman brand, to ABG TapouT, LLC. After Diaz learned that Palmieri had agreed to represent the defendants, Diaz’s lawyer informed Palmieri that rule 3-310 required his disqualification from the TapouT Action based on his representation of Diaz in the Herrera Action. Palmieri refused to withdraw as counsel and Diaz filed a motion to disqualify him.

At the outset of the hearing on Diaz’s motion, the trial court stated its tentative opinion that disqualification was “a no brainer.” The court stated to Palmieri that it was “very surprising that you would take this representation against [Diaz]” after having represented “both Diaz and his company in the Herrera Action.” After hearing argument from the parties and taking the matter under submission, the court issued a ruling disqualifying Palmieri from any further representation of the defendants in the TapouT Action. The court found that there was a “substantial relationship” between the issues in the two cases because “Diaz’s ownership interest in the underlying intellectual property is/was directly at issue in both actions.” It further ruled that, under California law, Palmieri was presumed to have acquired confidential information about Diaz during his representation of Diaz in the Herrera Action.

Our colleagues in Division Three of this district denied Palmieri’s petition for writ review of the disqualification order.<sup>6</sup> Frances O’Meara, formerly with the firm of Kaufman, Dolowich, Voluck & Gonzo, LLP, substituted in as counsel of record for the defendants.

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<sup>6</sup> The TapouT Action and the instant action were filed in Orange County. Shortly after Diaz filed the complaint in the instant action, the court granted Palmieri’s motion to transfer the case to Riverside County. Neither Palmieri’s motion nor the court’s transfer order is in the record.

In 2013, Diaz settled his claims against the defendants in the TapouT Action. About a week after the settlement, one of Palmieri's former associates filed a complaint against O'Meara and the Kaufman firm, asserting various causes of action, including libel, intentional interference with prospective economic advantage, and intentional infliction of emotional distress. Palmieri's former associate alleged that Palmieri had made false representations to the court in opposition to Diaz's disqualification motion, arranged to have O'Meara substitute in as new counsel, and surreptitiously managed litigation of the TapouT Action by working with O'Meara. The former associate also alleged that O'Meara had tried to coerce him into not reporting Palmieri to the California State Bar for breach of duty of loyalty to Diaz and violation of the court's disqualification order.

C. *The Present Lawsuit and Palmieri's Anti-SLAPP Motion*

Months later, Diaz learned of the allegations by Palmieri's former associate and filed the instant action against Palmieri for breach of fiduciary duties and legal malpractice. Diaz's complaint alleges that Palmieri received confidential information about him when Palmieri represented him in the Herrera Action. He alleges that this information was material to the TapouT Action and that, without his consent and over his objection, Palmieri accepted representation of his adversaries in the TapouT Action. Diaz also alleges that Palmieri continued to litigate the case by working with O'Meara after he was disqualified.

Palmieri filed an anti-SLAPP motion arguing that Diaz’s claims were barred because they arose from “Palmieri’s actual and alleged litigation activity” and were unlikely to succeed on the merits. According to Palmieri, “courts have repeatedly held that alleged disclosure of allegedly confidential information in violat[ion] of the Rules of Professional Conduct in connection with an issue under consideration by a public body is subject to [the anti-SLAPP statute].” To support this proposition, Palmieri cited two cases, *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658 (*Peregrine*) and *Fremont Reorganizing Corp. v. Faigin* (2011) 198 Cal.App.4th 1153 (*Fremont*).

Diaz argued that *Peregrine* and *Fremont* were inapplicable because they involved dissimilar facts. Diaz also argued that, in relying on those two cases, Palmieri ignored the many factually similar cases holding that a former client’s claims against an attorney for breach of fiduciary duty and professional negligence based on a successive conflict of interest do not trigger the anti-SLAPP statute, even though the claims might relate to the attorney’s involvement in an underlying lawsuit.

The trial court denied Palmieri’s motion. It found that the gravamen of Diaz’s complaint was not Palmieri’s litigation of the TapouT Action, but rather an alleged violation of rule 3-310(E) based on Palmieri’s acceptance of employment adverse to Diaz despite having “obtained confidential information material to the employment” during his previous representation of Diaz. As support for its ruling, the court cited several

appellate cases holding that successive conflict of interest claims are not based on protected petitioning activity and do not trigger the anti-SLAPP statute. The court concluded that Palmieri's reliance on *Peregrine* was misplaced because *Peregrine* did not involve a successive conflict of interest.

## II

### ANALYSIS

#### A. *The Anti-SLAPP Statute*

“The anti-SLAPP statute 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 established that there is a probability that the plaintiff will prevail on the claim.’ ”

(*Hylton, supra*, 177 Cal.App.4th at pp. 1270-1271.)

Determining whether a claim is subject to being stricken under the anti-SLAPP statute is a two-step process. “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.” (*Hylton, supra*, 177 Cal.App.4th at p. 1271.) “If the defendant does not demonstrate this initial prong, the court should deny the anti-SLAPP motion and

need not address the second step.” (*Ibid.*) “If the defendant satisfies the first step, the burden shifts to the plaintiff to demonstrate there is a reasonable probability of prevailing on the merits at trial.” (*Ibid.*, citing § 425.16, subd. (b)(1).)

On appeal, we review the trial court’s ruling on the anti-SLAPP motion de novo. (*Freeman v. Schack* (2007) 154 Cal.App.4th 719, 727.) We consider the pleadings, and supporting and opposing affidavits upon which the liability or defense is based, but we neither weigh credibility nor compare the weight of the evidence. (*Ibid.*) Rather, we “ ‘accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant’s evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.’ ” (*Ibid.*)

B. *The Gravamen of the Claim Controls the Application of the Anti-SLAPP Statute*

“[A]s our Supreme Court has observed, ‘the “arising from” requirement is not always easily met.’ ” (*Loanvest I, LLC v. Utrecht* (2015) 235 Cal.App.4th 496, 501-502 (*Utrecht*)). The trial court must “focus on the *substance* of the plaintiff’s lawsuit in analyzing the first prong of a special motion to strike.” (*Id.* at p. 502.) Accordingly, we disregard the labeling of the claim and instead “examine the *principal thrust* or *gravamen* of a plaintiff’s cause of action to determine whether the anti-SLAPP statute applies” and whether the trial court correctly ruled on the anti-SLAPP motion. (*Ramona Unified School Dist. v. Tsiknas* (2005) 135 Cal.App.4th 510, 519-522.) If the core injury-producing conduct upon which the plaintiff’s claim is premised does not rest on protected

speech or petitioning activity, collateral allusions to protected activity will not trigger application of the anti-SLAPP statute. (*Ibid.*)

As courts have observed, “[n]ot all attorney conduct in connection with litigation, or in the course of representing clients, is protected by section 425.16.” (See, e.g., *U.S. Fire Ins. Co. v. Sheppard, Mullin, Richter & Hampton* (2009) 171 Cal.App.4th 1617, 1626.)

C. *Diaz’s Claims Do Not Arise from Palmieri’s Petitioning Activity*

The sole issue in this appeal is whether Palmieri’s alleged breach of fiduciary duties and professional negligence arose from protected petitioning activity. Palmieri contends that the outcome of this case is mandated by *Peregrine*, which he asserts is “on all-fours” with the facts of this case. Diaz argues that the trial court was correct in concluding that *Peregrine* is inapplicable, and that this case is factually analogous to the many cases holding that, in a successive conflict of interest case, the gravamen of a former client’s complaint is not the underlying lawsuit, but rather the attorney’s decision to undertake the adverse representation in the first place. We agree.

Our Supreme Court has not ruled on whether a complaint alleging a successive conflict of interest triggers anti-SLAPP protection; however, “[a] growing body of case law holds that actions based on an attorney’s breach of professional and ethical duties owed to a client are not SLAPP suits, even though protected litigation activity features prominently in the factual background.” (*Castleman v. Sagaser* (2013) 216 Cal.App.4th

481, 491 (*Castleman*)). These appellate cases hold that when the basis of a former client's complaint is an alleged violation of rule 3-310 or conflict of interest through adverse representation, the gravamen of the complaint is not the attorney's exercise of the right of petition or speech, but rather the attorney's acceptance of the adverse representation. (See, e.g., *Benasra v. Mitchell Silberberg & Knupp LLP* (2004) 123 Cal.App.4th 1179, 1187 (*Benasra*) [Second Dist.]; *Freeman v. Schack* (2007) 154 Cal.App.4th 719, 729-730 (*Freeman*) [Fourth Dist.]; *United States Fire Ins. Co. v. Sheppard, Mullin, Richter & Hampton LLP* (2009) 171 Cal.App.4th 1617, 1626-1629 (*U.S. Fire Ins. Co.*) [First Dist.]; *Castleman, supra*, 216 Cal.App.4th at pp. 495-496 [Fifth Dist.]; *PrediWave Corp. v. Simpson Thacher & Bartlett LLP* (2009) 179 Cal.App.4th 1204, 1226-1227 [Sixth Dist.].)

For example, in *Benasra*, the court held that the anti-SLAPP statute did not apply to the former clients' claims against the defendant law firm for breach of the duty of loyalty. (*Benasra, supra*, 123 Cal.App.4th at p. 1187.) The former clients alleged that the firm breached fiduciary duties owed to them by representing one of their adversaries in an arbitration. (*Id.* at p. 1182.) The firm argued that the lawsuit arose from statements made by the attorneys during the course of the subsequent representation and were thus protected petitioning activity. (*Id.* at p. 1186.)

The court rejected this characterization of the former clients' claims and found that the complaint was in fact based on alleged violations of rule 3-310. (*Benasra, supra*, 123 Cal.App.4th at p. 1187.) The court concluded that the gravamen of the action was not the firm's exercise of the right of petition or speech, but rather the conflict of interest that arose when the firm accepted the adverse representation. (*Ibid.*)

Similarly, in *Freeman*, the court refused to apply the anti-SLAPP statute to claims filed by two clients against their former attorney for breach of contractual and fiduciary obligations. The former clients alleged that the attorney violated rule 3-310(C) and (E) by abandoning them to represent parties with adverse interests in their pending class action lawsuit as well as in a new class action suit. (*Freeman, supra*, 154 Cal.App.4th at pp. 727-728.) The court concluded that the attorney's litigation activity was collateral to the core allegation that he breached a duty of loyalty owed to his former clients. (*Id.* at pp. 729-730.) The fact that the former clients' claims were "related to or associated with [the attorney]'s litigation activities" was "not enough" to trigger the anti-SLAPP statute. (*Id.* at p. 729.) Instead, the gravamen of the complaint was the attorney's "*undertaking to represent* a party with interests adverse to plaintiffs, in violation of the duty of loyalty he assertedly owed them." (*Id.* at p. 732, italics added.)

Like the former clients' claims in *Benasra* and *Freeman*, the foundation of Diaz's claims is the allegation that Palmieri chose to align himself with Diaz's adversaries in the TapouT Action, thereby breaching duties of loyalty and confidentiality owed to him by

virtue of their prior attorney-client relationship during the Herrera Action. We see no reason to stray from the sound reasoning set forth in those cases. Accordingly, we conclude that Diaz’s claims arise not from Palmieri’s litigation of the TapouT Action, but from his decision to undertake the adverse representation in the first place. Diaz’s complaint does not trigger the anti-SLAPP statute.

Palmieri asserts that the conflict of interest cases cited *ante* represent the “minority view,” and he argues that *Peregrine* should control because it is “on all-fours” with the instant case. Like the trial court, we find *Peregrine* inapplicable because it does not involve an allegation of successive conflict of interest in violation of rule 3-310. In that case, clients of the defendant law firm claimed that the firm was harming their interests by taking certain litigation positions in support of the firm’s other clients. (*Peregrine, supra*, 133 Cal.App.4th at pp. 667-668.) The *Peregrine* court observed this distinction in *Utrecht*, when it refused to apply the holding in *Peregrine* to a case involving a conflict of interest through adverse representation. (*Utrecht, supra*, 235 Cal.App.4th at pp. 503-505.) In *Utrecht*, the court held that the complaint did not trigger the anti-SLAPP statute because “a legal malpractice action . . . brought by an attorney’s *former* client, claiming that the attorney breached fiduciary obligations to the client as the result of a conflict of interest . . . does not threaten to chill the exercise of protected rights and the first prong of the anti-SLAPP analysis is not satisfied.” (*Id.* at pp. 504-505, italics added.)

*Fremont*, the other case on which Palmieri relies, is similarly inapplicable. There, the plaintiff company alleged that its former in-house counsel had told an insurance commissioner, who was in the process of liquidating a related insolvent company, that the company planned to auction artwork owned by the insolvent company. (*Fremont, supra*, 198 Cal.App.4th at pp. 1160-1161.) In concluding the anti-SLAPP statute applied, the court distinguished the case from *Benasra, Freeman*, and other successive conflict of interest cases on the ground that the gravamen of the company's claims was the statement the attorney made to the commissioner, not the acceptance of adverse employment. (*Fremont, supra*, at p. 1170.)

Palmieri's characterization of the applicable case law as split into a majority and minority is incorrect. *Peregrine* and *Fremont* are not successive conflict of interest cases and Palmieri cites no such case that holds differently than *Benasra, Freeman*, or the other conflict of interest cases cited above.

Next, Palmieri contends Diaz's allegation that "Palmieri continued to actively represent the TapouT Defendants behind the scenes in direct violation of [the trial court's] order disqualifying him . . . and in violation of his duty of loyalty to plaintiff" clearly applies to protected petitioning activity. Reference to actions an attorney took in relation to ongoing litigation is not sufficient in itself to trigger the anti-SLAPP statute. This type of argument has been rejected by the line of cases just discussed. For example, in *Benasra*, the court explained that "[t]he breach occurs not when the attorney steps into

court to represent the new client, but when he or she abandons the old client. . . . In other words, once the attorney accepts a representation in which confidences disclosed by a former client may benefit the new client due to the relationship between the new matter and the old, he or she has breached a duty of loyalty. The breach of fiduciary duty lawsuit may follow litigation pursued against the former client, but does not arise from it.” (*Benasra, supra*, 123 Cal.App.4th at p. 1189.)

Lastly, Palmieri asserts that he never received any confidential information from Diaz and that TapouT is his longtime client, whereas Diaz was only a minor client in the Herrera Action. Such factual denials do not assist Palmieri in carrying his initial burden on an anti-SLAPP motion. “We do not consider the veracity of [the plaintiff’s] allegations in determining whether [his] claims arise from protected speech or petitioning activity.” (*Castleman, supra*, 216 Cal.App.4th at p. 493 [“Arguments about the merits of the claims are irrelevant to the first step of the anti-SLAPP analysis”].) Moreover, rule 3-310 does not distinguish between minor and longtime clients and a breach of the duty of loyalty based on violation of that rule “occurs whether or not confidences are actually revealed in the adverse action.” (*Benasra, supra*, 123 Cal.App.4th at p. 1187)

The trial court was correct in determining that Palmieri did not satisfy his burden as the moving party under the first prong of the anti-SLAPP statute. In light of our conclusion, we need not extend our analysis to the merits of the case. (*U.S. Fire Ins. Co., supra*, 171 Cal.App.4th at p. 1620.)

III

DISPOSITION

The judgment is affirmed. Plaintiff shall recover his costs on appeal.

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CODRINGTON  
J.

We concur:

RAMIREZ  
P. J.

KING  
J.