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October 3, 2017

**SUPREME COURT
FILED**

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Jorge Navarrete Clerk

Deputy

Honorable Chief Justice,
Tani Gorre Cantil-Sakauye
& Honorable Associate Justices,
Supreme Court of California
350 McAllister Street
San Francisco, California 94102-4797

Re: Rand Resources, LLC et al. v. City of Carson et al., California Supreme Court, Case No. S235735

To the Honorable Chief Justice & Associate Justices:

As invited by this Honorable Court, by order dated September 20, 2017, the City of Carson and James Dear (collectively, the “City”) submit this letter brief to address the effect, if any, of *Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, on the issues presented in the current appeal. For the reasons that will follow, we are of the considered opinion that *Park* resolves one of the issues pending in this appeal in favor of City.

I. INTRODUCTION

This Court’s *Park* opinion addresses an existing “uncertainty over how to determine when ‘[a] cause of action against a person ‘aris[es] from’ that person’s protected activity.” (*Id.* at 1062, quoting Code of Civ. Proc. § 425.15, subd. (b).)¹ *Park* defines how a claim “arises from” certain activity, but does not address whether that activity constitutes “protected activity.”

This Court’s grant of review raised two discrete issues: (1) Did [Rand Resources, LLC & Carson El Camino, LLC’s (collectively, “Rand’s”) fraud-based] causes of action [two, three, and four] . . . arise out of a public issue *or an issue of public interest* within the meaning of Code of Civil Procedure section 425.16? (2) Did [Rand’s] causes of action *arise out of* communications made in connection with an *issue under consideration by a legislative body*? (Italics & emphasis added.)

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¹ All further unlabeled statutory references are to the Code of Civil Procedure.

Respectfully, *Park* resolves the “*arise out of*” issue in the City’s favor because each of the alleged statements/promises made by Messers. Dear and Wynder² are, “in and of themselves,” the acts which Rand’s fraud-based causes of action “arise from.” However, *Park* does not address whether the speech in question involved *either* an “*issue of public interest*” *or* an “*issue under consideration by a legislative body*.”

II. ANALYSIS

Section 425.16 provides a two-prong analysis for determining whether an action may be stricken under the anti-SLAPP statute. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) The first prong requires the trial courts to determine whether a defendant has made a threshold showing that the challenged cause of action is one arising from protected activity.³ (*Id.*) The present appeal is focused on this first prong, which can be conveniently sub-divided as follows: Do the challenged causes of action for fraud in the Rand First Amended Complaint (“FAC”) (1) arise from (2) protected activity? *Park* addresses the “arising from” requirement, but not the “protected activity” elements of this first prong.

Pursuant to *Park*, a claim “arises from” protected activity “if the protected activity⁴ *itself* is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted.” (*Park, supra*, 2 Cal.5th at 1060 (emphasis in original).) This Court’s *Park* opinion embraced its previous opinion in *Navellier v. Sletten* (2002) 29 Cal.4th 82, which held that claims of breach of contract and fraud can be stricken pursuant to the anti-

² (See AA:I:2:30 [alleged Wynder promises]; AA:I:2:31 [alleged “confidential” communications]; AA:I:2:31-32 [alleged “rumors”]; AA:I:2:32 [more “confidential emails”]; AA:I:2:32-33 [alleged Wynder statements to Rand]; AA:I:2:35-36 [more Wynder “promise[s]”]; AA:I:2:36 [still more Wynder “promise[s]”].) Without any doubt, all three of the fraud-based causes of action in the First Amended Complaint allege communications “from which” the fraud causes of action against the City and its former Mayor “arise.”

³ The second prong of a court’s analysis is to determine whether the plaintiff has demonstrated a probability of prevailing on the claim (*Navellier*, 29 Cal.4th at 89); however this second prong is not at issue in the present appeal.

⁴ At issue in the present appeal is whether the underlying statements/promises of Messers. Dear and Wynder, which are the basis of Plaintiffs’ fraud based causes of action, constitute “protected activity” pursuant to Section 425.16, subd. (e). This Court’s *Park* opinion, however, *assumed* that the underlying conduct subject to the anti-SLAPP statute constituted “protected activity” in assessing whether claims “arise from” protected activity. Accordingly, for the purposes of addressing the “arising from” requirement argument, this brief will refer to the underlying conduct as “protected activity,” although that characterization of the conduct in the present appeal is an issue on appeal.

SLAPP statute where the protected activity supplied “elements” of the challenged claims. (*Id.* at 1063-64.) As will be detailed below, the present appeal is factually analogous to *Navellier Park*, therefore, does not change or otherwise limit the applicability of *Navellier* to the facts alleged in the FAC (or the conclusions that flow therefrom).

A. Because, in *Park*, This Court Embraced Its Previous Ruling in *Navellier*, the “Arising From” Element Has Been Satisfied With Respect to Rand’s Fraud Causes of Action that are the Subject of the City’s Anti-SLAPP Motion.

Park defines the requisite nexus between the claims an anti-SLAPP motion challenges and the underlying activity forming the bases of the claims. *Park* held that in order to meet the “arising from” requirement “the defendant’s act underlying the plaintiff’s cause of action must *itself* have been an act in furtherance of the right of petition or free speech.” (*Park, supra*, 2 Cal.5th at 1063 (emphasis in original).)

Park followed this Court’s previous ruling in *Navellier*, which found breach of contract and fraud claims were subject to be stricken pursuant to the anti-SLAPP statute. (*Id.* 1063-1064.) As this Court noted in *Navellier*, “fraud claims are not categorically excluded from the operation of the anti-SLAPP statute” (*Navellier, supra*, 29 Cal.4th at 82). In *Navellier*, the plaintiffs (*Navellier* and NMI) filed a federal action against the defendant, Sletten. (*Id.* at 85.) The parties subsequently entered into an agreement to settle part of the federal action and Sletten executed a release of liability in favor of *Navellier* and NMI as part of the settlement. (*Id.* at 86.)

Sletten nevertheless proceeded to file counterclaims against *Navellier* and NMI in the remaining federal action. (*Id.*) In state court, *Navellier* and NMI alleged that Sletten fraudulently represented his intent to be bound by the release and that he breached the settlement agreement by filing his counterclaims in the federal action. (*Id.*) This Court found that Sletten’s “misrepresentation of his intent not to file counterclaims . . . supplied an essential element of the fraud claim,” thereby “falling squarely within the ambit of the anti-SLAPP statute’s ‘arising from’ prong.” (*Id.* at 1063, 1064.)

The present appeal presents facts strikingly similar to those of *Navellier*. Rand alleges that former-Mayor Dear fraudulently represented his intent to be bound by the Exclusive Agency Agreement (“EAA”) but thereafter engaged in “secret” communications with Mr. Leonard Bloom in an effort to designate him as the City’s exclusive agent to negotiate on the City’s behalf with the NFL. (FAC at ¶¶ 54; 64-65). Rand also alleges that former-City Attorney Wynder fraudulently represented that, notwithstanding the express language in the EAA to the contrary, so long as Rand made “reasonable progress” with the NFL, the EAA would be extended by the City Council. (FAC at ¶¶ 54; 58-60).⁵

⁵ See, also, n. 2, *supra*.

Accordingly, (putting aside the garden-variety breach of contract claim included in the FAC which is *not* the subject of this appeal or the underlying special motion to strike), Rand’s fraud-based causes of action allege that Messers. Dear and Wynder made statements/promises/engaged in “secret” conversations which “in and of themselves” were “in furtherance of the right of petition or free speech” by addressing whom should act for, or continue to act for, the City as its exclusive agent for purposes of negotiating a billion dollar football franchise and stadium.

These alleged statements constitute the very acts which Rand’s fraud-based causes of action “arise from.” *Park*, therefore, confirms the City’s arguments on appeal. *Park* further narrows the issues to be resolved by this Court on appeal.

B. *Park* Did Not Address What Conduct Constitutes “Protected Activity.”

Also before this Court in the present appeal is whether Rand’s fraud-based causes of action arose out of “protected activity” within the meaning of Section 425.16. Specifically, the issue is whether the aforementioned alleged statements/promises/“secret” conversations by Messers. Dear and Wynder constituted *either* (1) conduct in furtherance of the exercise of the constitutional right of free speech in connection with a public issue or an issue of public interest (Section 452.16, subd. (e)(4)); or oral statements made in connection with an issue under consideration or review by a legislative body (Section 452.16, subd. (e)(2)).

While this Court’s opinion in *Park* clarifies whether the “arise out of” requirement has been met in a case, this Court specifically did not address the issue of whether particular conduct was “in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest” pursuant to Section 425.16, subd. (e)(4). (*Park, supra*, 2 Cal. 5th at 1072.)

Park is also silent on the issue of what oral statements could be considered “made in connection with an issue under consideration or review by a legislative . . . body” pursuant to Section 425.16, subd. (e)(2). Because *Park* does not address the issue of whether the misrepresentations alleged by Rand constituted protected activity within the meaning of Section 425.16, it does not have any effect on whether the alleged misrepresentations of Mr. Dear and Mr. Wynder were made in furtherance of speech as described in Section 425.16, subd. (e).

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III. CONCLUSION

The *Park* opinion supports the City's argument that Rand's fraud-based causes of action (two, three, and four) "arose from" the alleged protected speech of these defendants. *Park* makes clear that all of the communications alleged in the FAC are the very acts which these fraud causes of action "arise from." It remains for this Court to determine whether these communications constitute "protected activity" notwithstanding to the erroneous opinion of the court below to the contrary.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 2361 Rosecrans Ave., Suite 475, El Segundo, CA 90245.

On October 3, 2017, I served true copies of the following document(s) described as **LETTER BRIEF TO ADDRESS THE EFFECT, IF ANY, OF PARK V. BOARD OF TRUSTEES OF CALIFORNIA STATE UNIVERSITY (2017) 2 CAL. 5TH 1057, ON THE ISSUES PRESENTED IN THE CURRENT APPEAL** on the interested parties in this action as follows:

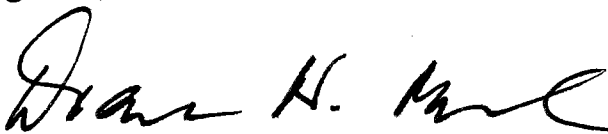
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 3, 2017, at El Segundo, California.


DIANE N. BRANCHE



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