Case No. S-235735

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SUPREME COURT OF CALIFORNIA

RAND RESOURCES, LLC, et al.

Plaintiffs, Appellants & Respondents,

v.

CITY OF CARSON, et al.

Defendants, Respondents & Petitioners

OPENING BRIEF OF THE CITY OF CARSON & JAMES DEAR

On Review From the Court of Appeal for the State of California,
Second Appellate District, Division One
Appellate Case No. B264493

After An Appeal From The Superior Court For The State Of California,
County Of Los Angeles, Case No. BC564093, Hon. Michael L. Stern

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I. THE ISSUES AS FRAMED BY THIS COURT IN ITS ORDER GRANTING REVIEW

1. Did plaintiffs' causes of action alleging the breach of and interference with an exclusive agency agreement to negotiate the designation and development of a National Football League (NFL) stadium and related claims arise out of a public issue or an issue of public interest within the meaning of Code of Civil Procedure section 425.16?[1]

2. Did plaintiffs' causes of action arise out of communications made in connection with an issue under consideration by a legislative body?

II. INTRODUCTION & SUMMARY OF THE ARGUMENT

Not six months ago, this Court wrote: "The Legislature enacted section 425.16 in 1992, noting 'a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (§ 425.16, subd. (a).) . . . '[T]o encourage continued participation in matters of public

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[1] The Exclusive Agency Agreement ("EAA") at issue in this case specified that it was entered into "solely for the purpose of: (a) coordinating and negotiating with the NFL for the designation and development of an NFL football stadium ("NFL Stadium") in the City; (b) facilitating the execution of appropriate agreements between the NFL and the City documenting the designation and development of the Property as an NFL Football Stadium (collectively, the "NFL Agreements"); and (c) performing such other services as may be reasonably requested by City in connection with this Agreement (collectively, with the services specified in subparagraphs (a) and (b) above, the "Services"), and hereby grants to Agent the exclusive right to perform the Services subject to the terms and conditions set forth herein." (Appellants' Appendix, Volume I, Tab 2, Page AA00045.)

significance,' and to ensure 'that this participation should not be chilled through abuse of the judicial process,' the Legislature has specified that the anti-SLAPP statute 'shall be ***construed broadly***.'" (*City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 416 [emphasis added].) This Court went further noting "[t]he Legislature did not limit the scope of the anti-SLAPP statute to activity protected by the constitutional rights of speech and petition. It went on to include 'any act . . . *in furtherance* of' those rights. (§ 425.16, subd. (b)(1), italics added.). . . . The Legislature's directive that the anti-SLAPP statute is to be 'construed broadly' so as to 'encourage continued ***participation in matters of public significance'*** supports the view that statutory protection of acts 'in furtherance' of the constitutional rights incorporated by section 425.16 may extend beyond the contours of the constitutional rights themselves." (*Id.* at 421 [emphasis added].)

Accordingly, so long as the actions of a defendant fall within the parameters of section 425.16(e), the Anti-SLAPP statute is an available tool to challenge litigation brought against public officials (or private citizens for that matter) who are engaged in matters of important public interest. "As used in this section, 'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' ***includes***: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any ***other official proceeding authorized by law***, (2) any written or oral statement or

writing made in connection with an ***issue under consideration or review by a legislative, executive, or judicial body***, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) ***any other conduct 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.***" (Code of Civ. Proc. §425.16, subd. (e) [emphasis added].)

Far from affording the Anti-SLAPP statute the "broad construction" this Court (and the plain words of the statute itself) commands, the Second Appellate District, in the opinion below, engaged in a disturbing "hair splitting" exercise, concluding the selection of an exclusive agent to represent the City of Carson (as contrasted with the actual negotiations of that exclusive agent) was not protected by section 425.16.

This opinion of the Second Appellate District is at odds with *Vasquez,* other seminal Anti-SLAPP decisions by this Court, including *Vargas v. City of Salinas* (2009) 46 Cal.4th 1, not to mention those of its sister appellate districts. It is further inconsistent with the jurisprudential body of law that has developed in construing and applying California's Anti-SLAPP statute and can become a slippery slope eroding away the protections of the Anti-SLAPP statutes. The opinion below constitutes plain error and must be reversed by this Court.

Selection, by the City Council of the City of Carson (and the public or private statements made by its public officials in connection therewith), of an "exclusive agent" to be the "face of the city" in its dealing with the National Football League ("NFL"), and one or more of its professional sports franchises, involving a potential billion dollar stadium project, was just as much a matter of public interest as would be the actual negotiations engaged in by that agent to lure the NFL and a franchise to Carson. By any standard, the EAA which is at the heart of the pending litigation meets the criteria to trigger application of the Anti-SLAPP statute.

Negotiation of this EAA (either at its inception or in connection with its possible extension) involved an "issue under consideration or review by a legislative [or] executive body"— specifically the Mayor and City Council of Carson. Alternatively, the EAA, and any statements allegedly made in connection with the same, involved the "furtherance of a . . . right of free speech" on the part of the Mayor of Carson, City staff or officials, and its City Council. And, saving the best for last, the EAA, its execution and possible extension, unquestionably involved a matter of great public interest in this community.

Reversal of the opinion below from the Second Appellate District is required for ***at least*** the following reasons. *First*, that opinion improperly focuses on protected speech, meetings and alleged "promises" regarding "who" the City was selecting as its exclusive agent to negotiate a possible

billion dollar NFL stadium project. As will be demonstrated, the fact that such alleged speech, meetings, and "promises" dealt with ***who*** would act as the City's exclusive agent to negotiate with the NFL, rather than statements, meetings, or "promises" made during those actual negotiations is, by law and sound public policy, a "distinction without a difference."

Second, all of the speech, meetings, and "promises" alleged in this action concerned a matter of public interest, the possible construction of a professional sports stadium project, and a contract, an EAA, both of which were under both the direct jurisdiction of, and consideration by, the Carson City Council. But, even if (for the sake of argument only), there is a distinction to be made between the "who" of the negotiator and the "what" of those actual "negotiations," selection of the City's exclusive agent is at least as critical to delivering a proposed stadium project as are the negotiations leading up to the project themselves. All such speech is inextricably intertwined (the "who" of the negotiations and the "what" of the negotiations) and must be protected within the meaning of the Anti-SLAPP statute.

Third, this Court's decisions in *Vasquez* and *Vargas* make clear that the Anti-SLAPP statute is to be interpreted broadly. This Court has carefully made reference to the legislative analysis of the 1997 amendments to the Anti-SLAPP statute. Quoting from a law review article that identified "a typical SLAPP suit scenario," this Court embraced the notion

that an abusive lawsuit could be brought against both public officials and private individuals and would still qualify for protection under the Anti-SLAPP statute.

The First Amended Complaint ("FAC") at issue in this appeal is precisely the type of abusive litigation that the Legislature had in mind when enacting amendments to the Anti-SLAPP statute in 1997. If the decision of the Second Appellate District goes uncorrected, that decision will contravene both legislative intent and this Court's recent decisions under the Anti-SLAPP statute.

Lastly, and of greatest concern, however, is the chilling effect the lower court's opinion will have on government officials as they act in the public interest. To say that a government official is exposed to claims of "fraud" because (s)he engages in conversations about whom a public agency should select or continue to use as its exclusive agent (even in the face of an existing and executory agreement designating that exclusive agent for a term of years) is to stifle speech, bully a public official, and force that official to cower in silence for fear of personal liability for speaking out on a matter of public interest.

Even if, speaking hypothetically, that speech or conduct were to give rise to a potentially viable claim for breach of contract, that fact, standing alone, does not defeat the protected nature of that speech and does not alter the fact that the public official is engaging in protected activities involving

a matter of public interest. So conceding, for the sake of review by this Court ***only***, that Rand Resources may potentially be able to plead a garden variety breach of contract claim, that does not defeat the privilege to engage in protected speech nor does it defeat the fact that such protected speech involved an important matter of public interest.

Accordingly, Petitioners respectfully request that the published opinion of the Second Appellate District in this case be reversed and that the trial court's decision granting Petitioners' Anti-SLAPP motion be affirmed and reinstated.

III. SUMMARY OF THE RELEVANT ALLEGED FACTS

A. The "Exclusive Agency Agreement" As Alleged In The FAC

Plaintiffs/Respondents, Richard Rand, owner of Rand Resources, LLC, and Carson El Camino, LLC (collectively "Rand Resources"), claim to be "real estate developer[s] with a track record of successfully developing properties all over the globe." (AA:I:2:24, 28.)[2] In 2008, Rand Resources and Defendant/Petitioner, the City of Carson ("City"), by and through its now-dissolved redevelopment agency, entered into an alleged exclusive negotiating agreement ("ENA"), whereby Rand Resources was provided with the exclusive right to negotiate a $100 million dollar mixed-use retail project on 91 acres of land in the City. (AA:I:2:28-29.)

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[2] Citations are to Appellants' Appendix unless otherwise noted. Citations to the Appellants' Appendix are cited as AA:Volume:Tab:Page.

Multiple extensions to this ENA were alleged to have been granted by the redevelopment agency, but the redevelopment agency was dissolved by an act of the California Legislature. (AA:I:2:29.) Due to such dissolution, the City and Rand Resources allegedly entered into an Exclusive Agency Agreement ("EAA") in 2012. (AA:I:2:29, 43-48.)

Under the EAA, Rand Resources "would become the exclusive agent of the City" for the purpose of "(a) coordinating and negotiating with the NFL for the designation and development of an NFL football stadium ("NFL Stadium") in the City" and "(b) facilitating the execution of appropriate agreements between the NFL and the City documenting the designation and development of [Rand Resources'] Property as an NFL football stadium". (AA:I:2:29-30.) This football stadium would involve a "new, state-of-the-art sports and entertainment complex within the City" where "one or more National Football League ("NFL") franchises" would "play its home games." (AA:I:2:24.) The football stadium would be located on a 91 acre parcel that was partially owned by Rand Resources. (AA:I:2:44.) Rand Resources alleges that El Camino "is the assignee of Rand Resources with respect to its rights under the EAA." (AA:I:2:25.)

As the EAA was about to expire in 2014 according to its terms, Rand Resources applied for an eleventh-hour extension of the same.[3] The

[3] Curiously, the FAC fails to allege any meaningful progress on the part of Rand Resources in securing an NFL franchise or building a stadium

City Council, in a public meeting on a duly noticed agenda, unanimously voted to deny the extension request.[4] Rand Resources then filed this action.

B. Allegations Of Fraud Based On Protected Speech And Petitioning Activities

Rand Resources' FAC is the operative pleading naming the City and/or its then-Mayor, Defendant/Petitioner Mr. James Dear ("Dear"), as defendants (collectively "Petitioners"). (AA:II:6:417.) The FAC attempts to add a new second, third, and fourth cause of action, which are based on ***alleged*** fraud by the City and/or Dear[5] in connection with the City and Dear's communications relating to whether the EAA should be extended. (AA:I:2:33.) Rand Resources also named the City in the first cause of action for breach of contract, which is not at issue in this appeal.[6]

Rand Resources alleges that Dear and other unidentified "City officials" held "clandestine meetings," "talk[ed] by the phone or through

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until Mr. Rand asked for his eleventh-hour extension of the EAA. Then, conveniently and for the first time, Mr. Rand alleges all the great things he had done (and which he had never bothered to share with City staff before that time).

[4] Although not explicit from the record, the City was approached by representatives of the San Diego Chargers, of the National Football League ("NFL"), in late 2014, ***after*** the expiration of the EAA, to discuss the potential of an NFL stadium in Carson. Neither Rand Resources nor the Bloom Petitioners were involved in any of these meetings or any later discussions with this franchise. Ultimately, the NFL's governing body voted to allow a stadium to be built in the City of Inglewood rather than in Carson.

[5] The purported fourth cause of action is the only claim asserted against Dear.

[6] Petitioners' Special Motion to Strike did not attack the breach of contract cause of action, which remains pending before the Superior Court.

text messages," and sent "confidential emails." (AA:I:2:31, 35-36, 37.) The purpose of these communications was "to cause[] the City to breach its prior representations and agreement to extend the EAA." (AA:I:2:33.)

Even though Rand Resources asserts that Dear and the City should have disclosed such communications to Rand Resources (AA:I:2:35-36), the FAC nowhere alleges the source of this claimed legal "duty of disclosure" owed on the part of Dear or the City to Rand Resources. Neither does the FAC purport to allege the ultimate "facts" giving rise to such duty.

Specifically, Rand Resources alleges the following protected petitioning and speech under the Anti-SLAPP statute:

- "[B]eginning in at least the summer of 2013, City officials, including Mayor James Dear, began secretly meeting with Leonard Bloom, the managing director and Chief Executive Officer of U.S. Capital, LLC, , [sic] regarding bring the NFL to Carson." (AA:I:2:24.)
- "For example, upon information and belief, Mr. Bloom and Mayor Dear met with NFL executives in Beverly Hills, held meeting [sic] at City offices and elsewhere to raise money to bring an NFL team to the City, spoke with representatives of NFL teams, including the San Diego Chargers, about relocating to Carson, and even used promotional materials for a football

stadium that copied information from materials created by Rand. Upon information and belief, Mr. Bloom did this with the knowledge and approval of Mayor Dear and other City officials." (AA:I:2:24-25.)

- In August 2014, Rand requested that the City approve the first of the two automatic extensions of the EAA. Despite Rand meeting all of the necessary conditions for the extension, the City refused to grant it. As Mayor Dear explained to Mr. Rand, the City 'no longer needed' him because 'we can do it ourselves.'" (AA:I:2:25.)
- "[T]he City—and specifically, City Attorney Bill Wynder—represented to Mr. Rand and his counsel that, so long as Plaintiffs showed reasonable progress with respect to bringing an NFL franchise to Carson, the EAA would be extended, just as the ENA had been several times. To reflect this, the EAA states expressly that, 'To the extent that such efforts are reasonably determined by the City to be consistent with the requirements of this Agreement, the City shall grant such extension request.'" (AA:I:2:30.)
- "Leonard Bloom and U.S. Capital, LLC, with the knowledge and support of representatives of the City, including Mayor Dear, were contacting NFL representatives and purporting to be agents

of the City with respect to bringing an NFL franchise to Carson. In so doing, Mayor Dear, Mr. Bloom and U.S. Capital, LLC would send each other 'confidential' emails to discuss matters relating to building a stadium in Carson. Further, Mayor Dear regularly sent Mr. Bloom and U.S. Capital, LLC private and confidential City of Carson documents relating to development of an NFL stadium, and Mr. Bloom and Ms. Paul routinely ghostwrote letters for Mayor Dear that Mayor Dear put on his official letterhead and sent to third parties as part of their efforts to undermine the EAA. . . . Indeed, Messrs. Bloom and Dear were involved in discussions with the City as to how to 'get around' the EAA." (AA:I:2:31.)

- "After hearing rumors about Mr. Bloom's activities with respect to the City and the NFL, Mr. Rand asked the Mayor about Mr. Bloom's involvement. The Mayor falsely told Mr. Rand that he did not know Mr. Bloom and was not aware of what, if anything, Mr. Bloom was doing with respect to the City and the NFL. At a later time, Mr. Rand asked the Mayor to set up a meeting with Mr. Bloom. At that time the Mayor acknowledged he did know Mr. Bloom and told Mr. Rand that Mr. Bloom would not meet with him." (AA:I:2:31-32.)

- "Prior to the expiration of the original term of the EAA, Rand sought to exercise its right to extend the agreement for another one-year period. To that end, Rand provided the City with an extension request and a report detailing its efforts to date and the anticipated steps to be undertaken in the extension period. Even though the EAA states that the City 'shall grant such extension request' under those conditions, the City [Council] did not do so. The City [Council]'s decision was contrary to that of Carson's Economic Development Commission, which voted unanimously (13-0) in favor of extending the EAA with Rand." (AA:I:2:32.)
- "After Rand provided the City with its extension request but before the City voted on the extension, Mr. Bloom and Ms. Paul sent confidential emails to Mayor Dear and other City officials to try to schedule a meeting 'as soon as possible' to discuss the joint agreement. Upon information and belief, Mr. Bloom and Ms. Paul met with Mayor Dear and at least one Carson councilperson prior to the EAA extension vote to discuss and conspire about how to breach the EAA and not extend it." (AA:I:2:32.)
- "Days before the City voted not to extend the EAA, a meeting took place that was attended by Mr. Rand, his counsel, City Attorney Wynder, and City Manager Nelson Hernandez. At this meeting, Mr. Wynder indicated the City was not going to extend

the EAA, notwithstanding the City's prior promises to extend the agreement and the explicit terms of the EAA. Mr. Wynder further stated that the City had been 'walking on eggshells' with Leonard Bloom and 'did not need' Rand anymore." (AA:I:2:33.)

- In specific support of the purported Second Cause of Action for "tortious breach of contract" against the City, Rand Resources alleges "[t]he City took actions to cover-up and conceal its breach of the EAA from Rand. For example, the City met in secret with Mr. Bloom and others to discuss bringing the NFL to Carson and did not inform Rand about those clandestine meetings [again this cause of action is devoid of ultimate facts giving rise to a duty of disclosure]. Further, even though Mayor Dear was aware of the secret meetings with Mr. Bloom and his interactions with the NFL, Mayor Dear falsely told Mr. Rand that he did not know Mr. Bloom and was not aware of what, if anything, Mr. Bloom was doing with respect to the City and the NFL. Moreover, prior to entering the EAA, the City Attorney, Mr. Wynder, falsely told Mr. Rand that, so long as Rand showed reasonable progress with respect to bringing and NFL franchise to Carson, the EAA would be renewed." (AA:I:2:35-36.)
- In specific support of the purported Third Cause of Action for promissory fraud against the City, Rand Resources alleges "[i]n

August 2012 prior to Rand entering into the EAA, City Attorney Bill Wynder, acting on behalf of the City, told Mr. Rand that, even though the EAA only initially provided for a term of two years, the City would extend the EAA for the two years beyond that period, just as it had with the ENA, so long as Rand showed reasonable progress with respect to bringing an NFL franchise to Carson. This was a material promise to Rand and Rand would not have entered into the EAA without this promise." (AA:I:2:36.)[7]

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[7] While not directly an issue within the parameters of a Special Motion to Strike, it is "black letter law" that a City Attorney has no authority to bind a City by his oral statements and only an action by a City Council (the legislative body of a city), taken at a duly noticed and public meeting, can have such legal effect. (Government Code §§ 41801-05, 40602; *see also* Carson Municipal Code § 2417 (b) "All ordinances, resolutions and contract documents ***shall, before presentation to the Council***, have been approved ***as to form and legality*** by the City Attorney or his authorized representative, and, where there are substantive matters of administration involved, shall have been examined and approved as to such matters by the City Administrator or his authorized representative"; *South Bay Senior Housing Corp. v. City of Hawthorne* (1997) 56 Cal.App.4th 1231, 1236 ["by the plain language of the statutes, the City's power to make a contract is limited to the prescribed method and, by necessary implication, that ***any other method is prohibited***—which means that, unless it was signed by the Mayor, the contract with South Bay is void and no implied liability can arise under that contract." [emphasis added]; *Montgomery v. Superior Court* (1975) 46 Cal.App.3d 657, 670 "***city councils . . . define and control the duties of their city attorneys***. This result is consistent with the general principle that an attorney's duties are ordinarily defined and controlled by his client."].) There is no allegation in the FAC that Carson's City Council ever afforded the City Attorney ***any*** authority to bind the City Council by his oral statements.

- In specific support of the purported Fourth Cause of Action for fraud against the City, James Dear, U.S. Capital and Bloom, Rand Resources alleges "[a]mong other things, Mr. Bloom and Ms. Paul scheduled their meetings with City officials and employees in secret so that Rand would not learn about them. Mayor Dear, U.S. Capital, LLC, and Mr. Bloom would send each other confidential emails to discuss their plans and efforts to interfere with the EAA. Mr. Bloom also instructed at least one person he was communicating with about the NFL to not communicate by email and instead to only talk by the phone or through text messages." (AA:I:2:37.) "In addition, Mr. Rand asked the Mayor about Mr. Bloom's involvement with the City and the NFL. Consistent with the conspiracy to conceal his activities with Mr. Bloom, the Mayor falsely told Mr. Rand that he did not know Mr. Bloom and was not aware of what, if anything, Mr. Bloom was doing with respect to the City and the NFL. Mayor Dear made these false statements knowing at the time that they were false and with the intent to deceive Rand and induce reliance." (AA:I:2:38.)[8]

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[8] Petitioners vigorously dispute ***each*** of these factual allegations and note that the lower court's recitation of the "facts" in its published opinion was based upon its obligation to accept as true, for purposes of ruling on the special motion to strike, Rand's allegations in his FAC (regrettably the

Petitioners' special motion to strike included all causes of action in the FAC naming the City or Dear, except for the single purported cause of action for breach of contract against the City.

C. The Superior Court Correctly Grants Two Anti-SLAPP Motions

On May 7, 2015, the Superior Court ***granted two special motions*** to strike in their entirety.[9] The trial judge correctly found that the allegations of the FAC were the functional equivalent of "an action for breach of an exclusive commercial development contract ["ENA"] with a public entity (containing causes of action for inducing breach of contract, intentional and negligent interference and Business and Professions Code section 17200) [and] is subject to [the] Anti-SLAPP [statute] on the basis of rights of petition and free speech in connection with a public issue." (AA:IV:21:1095; *Tuchscher Dev. Enters., Inc. v. S.D. Unified Port Dist.* (2003) 106 Cal. App. 4th 1219.)

The trial judge went onto explain that, under *Tuchscher*, communications involving the proposed development of such commercial

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lower court did not afford Petitioners, or its legal counsel, the courtesy of acknowledging that it was required by law to accept the alleged facts as being true thereby inadvertently leaving the impression that the alleged facts were true and correct). To be clear, those allegations are just that – none of the "facts" have been adjudicated as true or correct. In point of fact, they are neither true nor correct!

[9] On April 8, 2015, Defendants/Petitioners, Leonard Bloom, and U.S. Capital, LLC ("Bloom Petitioners"), filed a separate special motion to strike under California's Anti-SLAPP statute, which was set for hearing with Petitioners' motion on May 7, 2015.