6th Civ. Nos. H049521 and H049523 (considered together per 12/2/21 order)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

No. H049521:

LSI CORPORATION,
Plaintiff and Appellant,

vs.

KIRAN GUNNAM,
Defendant and Respondent.

No. H049523:

LSI CORPORATION,
Plaintiff and Respondent,

vs.

ANNAPURNA YARLAGADDA,
Defendant and Appellant.

Appeal from the Santa Clara County Superior Court,
Case No. 19-cv-358852
The Honorable Socrates P. Manoukian, Judge Presiding

COMBINED APPELLANT'S REPLY BRIEF (AS TO GUNNAM) AND RESPONDENT'S BRIEF (AS TO YARLAGADDA)

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APPELLANT'S REPLY BRIEF (AS TO GUNNAM)

INTRODUCTION

Respondent Kiran Gunnam disclosed appellant LSI Corporation's confidential information to another company in violation of a confidentiality agreement. LSI sued Gunnam for breaching the agreement, basing its claims entirely on the disclosure itself, which is not conduct protected by Code of Civil Procedure section 425.16. This alone compels reversal.

Gunnam's injury-producing conduct—disclosing LSI's confidential information—is all that is relevant at the first step of the anti-SLAPP analysis. The trial court erred by considering Gunnam's claimed *motive* for his conduct, as well as the *consequences* of his conduct—i.e., the fact that the other company used the wrongfully disclosed information to sue LSI. Gunnam's arguments in his response brief reflect the same erroneous analysis. Gunnam's attempt to intertwine his conduct with the other company's resulting lawsuit fails in light of our Supreme Court's repeated directives limiting the prong one anti-SLAPP analysis to the defendant's *injury-causing conduct*, and holding that both the motive for and damage flowing from the conduct are irrelevant.

Indeed, if Gunnam's conduct were protected activity, anyone could avoid liability for violating a confidentiality agreement with his former employer simply by claiming that his motive was to help another company file a lawsuit. An employee could retain and disclose his former employer's confidential information with impunity. The purpose of the anti-SLAPP

statute is not served by allowing such employees to shield themselves from the consequences of their wrongful conduct.

The absence of protected conduct requires reversal—no further anti-SLAPP analysis is required. But even if some of Gunnam's conduct is protected, his anti-SLAPP motion fails at the second prong. Contrary to Gunnam's argument that LSI "put forth zero evidence" to support its claims (Combined Respondent's Brief and Opening Brief (RB/XAOB) 34), the record easily establishes a prima facie case that Gunnam breached his employment agreement by disclosing LSI's confidential information and that LSI suffered damages. The trial court erred in finding that LSI had not submitted any evidence of damages. And even without proof of actual damages, LSI is entitled to nominal damages.

The Court should reverse.

RESPONSE TO GUNNAM AND YARLAGADDA'S UNSUPPORTED FACTUAL ASSERTIONS.

We cannot address Gunnam and Yarlagadda's fact-based legal arguments without first alerting the Court to the significant deficiencies in the factual aspects of their briefing.

No record support. Going outside the record is never permissible, but Gunnam and Yarlagadda do so repeatedly. (E.g., *Citizens Opposing a Dangerous Environment v. County of Kern* (2014) 228 Cal.App.4th 360, 366, fn. 8 ["'Factual matters that are not part of the appellate record will not be considered on appeal and such matters should not be referred to in the briefs'"].) For example, they describe proceedings and filings in the Delaware litigation that are not part of the record in this action, such as when they characterize LSI's arguments in a Delaware summary judgment motion that is not in the record. (See RB/XAOB 17.) They also repeatedly state that Gunnam "was not in Texas on or near the upload date" and was "1500 miles away" at the time, despite the absence of evidence in the record regarding his whereabouts on or near the upload date. (RB/XAOB 13, 20, 35.) Indeed, there isn't even any evidence that the person who uploaded the Scribd Documents was physically in Texas—the evidence only shows a location associated with an IP address. (See 3-AA-976-978.)

No record citations. As to matters that actually are in the record, "[e]ach and every statement in a brief regarding matters that are in the record on appeal, whether factual or procedural, must be supported by a citation to the record. This

rule applies regardless of where the reference occurs in the brief." (*Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 96, fn. 2.) But Gunnam and Yarlagadda fail to provide record citations not just in their statement of facts, but throughout their briefs. (E.g., RB/XAOB 15 [no record citations on the entire page, although some statements are in fact supported by the record, such as "In 2008, LSI hired Dr. Gunnam," see 3-AA-790].)

The consequence is clear: "Statements of facts not supported by references to the record may be disregarded as a violation of rule 8.204(a)(1)(C) of the California Rules of Court." (*Princess Cruise Lines, Ltd. v. Superior Court* (2009) 179 Cal.App.4th 36, 45; see also *JP-Richardson, LLC v. Pacific Oak SOR Richardson Portfolio JV, LLC* (2021) 65 Cal.App.5th 1177, 1194 [the reviewing court "must disregard unsupported statements of facts"]; *Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856 ["If a party fails to support an argument with the necessary citations to the record, that portion of the brief may be stricken and the argument deemed to have been waived"].)

ARGUMENT

I. PRONG ONE: BECAUSE LSI'S CLAIMS AGAINST GUNNAM DO NOT ARISE FROM PROTECTED ACTIVITY, THE INQUIRY ENDS—THE JUDGMENT MUST BE REVERSED.

LSI's opening brief describes three ways Gunnam violated the "Employee Invention and Confidential Information Agreement" (Agreement) (3-AA-788): (1) by disclosing LSI's confidential information on scribd.com (AOB 29); (2) by delivering confidential documents to TexasLDPC (AOB 37); and (3) by repeatedly breaching the Agreement while working at LSI (AOB 40).

Gunnam does not contend that his breaches of the Agreement while employed by LSI were protected activity under the anti-SLAPP statute. His claims of anti-SLAPP protection regarding the other two breaches—the Scribd disclosure and delivering confidential documents to TexasLDPC—are unavailing.

A. Causing LSI's Confidential Documents To Be Uploaded To Scribd.Com Is Not Protected Activity Under Section 425.16.

1. LSI bases its claim on the posting itself, which is not protected activity.

Posting the documents online in violation of the Agreement—or causing it to happen—cannot constitute protected activity under the anti-SLAPP statute, because it cannot meet the requirement of having been done in connection with an issue under consideration or review by a judicial body.

Gunnam argues that the Scribd disclosure was a litigation-related activity and therefore protected under Code of Civil Procedure section 425.16 (section 425.16) because, according to LSI's Complaint, TexasLDPC relied on the Scribd Documents in its subsequent lawsuit against LSI. (RB/XAOB 25.) But a court may not strike a claim unless *the speech or petitioning activity itself* is the wrong alleged, and not just evidence of liability. (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1060 (*Park*).) Gunnam violated the Agreement by causing LSI's confidential information to be posted to a public website, *as evidenced by* TexasLDPC's lawsuit.

That LSI sued Gunnam for breach of contract after TexasLDPC initiated the Delaware litigation, and that the Delaware litigation features prominently in the complaint, do not mean that LSI's claims against Gunnam *arose from* the Delaware litigation for purposes of the anti-SLAPP statute. (See *Park*, *supra*, 2 Cal.5th at p. 1063 ("'[T]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute'"].) With respect to the Scribd disclosure, LSI's claim is based solely on the upload itself, which is not protected activity under section 425.16.

2. Gunnam's motive for posting the confidential documents to scribd.com is irrelevant for purposes of prong one.

For purposes of the first step of the anti-SLAPP analysis, our Supreme Court has drawn a clear distinction between a defendant's conduct and the motive behind that conduct:

Courts examine only the conduct itself, without reference to the underlying motivation. In *Wilson v. Cable News Network, Inc.* (2019) 7 Cal.5th 871, 881 (*Wilson*) our Supreme Court held that a plaintiff's allegations of a defendant's wrongful motives cannot shield a claim arising from protected activity "from the same preliminary screening for minimal merit that would apply to any other claim arising from protected activity," i.e., from proceeding to the second prong of the anti-SLAPP analysis. The converse must likewise be true: Allegations of a defendant's motive cannot convert an unprotected act into a protected act under the first prong of the anti-SLAPP analysis.
(See AOB 30-35.)

Gunnam's argument that *Wilson* "does not address any issue relevant to this case" misses the mark entirely. (RB/XAOB 29, bold omitted.) While it's true that Gunnam is not "an employer accused of engaging in employment discrimination or retaliation" as the *Wilson* defendant was, that distinction is irrelevant. (RB/XAOB 29.) What matters is that Gunnam seeks to do what *Wilson* expressly denounced: He argues that his alleged *motive* of pursuing litigation protects his *conduct* of disclosing LSI's confidential information. (RB/XAOB 29; *Wilson*, *supra*,7 Cal.5th at p. 888 ["at the first step of the anti-SLAPP analysis, we routinely have examined the conduct of defendants without relying on whatever improper motive the plaintiff alleged"].)

Similarly, while Gunnam argues that *Wilson*'s reliance on *Jarrow Formulas, Inc. v. LaMarch*e (2003) 31 Cal.4th 728

demonstrates that he has satisfied prong one, this argument ignores *Wilson*'s very holding that motive is irrelevant at this step. (RB/XAOB 30.) *Jarrow* held that the act of filing a malicious prosecution action was protected activity under the anti-SLAPP statute regardless of whether probable cause or malice existed for filing the lawsuit. (*Jarrow*, *supra*, 31 Cal.4th at pp. 735-736, 739-740.) "That the claim [in *Jarrow*] arose from the filing of a lawsuit, protected First Amendment activity, was alone dispositive; allegations that the suit was filed without probable cause—or, for that matter, based on a malicious motive—were irrelevant at the first step, and mattered only at the second step." (*Wilson*, *supra*, 7 Cal.5th at p. 888.) *Jarrow* thus drew a clear distinction between the conduct and motive for prong one purposes, entirely consistent with *Wilson*.

Gunnam's error is focusing on the Delaware action, contending that LSI's claims against Gunnam arise "from the filing of [the Delaware] lawsuit—which is plainly 'protected First Amendment activity' and thus 'dispositive' for purposes of prong one" under *Wilson* and *Jarrow*. (RB/XAOB 30.) But, as LSI has reiterated, that the Delaware action may have *resulted* from Gunnam's conduct doesn't change the fact that LSI's claims arise from the posting. As in *Wilson*, "[t]he anti-SLAPP statute does not apply simply because an employer protests that its personnel decisions followed, or were communicated through, speech or petitioning activity." (*Wilson*, *supra*, 7 Cal.5th at p. 890.) "Put differently, to carry its burden at the first step, the defendant in a discrimination suit must show that the complained-of adverse

action, in and of itself, is an act in furtherance of its speech or petitioning rights. Cases that fit that description are the exception, not the rule." (*Ibid.*)

Gunnam's own argument illustrates the distinction between his conduct—disclosing the documents—and the alleged motive behind that conduct—to sue LSI. He argues: "At its core, LSI's complaint alleges that Dr. Gunnam provided counsel with documents regarding LSI's infringing products *to facilitate the filing of the Delaware Complaint*, which clearly constitutes conduct in furtherance of the right to petition." (RB/XAOB 25, italics added.) That "facilitat[ing] the filing of the Delaware complaint" may have been Gunnam's goal or purpose reflects nothing more than his state of mind—his *motive*. The conduct that injured LSI—because it breached the Agreement by putting confidential information in the public eye—was the disclosure, nothing more or less.

3. Gunnam's stated motive as to the Scribd posting relates only to damage flowing from his unprotected conduct.

There is another reason why Gunnam's stated motive does not confer anti-SLAPP protection on his conduct: The court must look to "the allegedly wrongful and injurious conduct of the defendant, *rather than the damage which flows from said conduct*." (*Renewable Resources Coalition, Inc. v. Pebble Mines Corp.* (2013) 218 Cal.App.4th 384, 396-397 (*Renewable Resources*), original italics.) Gunnam's *conduct* was causing LSI's confidential information to be posted online. The *damage flowing from that conduct* was TexasLDPC's subsequent

"discovery" and lawsuit against LSI. The Delaware action therefore is evidence supporting LSI's damages claim.

4. This case cannot be distinguished from *Renewable Resources*.

a. *Renewable Resources* correctly focused on the injury-producing conduct.

Gunnam attempts to distinguish this case from *Renewable Resources* on the basis that "the gravamen of LSI's case is Dr. Gunnam's alleged disclosure of documents to counsel for use in the Delaware litigation and Ms. Yarlagadda's authorization to file the lawsuit." (RB/XAOB 31.) Leaving aside that, as Gunnam himself later argues, the "gravamen" approach is obsolete (see pp. 21-22, *post*), this misconceives LSI's claim, which is based on Gunnam's conduct in making or causing the Scribd posting—itself not possibly protected. Similarly, the *Renewable Resources* plaintiff based its claims on the defendants' wrongful acquisition of confidential documents—like the posting here, not conduct in furtherance of the defendants' right of petition or free speech. (*Renewable Resources*, *supra*, 218 Cal.App.4th at pp. 396-398 [holding that the injury-producing conduct was the wrongful acquisition of the documents rather than the resulting lawsuit, which was the damage flowing from the conduct].)

Gunnam's argument that "LSI's admissions in its Complaint establish that all the causes of action against Dr. Gunnam target protected activity" is therefore unavailing. (RB/XAOB 24.) While the Complaint described the Delaware action (1-AA-35), it also made clear that Gunnam's injury-

producing conduct was violating the Agreement by disclosing LSI's confidential information. (E.g., 1-AA-36, ¶ 33 ["Upon information and belief, the confidential and proprietary information used and disclosed in TexasLDPC's complaints and on www.scribd.com was retained and/or disclosed by Gunnam in breach of his obligations under the EICI Agreement. Gunnam should not have retained possession of any of LSI's confidential and proprietary information following his separation from employment with LSI, or used or disclosed such information without LSI's authorization"].) LSI spelled out the basis for its claims against Gunnam, alleging that he violated the Agreement "by using and/or disclosing, and/or causing others to use and/or disclose, LSI's confidential and proprietary information without LSI's authorization" and that this was how he harmed LSI. (E.g., 1-AA-37, ¶¶ 41-42.)

LSI's Complaint therefore does not, as Gunnam argues, "show[] that LSI's causes of action arise from protected conduct." (RB/XAOB 25-26, citing *Bel Air Internet, LLC v. Morales* (2018) 20 Cal.App.5th 924, 937 (*Bel Air*).) It explicitly shows just the opposite—that the injury-producing conduct of disclosing confidential information on a public website is *not* protected activity. And, just as in *Renewable Resources*, LSI's references to the Delaware litigation in its Complaint described the damages flowing from Gunnam's conduct, rather than the injury-producing conduct itself. (*Renewable Resources*, *supra*, 218 Cal.App.4th at pp. 396-398.)

Additionally, as LSI explained in its opening brief, Gunnam's argument that *Bel Air* is more "comparable and compelling" than *Renewable Resources* fails because in that case, the entirety of the defendants' injury-producing conduct was alleged *communications* that "advised, counseled, [and] encouraged" litigation. (RB/XAOB 30-33; *Bel Air*, *supra*, 20 Cal.App.5th at p. 930.) Their "alleged encouragement to sue was not a separate act that simply evidenced or led to [plaintiff's] alleged inducement of a contract breach; it was an inseparable part of the alleged communication that formed the basis for [plaintiff's] claims." (*Bel Air*, *supra*, 20 Cal.App.5th at p. 945.) It therefore was "an integral part of the communications on which [plaintiff's] claims for tortious interference and breach of contract are based, rather than just evidence of some other decision or conduct that forms the basis for [plaintiff's] claims." (*Ibid.*)

Here, Gunnam's actionable conduct—disclosing LSI's proprietary information—was separate from any litigation and connected to litigation only by Gunnam's implicit motive. In any case, to the extent *Bel Air* requires consideration of motive or deems motive relevant, it is at least questionable in light of *Wilson*. (*Wilson*, *supra*, 7 Cal.5th at p. 889.)

b. The Supreme Court's repudiation of the "gravamen" analysis supports LSI, not Gunnam.

Gunnam further attempts to distinguish *Renewable Resources* by arguing that "the gravamen analysis in [*Renewable Resources*] is inapplicable to our facts," having been "'eliminated'"

by later decisional law (RB/XAOB 31-32) (despite his own reliance on that very mode of analysis in his preceding paragraph and Yarlagadda's reliance on it in her opening brief (RB/XAOB 44)). But while *Baral v. Schnitt* (2016) 1 Cal.5th 376 (*Baral*) did eliminate the gravamen analysis, its reasoning supports LSI, not Gunnam. As LSI showed in its opening brief, *Baral* held that instead of striking an entire count as pleaded in the complaint when granting an anti-SLAPP motion, "courts should analyze each claim for relief—*each act or set of acts supplying a basis for relief*, of which there may be several in a single pleaded cause of action—to determine whether the acts are protected and, if so, whether the claim they give rise to has the requisite degree of merit to survive the motion." (*Bonni v. St. Joseph Health System* (2021) 11 Cal.5th 995, 1010, italics added, citing *Baral, supra*, 1 Cal.5th at pp. 393-395.)

Under *Baral*, when the cause of action appears to allege a mixture of protected and unprotected activity, the protected-activity analysis focuses on *the injury-producing conduct*, rather than on the "essence," "gist," or "gravamen" of a cause of action. (*Bonni*, *supra*, 11 Cal.5th at pp. 1011-1012.) Mere incidental or collateral assertions are not subject to section 425.16. (*Baral*, *supra*, 1 Cal.5th at p. 394.) But Gunnam primarily relies on the overbroad pre-*Baral* position by arguing the trial court correctly struck LSI's claims in their entirely based on their "gravamen," without attention to what constituted the actual injury-producing conduct. (RB/XAOB 31.)

B. Delivering Confidential Documents To TexasLDPC Is Not Protected Activity Under Section 425.16.

1. LSI bases its claim on the disclosure itself, which is not protected activity.

As shown in LSI's opening brief, Gunnam's conduct in printing and delivering to TexasLDPC emails containing LSI's confidential information is not protected activity under section 425.16 for the same reasons Gunnam's conduct in causing the Scribd upload is not protected activity. (See AOB 37-39.)

Gunnam contends that this disclosure of LSI's confidential information to TexasLDPC via TexasLDPC's counsel, Fish & Richardson, constitutes prelitigation communications or preparing evidence for counsel. (RB/XAOB 32.) But Gunnam does not address the fact that he himself was not involved in or preparing for any litigation-related dispute against LSI when he provided the confidential emails to TexasLDPC. Again, delivering confidential emails to TexasLDPC via the conduit of Fish & Richardson was the legal equivalent to delivering the documents to Yarlagadda—she and her company, not the law firm, were the beneficiaries of the disclosure. Accordingly, Gunnam's injury-producing conduct was *disclosing* the information in the first place, which is not protected activity. It was not, as Gunnam argues, "providing information to counsel to assist in filing a lawsuit." (RB/XAOB 27.)

Any prelitigation communications between Gunnam and Fish & Richardson other than the disclosure itself are not at issue because they do not form the basis of any of LSI's claims.

(See *Graffiti Protective Coatings, Inc. v. City of Pico Rivera* (2010) 181 Cal.App.4th 1207, 1215 [prelitigation communications between defendant and others provided helpful context but were not the basis of plaintiff's claims, which thus could not be stricken under the anti-SLAPP statute].) Gunnam does not appear to claim otherwise.

2. Gunnam's conduct in disclosing confidential information to TexasLDPC is merely incidental to LSI's primary claim based on the Scribd posting.

Even if Gunnam's conduct in giving confidential documents to TexasLDPC could theoretically qualify as protected activity if LSI had asserted it as a distinct claim, it is merely incidental to LSI's separate claim based on the Scribd posting. (See AOB 39-40.) Gunnam does not appear to disagree. He also does not dispute that his giving TexasLDPC multiple emails containing LSI's confidential information is circumstantial evidence that he made or caused the Scribd posting. (See *ibid.*)

Because these allegations demonstrate an extensive pattern of violating confidentially, they provide context for LSI's claim based on the Scribd posting and cannot be stricken under the anti-SLAPP statute. (*Baral*, *supra*, 1 Cal.5th at p. 394.)

II. PRONG TWO: TO THE EXTENT LSI'S CLAIMS AGAINST GUNNAM AROSE FROM PROTECTED ACTIVITY, LSI HAS SHOWN A PROBABILITY OF PREVAILING.

A. The Trial Court Based Its Prong Two Ruling On An Erroneous Finding That LSI Had Not Submitted Any Admissible Evidence Of Damages.

The trial court erred by finding that LSI had not met its burden of demonstrating a probability of prevailing on either claim solely because, in the court's view, LSI had not submitted any admissible evidence of resulting damage. (4-AA-1322-1323.)

Gunnam's arguments to the contrary fail to recognize that the trial court's error was both factual, because the record contains ample evidence of actual damages, and legal, because the court failed to recognize LSI's entitlement to nominal damages and injunctive relief.

1. LSI's damages showing was more than sufficient to defeat an anti-SLAPP motion.

LSI has shown it suffered damages as a result of Gunnam's conduct. The Delaware lawsuit and the accompanying litigation costs—i.e., LSI's being forced to defend itself in the Delaware proceeding—unquestionably flow from Gunnam's conduct in violating the Agreement. (*See Renewable Resources*, *supra*, 218 Cal.App.4th at pp. 396-397 [the fact that plaintiff was forced to defend itself in litigation resulting from the wrongful acquisition of confidential documents constituted damages flowing from the wrongful conduct].)

It is not correct, as Gunnam claims, that "LSI again focuses on protected activity" in its damages analysis. (RB/XAOB 37, bold omitted.) As shown in the opening brief and above, LSI bases its breach of contract claim on Gunnam's *disclosure* of confidential information. (AOB 29-30, 37-39; pp. 14-15, 23-24, *ante*.) The *consequences* of Gunnam's disclosure—i.e., the damages flowing from his conduct—are the Delaware lawsuit and the accompanying litigation costs.

Gunnam's attempt to distinguish *Renewable Resources* on this point misses the mark. It doesn't matter, as Gunnam claims it does (albeit without explanation), that the plaintiff in *Renewable Resources* had to defend itself against litigation "to a finding of no liability" or that the plaintiff also presented evidence of other damages unrelated to litigation costs. (RB/XAOB 38, citing *Renewable Resources*, *supra*, 218 Cal.App.4th at p. 390.) The damages the plaintiff suffered included having to defend itself against litigation *at all*, at substantial expense—regardless of the outcome. (*Renewable Resources*, *supra*, 218 Cal.App.4th at p. 390.) That the *Renewable Resources* plaintiff presented evidence of other kinds of damages does not diminish the fact that the litigation and resulting costs—the *consequence* of the defendant's wrongful acquisition of confidential documents—constituted damages, and would have been sufficient to establish damages for purposes of prong two.

Gunnam claims, without citing authority, that the costs of defending the Delaware action "are not the sort of damages LSI

can recover based on the purported breach of contract." (RB/XAOB 14.) Perhaps he relies on the principle that one generally cannot recover non-foreseeable damages for a breach of contract. (E.g., Civ. Code, §§ 3300, 3333.) But that principle does not apply here: Where a breach of contract results in claims by third parties against the injured party, the breaching party "is liable for the amount of any judgment against the injured party together with his reasonable expenditures in the litigation, if the party in breach had reason to foresee such expenditures as the probable result of his breach at the time he made the contract." (Rest.2d Contracts: Unforeseeability and Related Limitations on Damages, § 351, com. c.)

Litigation is an entirely foreseeable consequence of breaching an agreement focused on confidentiality and intellectual property. Gunnam himself appears to have recognized this natural consequence when, as an LSI employee, he expressed an interest in using subject matter described in Texas A&M patent applications in LSI's products, and was instructed to ensure that LSI would not require IP (intellectual property) licenses from third parties. (3-AA-868-869.) He later assured LSI management that he did not see any issues with the IP, and that LSI would be covered based on its own patents. (3-AA-871.) Why the instruction from management? Because it was obvious to all that otherwise, LSI could get sued.

Given the Agreement's emphasis on protecting LSI's interests with respect to confidentiality and IP, litigation over IP and its attendant costs certainly were a predictable result of its

breach. (See also *De La Hoya v. Slim's Gun Shop* (1978) 80 Cal.App.3d Supp. 6, 10-12 [court affirmed award of fees incurred in defending criminal action triggered by breach of warranty of title in sale of gun that had been stolen; "It appears to be the general rule in those United States jurisdictions which have considered the problem that attorney fees incurred in litigation with third parties may be recoverable as damages in an action for breach of contract. [Citations.] We see no reason why the general rule applied elsewhere should not also be adopted in this state, and we follow it in this case"]; *Pacific Sunwear of California, Inc. v. Olaes Enterprises, Inc.* (2008) 167 Cal.App.4th 466, 483-484 [noting the parties' agreement that "PacSun would be entitled to its litigation expenses in the underlying [trademark] infringement litigation (the primary relief sought by PacSun) if the fees were 'proximately caused' by Olaes's breach of the warranty [of non-infringement]"].)

At this stage, LSI only needs to show that Gunnam's conduct caused it *some* damages—the *fact* of damage. (Cf. *Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 506 [evidence establishing the fact that plaintiff suffered damage was sufficient to defeat summary judgment even where there was dispute as to the precise calculation]; *Sycamore Ridge Apartments, LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1412 [in a malicious prosecution action, evidence that the plaintiff's attorneys spent time defending against the prior action constituted evidence that the plaintiff suffered damage as a result of the prior action and is

sufficient to defeat an anti-SLAPP motion].) Even at trial, "[w]here the *fact* of damages is certain, the amount of damages need not be calculated with absolute certainty. [Citations.]" (*GHK Associates v. Mayer Group, Inc.* (1990) 224 Cal.App.3d 856, 873, original italics.) "The law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation. [Citation.]" (*Id.* at pp. 873-874.)

LSI's showing was more than sufficient to defeat an anti-SLAPP motion.

2. California statutory authority and case law authorize nominal damages awards without proof of actual damages.

For at least a century and a half, California has expressly permitted recovery of nominal damages even when a breach of duty causes no appreciable detriment to plaintiff. (Civ. Code, § 3360 [enacted 1872]; see AOB 43-44.) This is why California courts have long rejected the very argument Gunnam makes—that breach of contract claims are not actionable without a showing of appreciable and actual damage. (*Elation Systems, Inc. v. Fenn Bridge LLC* (2021) 71 Cal.App.5th 958, 965-966, citing *Sweet v. Johnson* (1959) 169 Cal.App.2d 630, 632.)

Gunnam fails to address Civil Code section 3360, *Sweet v. Johnson*, or any of the other case law cited in LSI's opening brief that expressly permits a nominal damages award without a showing of actual damages. (E.g., *Midland Pacific Building Corp. v. King* (2007) 157 Cal.App.4th 264, 275 [affirming denial of

anti-SLAPP motion, finding that the plaintiff established a prima facie case for breach of contract without evidence of actual damages because nominal damages were available].) (RB/XAOB 38-39.) Instead, Gunnam cites what he calls "a long list of California cases that have held to the contrary," and suggests that LSI has been less than candid on this point. (RB/XAOB 38-39 & fn. 2.)

But Gunnam's "long list" consists entirely of two cases LSI cited and distinguished in its opening brief: *Roberts v. Los Angeles County Bar Assn.* (2003) 105 Cal.App.4th 604 and *Hecimovich v. Encinal School Parent Teacher Organization* (2012) 203 Cal.App.4th 450. (RB/XAOB 38-39; AOB 45-46.) And Gunnam fails to note LSI's principal point about those cases, which is that neither case acknowledged Civil Code section 3360 or *Sweet v. Johnson*. The Court should decline to follow them for that reason, as well as because their facts are entirely distinct from the facts of this case. (See AOB 45-46.)

Gunnam contends that *Mission Beverage Co. v. Pabst Brewing Co., LLC* (2017) 15 Cal.App.5th 686, 710-711 (*Mission Beverage Co.*), which LSI cited in its opening brief (AOB 44), actually undermines LSI's argument that it need not show actual damages at this stage of the litigation. (RB/XAOB 39, fn. 3.) Not so. While the Court of Appeal ultimately relied on evidence of actual damages, it noted that the plaintiff "of course" was entitled to recover nominal damages for a breach of contract claim under Civil Code section 3360 and *Sweet v. Johnson*. (*Mission Beverage Co.*, at p. 711.) So what *Mission Beverage Co.* shows is that even

when a case ultimately does not turn on nominal damages, California courts have recognized that "[a]bsent actual damages, a plaintiff might recover nominal damages for breach of contract." (E.g., *Copenbarger v. Morris Cerullo World Evangelism, Inc.* (2018) 29 Cal.App.5th 1, 15.)

The trial court therefore could not, at the anti-SLAPP stage, strike a cause of action simply because LSI did not proffer concrete damages calculations.

3. Because injunctive relief is available for breach of a confidentiality obligation, LSI did not have to show any damages to establish a prima facie case.

Finally, LSI's opening brief demonstrated that it need not show actual damages at the anti-SLAPP stage because LSI is entitled to the injunctive relief requested in its complaint. (AOB 48, citing 1-AA-41.) Gunnam fails to address the case LSI cited that finds injunctive relief appropriate where a defendant possesses confidential information and has misused confidential information in the past. (RB/XAOB 39-40; AOB 48-49, citing *Central Valley General Hospital v. Smith* (2008) 162 Cal.App.4th 501, 527 (*Central Valley*).) That is exactly what happened here. Gunnam's possession of LSI's confidential information and his previous disclosures of it are sufficient to establish the threat of future disclosure, justifying injunctive relief. (See *Central Valley*, *supra*, 162 Cal.App.4th at p. 527.)

It is immaterial whether, as Gunnam claims, the Scribd Documents were publicly identified in another patent litigation against LSI prior to the Delaware litigation. (See RB/XAOB 40.)

LSI's request for injunctive relief is not limited in any way to the Scribd Documents. LSI is entitled to seek injunctive relief as to *any* further breach of the Agreement—the disclosure of *any* confidential information in Gunnam's possession.

LSI thus has shown a probability of prevailing on its injunctive relief request based on Gunnam's repeated past disclosure of its confidential information.

B. LSI Presented Sufficient Evidence To Support An Inference That Gunnam Breached The Agreement By Posting The Scribd Documents, Or Causing Them To Be Posted.

1. The Scribd Documents were confidential.

LSI unquestionably showed that the Scribd Documents contained LSI's confidential information. The "Read Channel Overview Part 1" document, on which TexasLDPC relied in the Delaware action, included internal LSI documents authored by Gunnam and labeled "LSI Confidential" and "Internal Use Only." (2-AA-308, 320-335, e.g., ¶¶ 53, 56, 60, 106, 108.)

Gunnam argues the "LSI Confidential" label somehow does not establish that the Scribd Documents were in fact confidential, because "LSI routinely posts documents publicly online bearing that same designation." (RB/XAOB 36.) But Gunnam only cites the memorandum supporting his anti-SLAPP motion in making this argument, and the memorandum is not evidence. (*Ibid.*) And while the memorandum refers to a public SEC filing allegedly bearing the "LSI Confidential" label (see 1-AA-71), the SEC filing is not part of the evidence this Court may consider: The trial court denied Gunnam's request for judicial notice of

that filing (1-AA-88; 4-AA-1319, fn. 7), and Gunnam has neither challenged that ruling nor sought judicial notice in this Court. (Cf. Code Civ. Proc., § 437c, subd. (c) [at the summary judgment stage, "[i]n determining if the papers show that there is no triable issue as to any material fact, the court shall consider all of the evidence set forth in the papers, except the evidence to which objections have been made and sustained by the court"]; *Lopez v. Baca* (2002) 98 Cal.App.4th 1008, 1014-1015 [failure to challenge trial court's ruling sustaining evidentiary objections waives issues concerning the correctness of that ruling, and the reviewing court will not consider the evidence the trial court excluded]; *California Bank & Trust v. Lawlor* (2013) 222 Cal.App.4th 625, 637 [failure to challenge the trial court's ruling sustaining evidentiary objections requires the reviewing court to exclude the evidence]; see also Cal. Rules of Court, rule 8.252(a)(1) ["To obtain judicial notice by a reviewing court under Evidence Code section 459, a party must serve and file a separate motion with a proposed order"].)

Even if the Court could properly consider the SEC filing, it has nothing to do with the Scribd Documents. Simply because an unrelated SEC filing contained an "LSI Confidential" label does not mean the Scribd Documents did not contain confidential information. Gunnam also fails to address that, unlike the SEC filing, the same Scribd Documents with the "LSI Confidential" label also contained an "Internal Use Only" label. (AOB 50; 2-AA-308, 320-335, e.g., ¶¶ 53, 56, 60, 106, 108.) Certainly LSI

has made a prima facie case that these documents were not intended for the public.

Gunnam also errs by citing the Delaware court's denial of LSI's motion to seal the Delaware complaint in support of his argument that the Scribd Documents were no longer confidential. (RB/XAOB 27-28 [citing "the Delaware Judge's January 2019 ruling" on the motion to seal], 36 [referencing "the Delaware Court's finding that the Scribd Documents are no longer confidential"].) Like the SEC filing, the Delaware court's order is not part of the evidence this Court may consider. The trial court denied Gunnam's request for judicial notice as to this order. (1-AA-86; 4-AA-1319, fn. 7.) And while as to this document Gunnam at least invoked this Court's judicial notice power (RB/XAOB 27 ["This court can take judicial notice of the Delaware Judge's January 2019 ruling"]), as with the SEC filing he has neither challenged the trial court's ruling nor filed the required motion. The Court thus should not consider the order or any argument based on it.

Nor does it matter that the same scribd.com hyperlink may have been publicly identified in another patent suit against LSI, filed months before TexasLDPC filed the Delaware complaint. (RB/XAOB 16-17.) Whether LSI was on notice that the Scribd Documents were publicly available and whether the Scribd Documents contained confidential information are different inquiries. That LSI did not take immediate action does not mean the Scribd Documents did not contain confidential information or that LSI was not harmed by the upload. And to the extent

Gunnam argues that LSI's failure to act sooner with respect to the Scribd Documents precludes it from contending the posting violated the Agreement, Gunnam has forfeited that argument by failing to raise it in the trial court. (See *Los Angeles Police Protective League v. City of Los Angeles* (2022) 78 Cal.App.5th 1081, 1092.)

Additionally, this argument ultimately points the finger back to Gunnam. The Scribd Documents were uploaded on December 18, 2017. (3-AA-957 ¶ 8.) According to Gunnam, the prior patent litigation was filed in July 2018. (1-AA-66.) This occurred *after* the Scribd Documents were uploaded. So, in the absence of any contrary evidence, it was the Scribd upload rather than the complaint in the prior patent litigation that made the documents public.

In short, the fact that a publicly filed complaint referred to the Scribd Documents *after* the Scribd Documents were uploaded has no bearing on the fact that the upload itself harmed LSI in the first place. All it does is bolster LSI's claim that it was damaged by Gunnam's disclosure of its confidential information.

2. LSI presented ample circumstantial evidence that Gunnam made or caused the Scribd posting.

a. Circumstantial evidence supporting a reasonable inference is sufficient to establish a prima facie case for purposes of the prong two analysis.

As the opening brief explains, LSI's case necessarily depends on inferences from circumstantial evidence, because Gunnam flatly denies any involvement in the Scribd posting.

(AOB 51.) That hardly makes this case unusual. It's a rare defendant who dares to deny something the plaintiff can conclusively show by direct evidence.

Circumstantial evidence, by definition, is "[e]vidence of some collateral fact, from which the existence or non-existence of some fact in question may be inferred as a probable consequence." (Richardson, *The Law of Evidence* (3d ed. 1928) § 111, p. 68, quoted in Black's Law Dict. (11th ed. 2019).) And "[e]vidence supporting a reasonable inference may establish a prima facie case." (*Jenni Rivera Enterprises, LLC v. Latin World Entertainment Holdings, Inc.* (2019) 36 Cal.App.5th 766, 781, citing *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 822 and *Fremont Reorganizing Corp. v. Faigin* (2011) 198 Cal.App.4th 1153, 1175; see also *Evans v. Paye* (1995) 32 Cal.App.4th 265, 280, fn. 13 [prima facie evidence "may be slight evidence which creates a reasonable inference of fact sought to be established but need not eliminate all contrary inferences"].)

These principles are well settled. Indeed, we instruct juries every day that "[a]s far as the law is concerned, it makes no difference whether evidence is direct or indirect [i.e., circumstantial]." (CACI No. 202 ["Direct and Indirect Evidence"].) So it is not surprising that Gunnam's response offers nothing but unsupported denials that the law is what it clearly is. (RB/XAOB 34.)

The only question is accordingly whether LSI's circumstantial evidence is, in fact, sufficient to support an inference that Gunnam was behind the Scribd posting.

It is. Gunnam's silence on this point is a tacit concession of the fact.

b. Gunnam sidesteps LSI's circumstantial evidence and does not dispute that the inferences LSI has drawn are proper.

LSI's circumstantial evidence includes evidence that: (1) Gunnam readily and willingly breached confidentiality agreements; (2) the Scribd Documents contained material to which Gunnam had access; (3) Gunnam had a motive to breach the Agreement by disclosing LSI's confidential information; and (4) the events leading to the Scribd disclosure and TexasLDPC's subsequent lawsuit against LSI were close in time. (AOB 52-55.)

Gunnam's response is to argue that "LSI put forth zero evidence" because, Gunnam claims, all of LSI's evidence was "irrelevant, unsupported, and/or invalid due to a statute of limitations." (RB/XAOB 34.)

Not so, not even close.

The record directly supports every single one of the historical facts that LSI contends support the inference that Gunnam was responsible for the Scribd posting. (See AOB 52-55.) To be sure, Gunnam would be entitled to dispute whether the inference can properly be drawn from those historical facts—*but that's the one argument he hasn't made.*

Instead, Gunnam argues that "[a]ll adduced evidence concerning the Scribd Documents points to individuals unrelated to TexasLDPC or Defendants." (RB/XAOB 36.) This is nothing more than a request for the Court to draw inferences in his favor. It's not enough. The Court must credit *LSI's* evidence and draw all permissible inferences *in LSI's favor*. And because Gunnam's evidence does not defeat LSI's claim as a matter of law, it doesn't matter that Gunnam can posit contrary inferences. (*Park*, *supra*, 2 Cal.5th at p. 1067.)

As for Gunnam's argument that LSI's evidence is "invalid due to a statute of limitations" (RB/XAOB 34; see also RB/XAOB 15 ["LSI's supposed 'evidence' highlights that LSI failed to bring an action against Dr. Gunnam at that time . . . "]), he fails to explain why the statute of limitations is at all pertinent to the inferences that can be drawn from his repeated disregard of confidentiality agreements. There is no statute of limitations on relevance.

Typical of Gunnam's efforts to avoid the implication of the historical facts is his claim that there is no direct evidence that he retained LSI's confidential information, i.e., that he "took any of the Scribd Documents with him when he left the company." (RB/XAOB 35.)[1] Whether or not there is direct evidence is utterly

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[1] To the extent Gunnam argues there is no evidence he retained any of LSI's confidential information *at all*, ample evidence in the record demonstrates otherwise. (See 3-AA-896:12-897:22 [testimony regarding 8/27/2009 email printout], 853-854 [8/27/2009 email printout], 905:10-17, 906:8-909:2 [testimony

irrelevant. Again, what matters is whether the historical facts support the *inference* that he retained LSI's confidential information included in the Scribd Documents. They certainly do.

Indeed, the Scribd Documents included internal LSI documents *authored by Gunnam* and labeled "LSI Confidential" and "Internal Use Only." (2-AA-308, 320-335, e.g., ¶¶ 53, 56, 60, 106, 108.) It is more than reasonable to infer that Gunnam had access to documents he authored. Gunnam does not argue otherwise.

The Scribd Documents also included the types of documents Gunnam accessed on March 2, 2011, just days before he resigned. (3-AA-996 ¶ 7.) Particularly significant is that Gunnam accessed the TWIKI server and reviewed confidential technical documents *during the week before he resigned*—a period during which he had no legitimate employment-related reason to do so. (3-AA-951, 996, ¶ 7.) This strongly suggests his desire to retain LSI's confidential information after he left LSI. He also retained other confidential documents when he resigned from LSI and gave the documents to TexasLDPC, via Fish & Richardson, further creating an inference that he retained the Scribd Documents. (3-AA-896:23-898:24.)[2]

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regarding 12/21/2010 email printout], 856-859 [12/21/2010 email printout].)

[2] It is not true, as Gunnam claims, that LSI "admitted it could precisely track whether Dr. Gunnam *downloaded* documents

c. Gunnam and Yarlagadda's denials are irrelevant—what matters is that LSI's evidence is admissible and supports a reasonable inference that Gunnam caused the Scribd posting.

Gunnam and Yarlagadda's self-serving declarations that they had no involvement with the Scribd Documents have no bearing on the Court's prong two analysis, as the Court may not weigh the evidence. (RB/XAOB 35; *Park*, *supra*, 2 Cal.5th at p. 1067.) Rather, the Court must accept LSI's submissions as true and consider only whether any contrary evidence defeats LSI's submissions as a matter of law. (*Ibid.*) Gunnam's denial is precisely *why* LSI must present circumstantial evidence. And it has. (See AOB 52-55.)

Gunnam repeatedly argues "the evidence shows that both defendants were 1500 miles away when the Scribd Documents were posted." (RB/XAOB 13, 20, 35.) But there is no such evidence in the record—which is undoubtedly why Gunnam and Yarlagadda offer no record citations. Indeed, Gunnam and

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from LSI's internal server based on his unique user ID." (RB/XAOB 35, citing 3-AA-996 ¶¶ 3-7, italics added.) LSI's evidence demonstrated that LSI could identify the documents a user *reviewed or edited* on the "TWIKI" server based on that user's specific credentials—not that it could identify which documents a user *downloaded*. (3-AA-996, ¶¶ 3, 5.) Additionally, because the TWIKI server only tracked activity based on specific login credentials, anyone with access to another user's credentials or who had a different way to log in could view and download specific documents under a different ID, without the activity being connected to their own ID. (*Ibid.*)

Yarlagadda argued in their trial court reply brief that "LSI never even asked if [Gunnam] was in Texas on that date." (3-AA-1027.) Perhaps because the record does contain evidence that Gunnam and Yarlagadda own multiple properties in California (see 3-AA-902:13-903:25), at trial the factfinder might infer that Gunnam was in California on the date of the upload. But not now. (*Park*, *supra*, 2 Cal.5th at p. 1067.)

The absence of direct evidence that Gunnam was in Texas when the Scribd Documents were posted does not undermine the inference created by LSI's circumstantial evidence that Gunnam uploaded the Scribd Documents or caused them to be uploaded. Nothing in the record compels the inference that whoever uploaded the Scribd Documents was physically in Texas at the time. An IP address does not necessarily reveal anything about the user's physical location—especially when the user is, as Gunnam's brief describes him, "a distinguished researcher with over 80 patents and counting." (RB/XAOB 15.) For example, it is well known that someone connected to the Internet can mask his physical location through a VPN and can easily change his IP address. (See Hodge, *A VPN Isn't The Only Way To Change Your IP Address* (Sept. 20, 2022) <https://www.cnet.com/tech/a-vpn-isnt-the-only-way-to-change-your-ip-address/> [as of Sept. 20, 2022].)

As for Gunnam's argument that the Scribd Document's properties indicated the author was "Joe Garofalo" and the uploader was "Wei Wang," Gunnam has offered no evidence that Joe Garofalo, Wei Wang, or anyone else was actually involved in

the Scribd upload in any way. Both have denied involvement. (3-AA-775, 947.)

At this stage, LSI only needs to state a legally sufficient claim and make "a prima facie factual showing sufficient to sustain a favorable judgment." (*Baral*, *supra*, 1 Cal.5th at pp. 384-385.) LSI has done both. Unless Gunnam and Yarlagadda presented incontrovertible evidence defeating LSI's claims as a matter of law—and they did not—the Court cannot rely on their contrary evidence.

CONCLUSION

The Court should reverse and direct the trial court to deny Gunnam's anti-SLAPP motion. None of Gunnam's conduct at issue is protected activity under the anti-SLAPP statute. He cannot use his motive of helping TexasLDPC file a lawsuit to avoid the consequences of wrongfully retaining and disclosing LSI's confidential information. Nor can he use the resulting Delaware lawsuit against LSI as a shield against civil liability for his misconduct. Allowing a former employee to claim that his breach of a confidentiality agreement is protected activity would encourage the theft of confidential information and deter injured companies from bringing meritorious claims. This contradicts the very purpose of the anti-SLAPP statute.

Even if any of Gunnam's conduct were protected, the evidence is more than sufficient to establish a prima facie case. LSI has surpassed the showing required to defeat an anti-SLAPP motion, and its claims should proceed.

RESPONDENT'S BRIEF (AS TO YARLAGADDA)

INTRODUCTION

Appellant Annapurna Yarlagadda interfered with a confidentiality agreement between her husband, Kiran Gunnam, and his former employer, respondent LSI Corporation. She induced Gunnam to disclose LSI's confidential information in violation of the agreement, directly benefiting her company and harming LSI as a result. Indeed, her company used the wrongfully disclosed information to sue LSI for patent and copyright infringement.

Yarlagadda's wrongful conduct was entirely distinct from Gunnam's conduct, i.e., the disclosure itself. Her act of interfering with Gunnam and LSI's contract, or inducing Gunnam to breach the contract, was not the same as his act of breaching his own contract.

LSI thus brought separate claims against Yarlagadda, suing her for tortious interference and inducement. The trial court correctly denied Yarlagadda's anti-SLAPP motion, finding that her *injury-producing conduct*—inducing Gunnam to breach the confidentiality agreement—was not activity protected under Code of Civil Procedure section 425.16. The court recognized that the conduct itself was separate from the damage flowing from it—Yarlagadda's company forcing LSI into litigation—and did not confer anti-SLAPP protection.

Yarlagadda erroneously contends that LSI bases its claims on her involvement with her company's lawsuit, which constitutes protected activity. While her company's lawsuit has

indeed harmed LSI, it isn't the basis of LSI's claim against her—it's just part of LSI's damages. The direct cause of the harm was Gunnam's disclosure of LSI's confidential information, and that in turn was caused by Yarlagadda's conduct inducing Gunnam to breach his confidentiality agreement with LSI. And California case law is clear that the court's prong one analysis must focus on the defendant's conduct that caused injury, rather than the consequences of that conduct. Similarly, any alleged motive for the injury-producing conduct is irrelevant at this first step.

Under the second prong, LSI has shown that its claims have the requisite minimal merit. The record contains direct evidence of damages LSI suffered because of Yarlagadda's conduct, including consequential damages. The record also contains sufficient circumstantial evidence to establish a prima facie case that Yarlagadda interfered with or induced Gunnam to breach his employment agreement by disclosing LSI's confidential information.

The Court should affirm.

ARGUMENT

I. PRONG ONE: BECAUSE LSI'S CLAIMS AGAINST YARLAGADDA DO NOT ARISE FROM PROTECTED ACTIVITY, THE INQUIRY ENDS—THE DENIAL OF YARLAGADDA'S ANTI-SLAPP MOTION MUST BE AFFIRMED.

A. Yarlagadda's Injury-Producing Conduct Has Nothing To Do With The Right To Petition Or The Right To Free Speech.

LSI sued Yarlagadda for intentionally interfering with the Agreement between Gunnam and LSI, and for inducing Gunnam to breach the Agreement. (1-AA-38-40.) Her wrongful conduct therefore is entirely distinct from Gunnam's conduct (violating the Agreement by disclosing LSI's confidential information), and even further removed from any right to petition or right to free speech.

It isn't correct, as Yarlagadda claims, that her injury-producing conduct was "filing the Delaware lawsuit." (RB/XAOB 41, bold omitted.) What caused LSI harm—and what formed the basis of LSI's claims against Yarlagadda—was her interference with the Agreement and her inducement of its breach by Gunnam. (1-AA-38-40.) These actions occurred *before* TexasLDPC filed the Delaware litigation. The trial court correctly found that "Defendant Yarlagadda's impropriety is not dependent upon the content of what was disclosed *and LSI is not suing defendant Yarlagadda for instituting the Delaware Action.* Instead, the focus is on defendant Yarlagadda inducing her husband and others to breach their confidentiality agreements which is not protected activity." (4-AA-1323, italics added.)

It likewise isn't correct, as Yarlagadda claims, that LSI conceded that her alleged wrongdoing was "authoriz[ing] TexasLDPC's complaint against LSI, a lawsuit she likely could not have brought absent Dr. Gunnam's disclosure of LSI confidential information to TexasLDPC attorneys." (RB/XAOB 41, quoting 3-AA-776.) LSI never argued that its causes of action against Yarlagadda were based on that authorization. Instead, LSI has maintained that the authorization and TexasLDPC's lawsuit itself are *evidence* that Yarlagadda interfered with and induced Gunnam to breach the Agreement. (See 3-AA-776 [arguing that a trier of fact could conclude that Yarlagadda intentionally interfered with the Agreement "for the direct financial benefit of herself and Gunnam" and listing circumstantial evidence—including the fact that Yarlagadda authorized TexasLDPC's complaint against LSI—in support].) Again, a court may not strike a claim unless the speech or petitioning activity itself is the wrong alleged, and not just evidence of liability. (*Park*, *supra*, 2 Cal.5th at p. 1060.)

The same applies to the fact that Yarlagadda reviewed TexasLDPC's complaint before it was filed, knowing that it relied on LSI's confidential information. (RB/XAOB 43, citing 3-AA-776.) LSI's causes of action against Yarlagadda are not based on her involvement with the Delaware litigation. Her involvement in the litigation is evidence of her wrongful conduct, i.e., that she interfered with and induced Gunnam to breach the Agreement.

That LSI sued Yarlagadda for intentional interference with and inducement to breach contract after TexasLDPC initiated the Delaware litigation, and that the Delaware litigation features prominently in LSI's complaint, do not mean that LSI's claims against Yarlagadda *arose from* the Delaware litigation for purposes of the anti-SLAPP statute. (See *Park*, *supra*, 2 Cal.5th at p. 1063 ("'[T]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute"'].) LSI's claims against Yarlagadda are based solely on her inducing Gunnam to violate the Agreement and interference with the Agreement, which is not protected activity under section 425.16.

B. Yarlagadda's Motive For Inducing Gunnam To Breach His Confidentiality Agreement Is Irrelevant For Purposes Of Prong One.

As LSI has explained throughout its briefing (AOB 30-35; pp. 15-18, *ante*), a wrongdoer's motive for conduct that causes injury is irrelevant for prong one purposes. (*Wilson*, *supra*, 7 Cal.5th at p. 888.) Yarlagadda's injury-causing act of inducing Gunnam to breach his contract is not protected activity under section 425.16. At this step, it does not matter *why* Yarlagadda induced Gunnam to breach his contract with LSI.

Yarlagadda points to LSI's allegations of Gunnam and Yarlagadda's shared motives, e.g., that "a trier of fact could conclude that Yarlagadda acted 'for the direct financial benefit of herself and Dr. Gunnam,'" and that "'Dr. Gunnam and Yarlagadda share monies and assets and therefore, by definition, share any proceeds from TexasLDPC's lawsuit.'" (RB/XAOB 42,

citing 3-AA-776.) She also argues that evidence of her shared motives with Gunnam demonstrates that "LSI's entire complaint is directed to Dr. Gunnam and Ms. Yarlagadda's involvement in the Delaware lawsuit, including any benefit they may receive from it." (RB/XAOB 42.) But these arguments, which focus entirely on motive, only further distinguish Yarlagadda's *conduct*—inducing Gunnam to disclose the confidential information in violation of the Agreement—from her *motive*—to sue LSI.

C. Yarlagadda's Stated Motive For Interfering With The Agreement Relates Only To Damage Flowing From Her Unprotected Conduct.

LSI has shown in its reply brief that Gunnam's stated motive also does not confer anti-SLAPP protection on his conduct because the court must look to "'the allegedly wrongful and injurious conduct of the defendant, *rather than the damage which flows from said conduct*.'" (See pp. 18-19, *ante*, quoting *Renewable Resources*, *supra*, 218 Cal.App.4th at pp. 396-397, original italics.) The same applies to Yarlagadda's injury-producing conduct, i.e., interfering with the Agreement and inducing Gunnam to breach it. The damage flowing from that conduct was TexasLDPC's subsequent "discovery" of the documents and its lawsuit against LSI.

D. Yarlagadda Fails To Distinguish *Renewable Resources* And Erroneously Applies *Suarez* And *Bel Air*.

Like Gunnam, Yarlagadda attempts to distinguish the facts of this case from those in *Renewable Resources* "because the gravamen of LSI's case is, as LSI puts it: 'Yarlagadda also authorized TexasLDPC's complaint against LSI . . . .'" (RB/XAOB 44, quoting 3-AA-776.) This argument fails for two reasons.

First, as Gunnam acknowledged in his respondent's brief, the "gravamen analysis" no longer applies in the anti-SLAPP context. (RB/XAOB 31-32.)

Second, LSI does *not* base its claims against Yarlagadda on her authorization of TexasLDPC's complaint. Again, that authorization is *evidence* that Yarlagadda interfered with and induced Gunnam to breach the Agreement. Based on the analysis set forth in *Renewable Resources*, *supra*, 218 Cal.App.4th at pp. 396-398 (see pp. 19-21, *ante*), Yarlagadda's wrongful conduct—inducing Gunnam to breach the Agreement—is not protected activity because the injury-producing conduct is the inducement itself, rather than the resulting lawsuit. The trial court thus correctly determined that this conduct is "akin to the defendants in [*Renewable Resources*] where the court found the injury producing conduct to be the defendants' wrongful purchase of confidential documents, an act which did not involve the furtherance of a right to petition or right to free speech." (4-AA-1323.)

Yarlagadda also argues the trial court erred by failing to address *Suarez v. Trigg Laboratories, Inc.* (2016) 3 Cal.App.5th 118. (RB/XAOB 44-45.) This argument fails, as it is based on the presumption that "the activity upon which LSI premises the causes of action against Ms. Yarlagadda in this case is her authorization of the complaint to counsel in the Delaware case." (*Ibid.*) Moreover, as shown in LSI's opening brief, *Suarez* is easily distinguishable. (See AOB 36-37.) The Court of Appeal in *Suarez* focused on an email stating that all correspondence related to an expected letter of intent should be sent to the defendant's attorney, rather than directly to the defendant, "to keep the contents within attorney client privilege for the Rafael [Suarez] case." (*Suarez*, *supra*, 3 Cal.App.5th at p. 123.) This showed that the conduct at issue was litigation-related activity expressly aimed at plaintiff Suarez's case, and "occurred as an explicit part of the settlement strategy." (*Id.* at pp. 123-125.) In contrast, Yarlagadda's conduct in inducing Gunnam to breach the Agreement did not occur during litigation and was entirely separate from any litigation that resulted from the breach. The act of interfering with a contract (or inducing the breach) was not a litigation-related activity.

Finally, Yarlagadda's argument that *Bel Air* is more "comparable and compelling" fails for the same reasons Gunnam's identical argument fails. (RB/XAOB 30, 32-33, 45; pp. 20-21, *ante*.) The entirety of the *Bel Air* defendant's conduct was communications that "advised, counseled, [and] encouraged" litigation. (*Bel Air*, *supra*, 20 Cal.App.5th at p. 930.) Here,

Yarlagadda's actionable conduct—inducing Gunnam to breach the Agreement—was separate from any litigation or any alleged motive to initiate litigation against LSI. As noted above, this was not the case in *Bel Air*. (See pp. 20-21, *ante*.) And, in light of *Wilson*, *Bel Air* is at least questionable to the extent it deems motive relevant for prong one purposes. (*Wilson*, *supra*, 7 Cal.5th at p. 889.)

II. PRONG TWO: TO THE EXTENT LSI'S CLAIMS AGAINST YARLAGADDA AROSE FROM PROTECTED ACTIVITY, LSI HAS SHOWN A PROBABILITY OF PREVAILING.

Yarlagadda argues that LSI cannot succeed on its claims against her "[f]or the same reasons that apply to Gunnam." (RB/XAOB 46.) Specifically, Yarlagadda contends both causes of action against her require "at least some actual disturbance with or breach of the contract and resulting damages, which LSI has failed to show." (*Ibid.*)

But, as its opening and reply briefs show, LSI has presented ample evidence that Gunnam breached the Agreement, and that it suffered resulting damages. (AOB 41-43; pp. 25-29, 35-39, *ante*.) And, as California authority makes clear, LSI doesn't need to show actual damages to survive an anti-SLAPP motion on its breach of contract claims because LSI may recover nominal damages even without a finding of actual damages. (AOB 43-44; pp. 29-31, *ante*.) Because LSI's tort claims against Yarlagadda necessarily involve a breach of contract, LSI doesn't need to show actual damages at this point.

Additionally, because LSI's claims against Yarlagadda are tort claims—unlike LSI's contract claims against Gunnam—LSI is entitled to consequential damages, i.e., "the amount which will compensate for all the detriment proximately caused [by the wrongdoing], whether it could have been anticipated or not." (Civ. Code, § 3333.) There is a direct line of causation between Yarlagadda's conduct in interfering with or inducing Gunnam to breach the Agreement and the resulting Delaware litigation. LSI's litigation costs in being forced to defend itself in the Delaware proceeding are unequivocally damages caused by Yarlagadda's conduct. Since, as shown above (pp. 25-29, *ante*), the Delaware litigation costs are recoverable against Gunnam for his breach of contract, a fortiori they are recoverable against Yarlagadda for her tortious conduct.

Yarlagadda also contends that "LSI has not set forth any facts showing that Ms. Yarlagadda acted (much less intentionally acted) to induce a breach or disruption of LSI's alleged contractual relationship with Dr. Gunnam, as required to succeed on these intentional torts." (RB/XAOB 46.) But Yarlagadda's own brief contradicts this argument and highlights the circumstantial evidence supporting LSI's claims against her. As Yarlagadda herself pointed out, the record contains evidence of her motive to induce Gunnam to breach the Agreement. (RB/XAOB 42.) She created TexasLDPC for the express purpose of commercializing the Texas A&M patents. (3-AA-938:4-12.) Additionally, Yarlagadda is TexasLDPC's chief executive officer and majority owner. (2-AA-439 ¶ 1; 3-AA-902:1-6.) She therefore

would directly benefit from the proceeds of TexasLDPC's lawsuit. As a named inventor of the patents asserted in the Delaware litigation, Gunnam will directly benefit from any licensing revenue TexasLDPC generates from that case because a portion is paid to Texas A&M. (3-AA-910:17-916:12.) Yarlagadda thus also indirectly benefits if TexasLDPC succeeds in its lawsuit because she and Gunnam share assets. (3-AA-902:10-903:25, 937:14-16.)

Moreover, Yarlagadda's involvement in the Delaware litigation, by authorizing TexasLDPC's complaint against LSI and reviewing the complaint before it was filed, is evidence that she intentionally interfered with the Agreement. (2-AA-439 ¶ 4; 3-AA-930:17-931:1.)

LSI's circumstantial evidence specifically as to Yarlagadda is more than sufficient to support an inference that she interfered with or induced Gunnam to breach the Agreement. Because Yarlagadda has not presented incontrovertible evidence defeating LSI's claims as a matter of law, the Court cannot rely on her contrary evidence and must accept LSI's inference at this stage in the litigation. (*Park*, *supra*, 2 Cal.5th at p. 1067.)

CONCLUSION

Yarlagadda's injury producing conduct—intentionally interfering with the Agreement and inducing Gunnam to breach the Agreement—has nothing to do with her right to petition or right to free speech. None of her conduct is protected activity under the anti-SLAPP statute. Even if any of Yarlagadda's conduct somehow were protected, LSI has more than established a prima facie case.

The Court should affirm the trial court's order denying Yarlagadda's anti-SLAPP motion.

Date: September 26, 2022

MCKOOL SMITH HENNIGAN
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Robin Meadow
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By: /s/ Robin Meadow

Plaintiff, Appellant, and Cross-Respondent, LSI Corporation

CERTIFICATION

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that this **Combined Appellant's Reply Brief (As To Gunnam) And Respondent's Brief (As To Yarlagadda)** contains **9,985 words**, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Date: September 26, 2022 /s/ Robin Meadow

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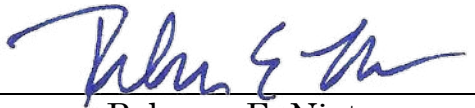

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/s/Rebecca Nieto

Signature

Meadow, Robin (51126)

Last Name, First Name (Attorney Number)

Greines Martin Stein & Richland LLP

Firm Name