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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JEFFREY D. GROSS et al.,

Plaintiffs and Respondents,

v.

MICHAEL D. DROBOT, SR., et al.,

Defendants and Appellants.

B285743

(Los Angeles County  
Super. Ct. No. NC060656)

APPEAL from an order of the Superior Court of  
Los Angeles County, Ross M. Klein, Judge. Reversed.

Donald G. Norris, a Law Corporation, and Donald G. Norris  
for Defendants and Appellants.

Cara Stone and Marc Indeglia for Plaintiffs and  
Respondents.

Defendants and appellants Michael D. Drobot, Sr., and affiliated entities, Healthsmart Pacific, Inc., and Pacific Specialty Physician Management, Inc. (collectively Drobot) appeal the lower court's denial of Drobot's special motion to strike a complaint filed by plaintiffs and respondents Jeffrey D. Gross, M.D., and affiliated entities, Jeffrey D. Gross, M.D., Inc., and Oasis Medical Providers, Inc. (collectively Gross), to the extent it alleges claims against Drobot. Gross's complaint alleges that Gross suffered damages after Drobot filed an indemnification complaint against him in federal court. Drobot argues these allegations reflect protected activity under Code of Civil Procedure section 425.16,<sup>1</sup> and that because Gross's claims arise from such activity and are barred by the litigation privilege, the court erred in denying Drobot's motion to strike.

We agree. Drobot's motion specifically identifies allegations of protected activity that are necessary to support the damages element of Gross's claims against Drobot, and Gross has failed to "establish that there is a probability that [it] will prevail" on those claims. (§ 425.16, subd. (b)(1).) Accordingly, we reverse the lower court's denial of Drobot's motion to strike Gross's complaint against Drobot and deny Gross's request that it be granted leave to amend.

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<sup>1</sup> All statutory references, unless otherwise specified, are to the Code of Civil Procedure.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. *Lawsuits Relevant to This Appeal*

Three related lawsuits shape the issue presented on appeal. First, State Compensation Insurance Fund (SCIF)—not a party to this appeal—filed a federal lawsuit against Drobot (the SCIF complaint). The SCIF complaint alleged that Drobot made “kickback” payments to doctors and others in exchange for referrals. Specifically, it alleged that Drobot made these kickback payments via sham agreements with doctors and others.

Second, in June 2015, Drobot filed a federal complaint against Gross and others (the indemnification complaint). The complaint alleged that Gross had received some of the kickback payments described in the SCIF complaint via a collection agreement between Gross and Drobot. On that basis, Drobot sought equitable indemnity.

Third, in May 2016, Gross filed the instant lawsuit in a California state court against Drobot and others (the Gross complaint). The Gross complaint includes fraud and negligent misrepresentation causes of action against Drobot, alleging Drobot made misrepresentations on which Gross relied in entering into three agreements with Drobot, among them the collection agreement at issue in the indemnification complaint. Specifically, the Gross complaint alleges Drobot falsely represented that these agreements and “the transactions contemplated thereby[] were completely lawful and in compliance with all applicable [m]edical [l]aws,” that Gross “reasonably and justifiably relied on [these] representations in entering into and performing under the [a]greements,” and that Gross has “been substantially harmed as a result and ha[s] suffered damages.”

The complaint alleges his damages resulting from this conduct “includ[ed], without limitation, substantial legal fees and expenses incurred in defending against [the indemnification complaint], future legal fees and expenses, a potential adverse judgment, the loss of one or more medical licenses, loss of future income, reputational harm, and other general and special damages, all in an amount to be proven at trial.”

Key to Drobot’s arguments on appeal are additional allegations in the Gross complaint that Gross “did not suffer any actual injury as a result of the misconduct of [Drobot] until he was served with [the indemnification complaint] and forced to incur legal fees and expenses in defending [the complaint]. Since service of the [complaint], [Gross] ha[s] been forced to incur substantial legal fees and expenses in defending against the [complaint]. In addition, the [complaint] threatens to cause [Gross] other losses, including further legal fees and expenses, a potential adverse judgment, the loss of one or more medical licenses, loss of future income, reputational harm, and other general and special damages.”

**B. *Drobot’s Anti-SLAPP Motion to Strike and Trial Court Decision***

Drobot moved to strike, under section 425.16, the causes of action against Drobot in the Gross complaint. Section 425.16, also known as the “anti-SLAPP”<sup>2</sup> statute, is designed to “weed[] out, at an early stage, meritless claims arising from” “protected activity,” meaning activity “ ‘in furtherance of the person’s right of petition or free speech.’ ” (*Baral v. Schnitt* (2016) 1 Cal.5th

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<sup>2</sup> SLAPP is an acronym referring to “strategic lawsuit against public participation.” (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57.)

376, 381, 384 (*Baral*); § 425.16, subd. (b)(1).) The statute provides a mechanism for striking claims<sup>3</sup> (or portions thereof) that arise from such protected activity, “unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” (*Ibid.*; see *Baral, supra*, 1 Cal.5th at p. 393.)

Drobot’s anti-SLAPP motion argued that Gross’s claims against Drobot arose from the protected activity of filing the indemnification complaint. The trial court disagreed, concluding that Gross’s claims instead arose from Drobot’s alleged misrepresentations, because those constituted the “gravamen” of the claims. The court therefore denied Drobot’s motion. Drobot timely appealed.

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<sup>3</sup> To avoid confusion, our high court in *Baral, supra*, 1 Cal.5th 376, referred to “the proper subject of a special motion to strike as a ‘claim,’ ” instead of a “ ‘cause of action,’ ” though section 425.16 uses both terms. (*Baral, supra*, at p. 382.) We use the term “claim” here as well.

## DISCUSSION

### I. Sufficiency of the Record to Decide Appeal

As a preliminary matter, Gross argues the incompleteness of the record on appeal requires us to reject all of Drobot's arguments. We disagree.

It is an appellant's responsibility to provide a record that is adequate for review of its claims. (*In re L. B.* (2003) 110 Cal.App.4th 1420, 1424.) But this does not warrant summary dismissal of Drobot's appeal. The record before us is sufficient to "undertake a meaningful review of [the] argument on appeal," as we do below. (*Foust v. San Jose Construction Co., Inc.* (2011) 198 Cal.App.4th 181, 187; *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295–1296.)

### II. Anti-SLAPP Statute Analysis

In analyzing an anti-SLAPP motion, a court first determines whether the claims the movant—here, Drobot—seeks to strike "aris[e] from" protected free speech or petitioning activity. (*Baral, supra*, 1 Cal.5th at p. 396; *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89.) This requires "that relief is sought based on allegations arising from activity protected by the statute." (*Baral, supra*, 1 Cal.5th at p. 396.) If the movant makes this showing, the burden shifts to the plaintiff—here, Gross—to establish that any such claims based on protected activity are legally sufficient in "a summary-judgment-like procedure." (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 278 & 291 (*Soukup*); *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820.) Claims and allegations as to which the plaintiff fails to make such a showing should be stricken. (*Baral, supra*, 1 Cal.5th at p. 396.)

On appeal, we review the trial court’s decision regarding an anti-SLAPP motion de novo, “engaging in the same two-step process.” (*Tuszynska v. Cunningham* (2011) 199 Cal.App.4th 257, 266–267.) In so doing, we consider “the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based.” (§ 425.16, subd. (b)(2).)

**A. *Prong One: Gross’s Claims Against Drobot Arise from Protected Activity Because They Rely on the Indemnification Complaint to Establish Damages***

A claim “aris[es] from” protected activity in a complaint if that activity “ ‘gives rise to [the] asserted liability’ ” (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1063 (*Park*)) and thus “is alleged to justify a remedy.” (*Baral, supra*, 1 Cal.5th at p. 395.)

Drobot’s filing of and statements in the indemnification complaint are protected activities (see *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115; *Soukup, supra*, 39 Cal.4th at p. 291), and Gross expressly alleges these activities to be the source of damages. Thus, Gross relies on protected activity to support a requisite element of his claims against Drobot. (See *Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638 (*Lazar*) [damages is an element of fraud]; *Intrieri v. Superior Court* (2004) 117 Cal.App.4th 72, 86 (*Intrieri*) [same for misrepresentation].) Further, at the hearing before this court, Gross’s counsel could identify no allegations, other than those related to the indemnification complaint, that support Gross’s damages. This singular reliance on allegations of protected activity shifts the burden to Gross to defend its claims in the second prong of the analysis. (See *Baral, supra*, 1 Cal.5th at p. 396.)

**B. *Prong Two: The Litigation Privilege Bars Claims Arising from the Indemnification Complaint***

Gross cannot demonstrate that its claims are “legally sufficient and factually substantiated,” because they are barred by the litigation privilege. (See *Baral, supra*, 1 Cal.5th at p. 396; *Newport Harbor Offices & Marina, LLC v. Morris Cerullo World Evangelism* (2018) 23 Cal.App.5th 28, 48–49 (*Newport*).) The litigation privilege is statutory and prohibits liability—except for malicious prosecution—arising from a publication or broadcast made in a judicial proceeding or other official proceeding. (*Newport, supra*, 23 Cal.App.5th at pp. 48–49; Civ. Code, § 47, subd. (b).) The privilege encompasses “statements made in pleadings,” such as the indemnification complaint. (*Hagberg v. California Federal Bank* (2004) 32 Cal.4th 350, 361.) The litigation privilege “ ‘is absolute and . . . ‘has been given broad application.’ ” (*Fremont Reorganizing Corp. v. Faigin* (2011) 198 Cal.App.4th 1153, 1172 (*Fremont*).)

Gross does not appear to dispute—and we agree—that the litigation privilege bars a cause of action that relies on the indemnification complaint. Gross argues, however, that its allegations involving the indemnification complaint support only damages—rather than liability—and thus the privilege does not bar Gross’s claims. This ignores that damages is a necessary element of fraud and misrepresentation, and thus necessary to establish Drobot’s alleged liability for those torts. (See *Lazar, supra*, 12 Cal.4th at p. 638 [fraud]; *Intrieri, supra*, 117 Cal.App.4th at p. 86 [misrepresentation].) In sum, the trial court erred in denying Drobot’s motion to strike the complaint against Drobot, because Gross’s claims arise from the indemnification complaint, and are barred by the litigation privilege.



### **III. Request for Leave to Amend**

Gross further requests that, “if this [c]ourt decides to overturn the trial court’s judgment,” we should also order the trial court to grant Gross “leave to amend [Gross’s] complaint to add allegations about the [i]ndictment” against Gross, issued after this appeal was filed, and of which this court has taken judicial notice.<sup>4</sup> Gross argues that it will “likely prevail” with such an amended complaint against Drobot, because the indictment “has caused [Gross] serious harm, and it forms a substantial basis for the damages [Gross] seek[s].”

Permitting plaintiffs to resurrect claims stricken under its provisions by amending those claims would frustrate the statute’s goal of quickly disposing of SLAPP claims. (See *Simmons v. Allstate Ins. Co.* (2001) 92 Cal.App.4th 1068, 1074.) Of course, our opinion does not affect Gross’s right to seek relief in a separate lawsuit, so long as any claims it brings do not rely on the indemnification complaint.

### **IV. Request for Attorney Fees**

Finally, both Gross and Drobot request attorney fees, should their respective arguments on appeal prevail. Section 425.16 contemplates recovery of attorney fees and costs for either “a prevailing defendant on a special motion to strike” or “a plaintiff prevailing on the motion” “[i]f the court finds that [the] special motion to strike [was] frivolous or [was] solely

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<sup>4</sup> We granted Gross’s request for judicial notice of a January 2018 federal criminal indictment, issued after the anti-SLAPP motion had been denied, which alleges Jeffrey David Gross engaged in a criminal conspiracy and committed several other federal crimes by accepting kickback payments from Drobot, and that he did so via the same agreements at issue in all three lawsuits discussed above.

intended to cause unnecessary delay.” (§ 425.16, subd. (c)(1).) The trial court declined to award attorney’s fees to either party, because defendant Drobot had not prevailed, and because the court concluded the motion was not “frivolous or intended to delay.” Following this appeal, however, Drobot will be the prevailing defendant on the anti-SLAPP motion and thus statutorily entitled to attorney’s fees.

### **DISPOSITION**

The trial court’s order denying Drobot’s motion to strike is reversed. Upon remand, the trial court shall grant the motion to strike the complaint against Drobot and reconsider Drobot’s request for attorney’s fees.

Drobot shall recover its costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

WEINGART, J.\*

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.