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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

ASSET MANAGEMENT CONSULTANTS, INC., et al., Plaintiffs and Respondents, v. MICHAEL STELLA et al., Defendants and Appellants.	B272121 (Los Angeles County Super. Ct. No. BC604757)

APPEAL from an order of the Superior Court of Los Angeles County, Michael L. Stern, Judge. Affirmed.

Catanzarite Law Corporation, Kenneth J. Catanzarite, Nicole M. Catanzarite-Woodward and Eric V. Anderton for Defendants and Appellants Michael Stella and Pamela Sue Stella.

Jackson Tidus, M. Alim Malik, Kathryn M. Casey and Charles M. Clark for Plaintiffs and Respondents Asset Management Consultants, Inc.; AMC-Hamilton SPE, LLC; AMC-Baker SPE, LLC; AMC-Wilnaldi, LLC; AMC-Overland SPE, LLC;

AMC-Capom SPE, LLC; AMC-Arbor Square SPE, LLC; and AMC-Packard, LLC.

Michael Stella and Pamela Stella appeal from the order denying their special motion to strike under Code of Civil Procedure section 425.16 (section 425.16) directed to the three causes of action (for breach of contract, express indemnity and declaratory relief) asserted in the complaint against them filed by Asset Management Consultants, Inc. (AMC) and seven affiliated limited liability companies that served as the general partners of limited partnerships in which the Stellas purchased investment interests (collectively AMC parties). The trial court ruled none of the AMC parties' claims, based on allegations the Stellas had breached representations and warranties made in connection with their investments, arose from protected speech or petitioning activity within the meaning of section 425.16. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Representations and Warranties Made in Connection with the Purchase of Limited Partnership Interests*

Between August 2006 and January 2009 Michael Stella individually, or Michael Stella and Pamela Stella jointly, entered into agreements to purchase interests in 11 limited partnerships managed, directly or indirectly, by AMC, each formed to acquire ownership of a specific piece of real property. The Stellas were solicited to invest in the limited partnerships through private placement memoranda. In connection with each investment he or they signed a subscription agreement in which it was represented, "I have reviewed the Confidential Private Placement

Memorandum that accompanies this Subscription Agreement, including the discussion of the Risk Factors contained in that Memorandum."

The subscription agreements signed by the Stellas, all of which were substantially the same, also contained a representation regarding due diligence, "I have made such inquiries and investigations as my advisers and I determined to be appropriate for the purpose of deciding whether to invest in the Partnership. I acknowledge that I have been advised to consult with my own attorney and/or accountant concerning this investment, the risks associated with it, and its suitability to my current financial situation and my investment objectives."

In addition, the Stellas agreed to indemnify those entities and individuals associated with the investments for any misstatements made in connection with the proposed investment, "I covenant and agree to indemnify and hold the Partnership, its General Partner and affiliates free and harmless from and against any loss, damage or liability arising from or due to any breach of any of the representations and warranties, and from any false statement, representation or omission made by me in this Subscription Agreement and Registration Form being executed and delivered by me in connection with my proposed investment in the Partnership."

2. *Investor Lawsuits Alleging Misstatement of the True Purchase Price for the Properties and a Deliberately Misleading Description of Purported Real Estate Commissions*

Michael Stella was a plaintiff in a lawsuit filed in May 2012 in Los Angeles Superior Court, *Ahern v. Asset Management Consultants, Inc.*, BC484356 (the *Ahern* action), concerning limited partnership and tenant-in-common investments in

commercial real property on East La Palma Avenue in Anaheim. The complaint alleged the offering materials prepared by AMC and other related defendants misrepresented the purchase price and fair market value for the property by falsely labeling a $1.3 million real estate commission to be paid to AMC and its affiliates when, in fact, "what was purported to be a commission was an illegal and secret mark-up of the Property purchase price in which the defendants conspired to inflate the price to hide the fact the Property could have been purchased for $30,000,000 or less" and to disguise the fact that the purported commission was actually being paid by the investors, not the seller.[1]

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[1] The claims against AMC and a number of related defendants in the *Ahern* action were ordered to arbitration. Stella and the other plaintiffs elected not to pursue those claims in arbitration and to continue with their lawsuit against the remaining defendants. Relying on the court's order compelling arbitration, however, AMC and the other parties demanded arbitration of their affirmative claims for contractual indemnity based on the alleged breach of representations and warranties in documents signed in connection with the investment in the La Palma Avenue property. Although the arbitrator found in favor of the AMC parties, awarding them all fees and costs incurred in responding to the underlying lawsuit, and the superior court confirmed that award, we reversed the judgment and directed the superior court to grant the petition to vacate the award, holding the arbitration provision upon which the court had relied when it compelled arbitration did not apply to the limited partnership or tenant-in-common investors. (*Ahern v. Asset Management Consultants, Inc.* (Aug. 11, 2015, B253974 & B257684) [nonpub. opn.].) This lawsuit was filed shortly after our decision became final.

Stella thereafter filed two additional lawsuits—in May 2013 and April 2015—based on his investments in 10 other limited partnerships affiliated with AMC. These lawsuits contained allegations similar to those in the *Ahern* action concerning misrepresentation of the actual purchase price and fair market value of the real property acquired as part of each transaction.

We described the central allegations of the May 2013 action in our decision in *Stella v. Asset Management Consultants, Inc.* (2017) 8 Cal.App.5th 181, 188: "The gravamen of the lawsuit was that the private placement memoranda's description of a real estate commission to be paid by the seller of the property at closing . . . was false. In fact, the payment was not a real estate commission but a syndication fee or markup, the economic burden of which was borne by the purchasers of the limit[ed] partnership units, not the seller of the real property. That is, the purported real estate commission did not reduce the negotiated purchase price received by the seller, as it would if the seller truly paid the commission, but was added to the negotiated price so that its economic burden was shifted to the investors, thereby diluting the value of the investment. As a result of this fundamental misrepresentation, Stella alleged the private placement memoranda contained additional false representations or misleading half-truths concerning the fair market value of the property, the appraised value of the property, the loan-to-cash value ratio and the compensation to be received by the general partner of the limited partnership. [¶] Stella alleged AMC and the other defendants knew these representations were false and intended the investors to rely on them. He also alleged he and the investor classes he sought to represent read the private

placement memoranda and reasonably relied on the misrepresentations contained in them." (Footnotes omitted.)[2]

3. *The AMC Parties' Complaint for Breach of Contract and Indemnity*

On December 17, 2015 AMC and seven limited liability companies that AMC manages filed the instant lawsuit against the Stellas for breach of contract, express indemnity and declaratory relief.[3] The complaint alleged the AMC parties had

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[2] In *Stella v. Asset Management Consultants, Inc.*, *supra*, 8 Cal.App.5th 181, we affirmed the judgment dismissing Stella's 2013 lawsuit following an order sustaining without leave to amend the AMC parties' demurrer to the first amended complaint for fraud and related causes of action. We held the delayed discovery rule did not postpone accrual of Stella's claims, which were filed more than four years after the limited partnership transactions had closed, because the private placement memoranda provided inquiry notice, if not actual notice, of the alleged wrongdoing. (*Id*. at p. 197.) Accordingly, the claims were barred by the applicable statutes of limitations, whether two, three or four years. (*Ibid*.)

[3] In addition to AMC the plaintiffs are AMC-Hamilton SPE, LLC, the general partner of Hamilton Venture, L.P.; AMC-Baker SPE, LLC, the general partner of Baker-Cal Venture, L.P.; AMC-Wilnaldi, LLC, the general partner of Wilnaldi Venture, L.P.; AMC-Overland SPE, LLC, the general partner of Overland Venture, L.P.; AMC-Capom SPE, LLC, the general partner of Capom Venture, L.P.; AMC-Arbor Square SPE, LLC, the general partner of Arbor Square Venture, L.P.; and AMC-Packard, LLC, the general partner of Packard Venture, L.P. The complaint alleges AMC is also the manager of four other limited liability companies and an affiliate of their related limited partnerships. The Stellas purchased interests in all of the limited partnerships identified in the complaint.

relied on the Stellas' representations and warranties in the subscription agreements they signed when investing in 11 limited partnerships and would not have permitted the Stellas to purchase their limited partnership interests without those representations and warranties or if they had known the representations and warranties were false.

Specifically, the AMC parties alleged the Stellas had breached the express representation that they had reviewed the private placement memoranda that accompanied the various subscription agreements by not reading the risk factors portions of the memoranda that disclosed, in a section labeled "Market Value of Property," "The purchase price of the Property has been negotiated to include a commission to be paid to the Manager of the General Partner by the Seller (see 'General Partner's Compensation and Fees') in addition to other brokerage commissions owed by the Seller. Accordingly, the Seller would have sold the Property for a lower Purchase Price if it were not obligated to pay such commission." In support of this allegation the AMC parties cited the lawsuits filed by the Stellas asserting the AMC parties had misrepresented the purchase price and fair market value of the properties acquired by the various limited partnerships. In other words, the AMC parties alleged the Stellas' claims of fraud and misrepresentation demonstrated they had failed to examine the private placement memoranda and, consequently, had violated the investment agreements' representations and warranties.

The complaint sought as damages proximately caused by the Stellas' breach of contract (that is, their alleged false representations and warranties) a sum in excess of $400,000. In their cause of action for express indemnity, based on the

indemnification and hold-harmless provisions in the subscription agreements, the AMC parties again sought a sum in excess of $400,000 for breach of the representations and warranties in the subscription agreements. Finally, the AMC parties sought a declaration that the Stellas are contractually obligated to indemnify them for damages incurred as a result of those alleged breaches.

4. *The Special Motion To Strike*

The Stellas moved pursuant to section 425.16 to strike the AMC parties' complaint in its entirety, contending the gravamen of the causes of action for breach of contract, indemnity and declaratory relief was that the allegations of fraud in the *Ahern* action and the Stellas' May 2013 and April 2015 lawsuits were untrue. Thus, the AMC parties' claim they were damaged by having to defend themselves in those lawsuits was based on the Stellas' protected free speech or petitioning activity. The Stellas also argued their litigation activities were absolutely privileged under Civil Code section 47, subdivision (b), and, therefore, the AMC parties could not establish a probability of prevailing on their claims. In addition, they argued the indemnity provisions upon which the AMC parties relied did not extend to fees and costs incurred in defending claims brought by the subscribing indemnitors.[4]

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[4] The Stellas also demurred to the complaint. The court overruled the demurrer at the same hearing at which it denied the special motion to strike. The court found the Stellas had failed to meet and confer prior to filing their demurrer, as required by Code of Civil Procedure section 430.41. The court also ruled the litigation privilege did not apply, the causes of action were not barred as a matter of law by the governing

In their opposition to the motion the AMC parties argued they had not pleaded causes of action arising from the Stellas' petitioning activity but rather claims based on their false representations in the subscription agreements signed as part of the Stellas' investments in the 11 limited partnerships. The Stellas' several lawsuits were identified in the AMC parties' complaint, they explained, because it was the filing of those actions that provided notice that the representations and warranties (that the Stellas had read the documentation and conducted an adequate due diligence before making the investments) were false. Although the cost of defending those lawsuits constitutes the damages for which the AMC parties seek recovery, it is the wrongful conduct, not the remedy, that determines whether section 425.16 is properly applied to the complaint.

The AMC parties also argued there was probable merit to their claims, presenting evidence supporting the contention the Stellas had misrepresented their review of the relevant documentation before investing, distinguishing the cases holding an indemnity provision applied only to third-party claims and contending the litigation privilege was inapplicable to their claims for breach of contract and indemnity based on misrepresentations in the subscription agreements.

The superior court denied the motion, ruling that none of the AMC parties' claims arose from protected speech or petitioning activity and, therefore, section 425.16 did not apply to the complaint. Because it concluded the Stellas had failed to

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statutes of limitations and the AMC parties had sufficiently pleaded the elements of the three causes of action in their complaint.

satisfy their burden on the first step of the required analysis under section 425.16, the court did not consider whether the AMC parties had demonstrated a probability of success on the merits.

The Stellas filed a timely notice of appeal.

DISCUSSION

1. *Section 425.16: The Anti-SLAPP Statute*[5]

Section 425.16 provides, "A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).) Pursuant to subdivision (e), an "'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

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[5] SLAPP is an acronym for "strategic lawsuit against public participation." (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 815, fn. 1.)

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."

In ruling on a motion under section 425.16, the trial court engages in what is now a familiar two-step process. "First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. [Citation.] If the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384 (*Baral*).)

a. *Step one*

The moving party's burden on the threshold issue is to show "the challenged cause of action arises from protected activity." (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056; see *Baral*, *supra*, 1 Cal.5th at p. 396 ["[a]t the first step, the moving defendant bears the burden of identifying all allegations of protected activity, and the claims for relief supported by them"].) "[T]he statutory phrase 'cause of action . . . arising from' means simply that the defendant's act underlying the plaintiff's cause of action must *itself* have been an act in furtherance of the right of petition or free speech. [Citation.] In the anti-SLAPP context, the critical point is whether the plaintiff's cause of action itself was *based on* an act in furtherance of the defendant's right of petition or free speech. [Citations.] 'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause [of action] fits one of the categories spelled out in section 425.16, subdivision (e) . . . .'" (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78 (*City of Cotati*); accord, *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 66 [""the act underlying the plaintiff's cause" or "the act which

forms the basis for the plaintiff's cause of action" must *itself* have been an act in furtherance of the right of petition or free speech"'].)

The mere fact an action was filed after protected activity took place does not mean it arose out of protected activity. (*City of Cotati, supra,* 29 Cal.4th at pp. 76-78; *Navellier v. Sletten* (2002) 29 Cal.4th 82, 89 (*Navellier*).) Thus, a claim filed in response to, or in retaliation for, threatened or actual litigation, even if properly viewed as an oppressive litigation tactic, is not subject to section 425.16 simply because it was triggered by protected activity. (*City of Cotati*, at p. 78; *Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 924.) The critical inquiry always is whether the claim is based on the defendant's protected activity. (*Park v. Board of Trustees of the California State University* (2017) 2 Cal.5th 1057, 1062-1063 (*Park*); *Baral*, *supra*, 1 Cal.5th at p. 396; *City of Cotati,* at pp. 76-77.)

"When relief is sought based on allegations of both protected and unprotected activity, the unprotected activity is disregarded at [the first] stage. If the court determines that relief is sought based on allegations arising from activity protected by the statute, the second step is reached." (*Baral*, *supra*, 1 Cal.5th at p. 396.) However, "if the allegations of protected activity are only incidental to a cause of action based essentially on nonprotected activity, the mere mention of the protected activity does not subject the cause of action to an anti-SLAPP motion." (*Scott v. Metabolife Internat., Inc.* (2004) 115 Cal.App.4th 404, 414; accord, *Kenne v. Stennis* (2014) 230 Cal.App.4th 953, 967-968; *World Financial Group, Inc. v.*

HBW Ins. & Financial Services, Inc. (2009) 172 Cal.App.4th 1561, 1574.)

b. *Step two*

If the moving party fails to demonstrate that any of the challenged claims for relief arise from protected activity, the court properly denies the motion to strike without addressing the second step (probability of success). (*City of Cotati*, *supra*, 29 Cal.4th at pp. 80-81 ["[i]n view of our conclusion that City's cause of action did not arise from Owners' federal suit, we do not reach the anti-SLAPP statute's secondary question whether City 'established that there is a probability that [City] will prevail on the claim'"]; *Trilogy at Glen Ivy Maintenance Assn. v. Shea Homes, Inc.* (2015) 235 Cal.App.4th 361, 367; *Hylton v. Frank E. Rogozienski* (2009) 177 Cal.App.4th 1264, 1271.) However, if the defendant satisfies the first step, "the burden shifts to the plaintiff to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated. The court, without resolving evidentiary conflicts, must determine whether the plaintiff's showing, if accepted by the trier of fact, would be sufficient to sustain a favorable judgment." (*Baral*, *supra*, 1 Cal.5th at p. 396; accord, *Zamos v. Stroud* (2004) 32 Cal.4th 958, 965.) Nonetheless, the court should grant the motion "'if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim.'" (*Taus v. Loftus* (2007) 40 Cal.4th 683, 714; accord, *Baral*, at p. 385 [the court "accepts the plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law"]; *Zamos,* at p. 965.)

c. *Burden of proof and standard of review*

The moving party has the burden on the first issue; the responding party has the burden on the second issue. (*Baral*, *supra*, 1 Cal.5th at p. 396; *Chodos v. Cole* (2012) 210 Cal.App.4th 692, 701.) We review the trial court's rulings independently under a de novo standard of review. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325; *Rusheen v. Cohen, supra,* 37 Cal.4th at p. 1055.)

2. *The AMC Parties' Claims Do Not Arise From the Stellas' Protected Petitioning Activity*

A cause of action arising out of the defendant's litigation activity directly implicates the right to petition and is subject to a special motion to strike. (*Rusheen v. Cohen, supra,* 37 Cal.4th at p. 1056 ["'[a] cause of action "arising from" defendant's litigation activity may appropriately be the subject of a section 425.16 motion to strike"']; *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 741 [malicious prosecution action by its very nature arises out of defendant's constitutionally protected petitioning activity—the underlying lawsuit]; *Navellier*, *supra*, 29 Cal.4th at p. 90.) But, as discussed, that the lawsuit being challenged was triggered by earlier litigation activity does not, without more, establish that it arises from, or is based on, protected petitioning activity. The companion cases *City of Cotati*, *supra*, 29 Cal.4th 69 and *Navellier*, *supra*, 29 Cal.4th 82 illustrate the difference.[6]

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[6] In the third companion case, *Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th 53, the Supreme Court held, in part, that the plaintiff's subjective intent in filing the lawsuit is irrelevant when determining a special motion to strike—that is, the lawsuit need not have been filed to chill the

In *City of Cotati* the Supreme Court held a declaratory relief action that was unquestionably prompted by, and related to, earlier litigation activity did not satisfy the first prong of the section 425.16 analysis. Owners of mobilehome parks had filed a declaratory relief action against the City of Cotati in federal court seeking a judicial determination that the City's rent control ordinance constituted an unconstitutional taking. (*City of Cotati*, *supra*, 29 Cal.4th at pp. 71-72.) In response, the City sued the park owners in state court, requesting a declaration the rent control ordinance was valid and enforceable. (*Id*. at p. 72.) The City "concede[d] that its purpose in filing the state court action was to gain a more favorable forum in which to litigate the constitutionality of its mobilehome park rent stabilization ordinance," and it intended "to seek to persuade the federal court to abstain from hearing [the owners'] suit." (*Id*. at p. 73.) The Supreme Court rejected the argument the filing of the City's action arose from the filing of the earlier federal action within the meaning of section 425.16. Although the City had acknowledged its only ground for alleging the existence of an actual controversy was the fact the park owners had sued it in federal court, because the basis for the City's request for relief was the underlying controversy respecting the rent control ordinance, the Court held the City's lawsuit was not subject to a special motion to strike. (*City of Cotati*, at pp. 79-80.)

In *Navellier*, in contrast, the Supreme Court held a claim for breach of a release clause in a contract was subject to section 425.16 because the alleged breach consisted of asserting

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defendant's exercise of his or her right to free speech or petition. (*Id*. at p. 58.)

claims in litigation (in a counterclaim in a federal lawsuit that had been initiated prior to the release agreement) that had purportedly been released under the contract: "In alleging breach of contract, plaintiffs complain about Sletten's having filed counterclaims in the federal action. Sletten, plaintiffs argue, 'counterclaimed for damages to recover money for the very claim he had agreed to release a year earlier' . . . . [¶] . . . Sletten is being sued because of the affirmative counterclaims he filed in federal court. In fact, but for the federal lawsuit and Sletten's alleged actions taken in connection with that litigation, plaintiffs' present claims would have no basis." (*Navellier*, *supra*, 29 Cal.4th at p. 90.)[7]

The Stellas' argument that the AMC parties' lawsuit is similar to the breach of contract action considered in *Navellier* misconstrues the AMC parties' complaint and misapprehends the Supreme Court's analysis in *Navellier* and *City of Cotati*. Unlike

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[7] The *Navellier* majority also held the plaintiffs' fraud claim against Sletten arose from protected activity. (*Navellier*, *supra*, 29 Cal.4th at p. 90.) That claim was based on Sletten's alleged misrepresentations and omissions in negotiating and executing the release, which he subsequently repudiated, specifically focusing on his failure to disclose when he signed the release that he secretly was not in agreement with its terms. (*Id.* at pp. 89-90.) The release, part of an employment agreement with Sletten, limited the types of claims Sletten was permitted to file in the pending federal action, preserving only claims for contribution and indemnity. The Court concluded that negotiation and execution of the release involved statements or writings made in connection with an issue under consideration or review by a judicial body within the meaning of section 425.16, subdivision (e)(2). (*Navellier*, at p. 90.)

the plaintiffs in *Navellier*, the AMC parties did not allege the filing of the *Ahern* action and other Stella lawsuits breached the contract between the Stellas and the AMC parties. Rather, as in *City of Cotati*, the lawsuits filed by the Stellas alleging they were unaware of the true purchase price and fair market value of the properties acquired by the limited partnerships alerted the AMC parties to the Stellas' failure to review the private placement memoranda prepared for the limited partnership offerings, as they had represented they had done. That is, the lawsuits are evidence of the breach of warranties and representations. However, it was the Stellas' alleged failure to comply with their obligation to review the risk factor portions of the private placement memoranda or to conduct an appropriate due diligence before investing that constituted the breach of contract—the wrongful conduct that was the injury producing activity. (See *Park*, *supra*, 2 Cal.5th at p. 1064 [in analyzing the first step in an anti-SLAPP motion, care must be taken "to respect the distinction between activities that form the basis for a claim and those that merely lead to the liability-creating activity or provide evidentiary support for the claim."].) Moreover, unlike the misrepresentations and omissions alleged as the basis for the fraud claim in *Navellier*, which related to a release of claims in pending litigation and, therefore, involved statements or writings in connection with a matter under review by a judicial body (see *Navellier*, *supra*, 29 Cal.4th at p. 90), the allegedly false statements in the subscription agreements' warranties and representations—that the Stellas reviewed the private placement memoranda, including the discussion of risk factors—concerned private financial matters, not statements in connection with a judicial proceeding or an issue of public interest.

To be sure, the need to defend the *Ahern* action and the Stellas' other lawsuits is the injury that has allegedly resulted from the breach of warranties and representations, and the costs associated with defending those lawsuits constitute the damages the AMC parties seek to recover. To that extent, as in *Navellier*, but for the Stellas' litigation activity, the AMC parties would not have filed the present lawsuit. But as our colleagues in Division Three of this court explained in *Renewable Resources Coalition, Inc. v. Pebble Mines Corp*. (2013) 218 Cal.App.4th 384, 396-397 (*Renewable Resources*), "[T]o determine the applicability of the anti-SLAPP statute, we look to the allegedly wrongful and injurious conduct of the defendant, *rather than the damage which flows from said conduct*."

At issue in *Renewable Resources*, *supra*, 218 Cal.App.4th 384 was a lawsuit by Renewable Resources Coalition, Inc. against two entities and their attorneys (the Pebble defendants) who had obtained (by paying $50,000) confidential documents from a former fundraiser for Renewable Resources Coalition that were then used by the Pebble defendants to prosecute a complaint for election law violations against Renewable Resources Coalition before a state agency. The trial court granted the Pebble defendants' special motion to strike causes of action for interference with contract and interference with prospective economic advantage, ruling with respect to the first prong of the section 425.16 analysis that the two claims arose out of the Pebble defendants' filing of the administrative complaint, protected petitioning activity. (*Renewable Resources*, at pp. 387, 391-392.)

The Court of Appeal reversed the order granting the special motion to strike, concluding the Pebble defendants' alleged

liability arose from their conduct in bribing the former fundraiser to turn over confidential documents, not from their subsequent actions in filing the election law complaint: "[T]he trial court erroneously focused on the Coalition's damages allegations, i.e., that the Coalition was forced to defend itself in the [administrative] proceeding. Instead, the proper focus should have been on the 'allegedly wrongful and injury-producing conduct' [citation] which gave rise to the Coalition's damages." (*Renewable Resources*, *supra*, 218 Cal.App.4th at p. 396.)

According to the AMC parties' complaint, the costs incurred in defending the Stellas' lawsuits flowed from the Stellas' breach of the representations and warranties in the subscription agreements. That breach, like the bribe alleged in *Renewable Resources*, was not an exercise of the constitutionally protected right of petition or free speech. As Division Three explained with respect to the damage allegations in *Renewable Resources*, the AMC parties' claim for damages—the costs of defending litigation initiated by the Stellas as a consequence of their alleged wrongful conduct—does not make the AMC parties' lawsuit subject to a special motion to strike under section 425.16.

The Stellas' attempt to distinguish *Renewable Resources* and to salvage their special motion to strike by asserting that the AMC parties have sued them because they purportedly alleged untrue facts in the *Ahern* action and the other investor lawsuits, that is, facts that are inconsistent with the private placement memoranda and other transaction documents. If that were so, the AMC parties' lawsuit would be akin to a (premature) malicious prosecution action and would certainly be based on protected petitioning activity. (See *Jarrow Formulas, Inc. v. LaMarche*, *supra*, 31 Cal.4th 728.) But the Stellas have it

backward. The wrongful and injury-producing conduct established by the inconsistency between the disclosures in the private placement memoranda and the allegations in the Stellas' lawsuits, according to the AMC parties' complaint, is the breach of the obligation to carefully review those financial disclosures at the time of the investments, not subsequently pleading they were unaware of information that had actually been disclosed. As such, the AMC parties' complaint does not arise from protected activity. The special motion to strike was properly denied.

DISPOSITION

The order denying the special motion to strike is affirmed. The AMC parties are to recover their costs on appeal.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.