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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

NYGÅRD INTERNATIONAL
PARTNERSHIP et al.,

Plaintiffs and Appellants,

v.

STEPHEN J. FERALIO,

Defendant and Appellant,

LOUIS BACON et al.,

Defendants and Respondents.

B266683

(Los Angeles County
Super. Ct. No. BC558003)

APPEALS from an order of the Superior Court for Los Angeles County, Stephanie M. Bowick, Judge. Reversed in part and affirmed in part.

Kasowitz, Benson, Torres & Friedman, Linda Kornfeld, Aaron H. Marks, Henry Brownstein and Kenneth R. David for Plaintiffs and Appellants Nygård International Partnership and Nygård, Inc.

Murphy & McGonicle, Steven D. Feldman; Tantalo & Adler, Michael S. Adler and Joel M. Tantalo for Defendant and Appellant Stephen J. Feralio.

Susman Godfrey, William Christopher Carmody, Jacob W. Buchdahl, Stephen Shackelford, Jr., Mark Musico, Trinity Brown and Davida Brook for Defendants and Respondents Louis Bacon and Jack Palladino.

This case involves two appeals and a cross-appeal from the trial court's order on two special motions to strike under Code of Civil Procedure¹ section 425.16, the so-called anti-SLAPP statute. The court granted in its entirety the motion brought by defendants Louis Bacon and Jack Palladino (collectively, Bacon/Palladino) with regard to claims alleged against them by plaintiffs Nygård International Partnership and Nygård Inc. (we will refer to both plaintiffs as the singular Nygård), and granted the motion brought by defendant Stephen J. Feralio as to some claims alleged against him, but denied the motion as to other claims. Nygård appeals from the order granting Bacon/Palladino's motion; Feralio appeals from the order denying in part his motion; and Nygård cross-appeals from the order granting in part Feralio's motion. We conclude that none of the claims alleged by Nygård arise from activity protected under section 425.16. Accordingly, we reverse the

¹ Further undesignated statutory references are to the Code of Civil Procedure.

order to the extent it grants the motions and affirm it to the extent it denies Feralio's motion.

BACKGROUND²

A. *The Parties*

Nygård International Partnership and Nygård, Inc. are multinational fashion companies, designers, manufacturers, wholesalers, and retailers of women's apparel. They are led by their founder, Chairman, and Chief Executive Officer, Peter J. Nygård.

Feralio was hired as a videographer by Nygård. His job was to record and produce edited videos regarding Nygård's business affairs and events, as well as the lifestyle of Mr. Nygård and others.

Bacon owns property adjacent to Mr. Nygård's estate in the Bahamas. He and Mr. Nygård have a long history of conflicts, and have been or are involved in numerous lawsuits against one another and/or entities controlled by one another.

Palladino is a private investigator for Bacon, based in San Francisco.

² Our discussion of the facts is based upon the allegations of Nygård's complaint and the evidence presented in support of and in opposition to the motions, construing the allegations and evidence in the light most favorable to Nygård. (See *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.)

B. *Feralio's Employment With Nygård*

Feralio began working for Nygård as a videographer in May 2011, when he was just out of film school, on a 90-day trial basis. In November 2011, he and Nygård executed an independent contractor agreement (the 2011 agreement), with a retroactive effective date that coincided with the end of the 90-day trial period; the agreement gave Feralio the title of creative director. That agreement included two provisions that are relevant to this action: a confidentiality provision and an assignment of intellectual property provision.

The confidentiality provision provided that “[a]ny information involving the business or affairs of Nygård International Partnership, including its affiliates and subsidiaries (collectively, ‘Nygård’) and their respective directors, officers and employees is the property of Nygård and is to be treated and protected as confidential. It may not be disclosed in any manner whatsoever to any other person. All confidential information is the exclusive property of Nygård. This obligation continues after the termination of the attached Agreement for a period of seven (7) years.”

The assignment of intellectual property provision stated: “Any items created or obtained by You or another Nygård employee/service provider/independent contractor, including, copyright works, business methods, trademarks, industrial designs, patents, records, reports, Nygård processes and other materials, belong exclusively to Nygård. You agree to assign all of your rights to such intellectual property to Nygård without further compensation, and in that regard to also execute any and all documentation. This provision applies whether or

not the item is patentable or capable of being the subject of a trademark registration.”

Under the 2011 agreement, Nygård paid Feralio \$4,000 per month (plus additional amounts for certain videos) and provided him with other benefits, including housing, travel, and medical expenses. According to Feralio, he resigned from the 2011 agreement and stopped providing services to Nygård for a while in January 2012, but resumed his work in late February 2012. However, Nygård presented evidence that Feralio did not resign, and continued to work for Nygård, submitting invoices for his salary throughout January and February 2012.

According to Nygård, Feralio continued to work for Nygård uninterrupted until another independent contractor agreement was drafted in February 2013 (the 2013 agreement) to memorialize Feralio’s increased pay, to \$6,000 per month; the remainder of the terms were materially identical to the 2011 agreement, including the confidentiality and assignment of intellectual property provisions. Although Feralio submitted a declaration in which he stated that he did not sign the 2013 agreement, Nygård contends that, regardless whether he signed it, he agreed to its terms. Nygård presented evidence that Feralio submitted, and Nygård paid, invoices reflecting his increased pay.³

³ Nygård also submitted evidence that Feralio attached the 2011 agreement and the 2013 agreement to an email that stated that they were “the 2 contracts I signed in my 2 years of Nygård Employment.” Feralio later stated, however, that he made a mistake in the email, and that he did not sign the 2013 agreement.

Later that year, in August 2013, Feralio signed an agreement (the copyright agreement) acknowledging that “all videography, photography, recording, burning DVDs, compressing video data, motion pictures, digital recordings, and other audio visual works” (i.e., the “Works”) created by Feralio during the course of his performance under the contract with Nygård “were ‘Works Made for Hire’ as defined under the U.S. Copyright Act.” The copyright agreement also provided that Feralio “hereby irrevocably assigns, transfers, grants, and conveys exclusively to NYGÅRD all of the right, title, and interest of every kind whatsoever throughout the entire world in and to the Works, including, without limitation, the copyrights, and all renewals and extensions thereof, in and to the Works.”

Feralio apparently left Nygård sometime in August 2013, but asked to return in early November 2013. Mr. Nygård agreed that Feralio could return on the same terms he worked under before he left.

In February 2014, during events for Super Bowl week, Feralio flew a video drone over Times Square in New York City, despite Mr. Nygård’s explicit instructions not to do so. The New York Police Department cited Feralio, and Feralio asked Nygård to pay for the fine, his attorney fees, and travel expenses related to his response to the citation. Nygård declined Feralio’s request. Shortly thereafter, in early March 2014, Nygård terminated its relationship with Feralio. At that time, a Nygård representative told Feralio that his “projects are Nygård proprietary property,” and that under the terms of his contract he was required “to return all Nygård owned property.” Feralio, however, did

not turn over his copy -- the only complete copy -- of all the work he created while employed by Nygård.

B. Feralio's Contacts With Bacon and Palladino

In late March 2014, Feralio called Bacon's offices and spoke with Bacon's brother, Zack. Feralio introduced himself as "Mark Beauchamp" and told Zack that he had information relevant to Bacon's disputes with Mr. Nygård. Zack told Feralio that Bacon's private investigator would contact him to assess the information. On March 28, 2014, Feralio provided Zack with an email address and cell phone number where he could be reached. Feralio emailed Zack on April 1, 2014, asking to speak to him or the investigator. Palladino called him later that day and arranged to meet with him the following week.

Palladino met with Feralio in San Francisco on April 7, 2014. Palladino suspected that "Mark Beauchamp" was a pseudonym; Feralio confirmed that it was, and told him his real name. Feralio told him that he had been hired by Nygård to create and edit video footage of Mr. Nygård and his business operations around the world. He said that he had worked for Nygård full time from May 2011 through July 2013, took a six month break, then went back for a brief period. He informed Palladino that he had 10 to 12 terabytes of video footage (as many as 1,000 hours or more of digital video footage) as a result of his work filming for Nygård, and was willing to provide that footage to Bacon. Feralio showed Palladino approximately 30 seconds of video footage on his iPad.

The following day, Feralio emailed Palladino, and told him that he (Feralio) had been required by Mr. Nygård to create videos critical of Bacon to post on a certain YouTube account. Feralio attached to the email a link to the YouTube account and photographs of notes that Feralio said he were given to him by Mr. Nygård, instructing him regarding the content of the videos.

On April 12, 2014, Feralio again emailed Palladino. He asked Palladino if it would be possible for Bacon to fly him to New York City and put him up in a hotel on certain dates so they could meet. He closed by stating, “I also would like to lock in the compensation terms.”

Five days later, in response to Palladino’s request for a copy of any agreements he had with Nygård, Feralio emailed Palladino the two written agreements he said he had signed regarding his work for Nygård, the 2011 agreement and the 2013 agreement (but see fn. 3, *ante*). On May 1, 2014, Feralio met with Palladino, who told Feralio that Bacon’s attorneys (Gibson Dunn & Crutcher, hereafter Gibson Dunn) planned to bring a legal action in New York to obtain permission for him to turn over the video files. Feralio met with Gibson Dunn and Palladino in New York two weeks later. Gibson Dunn told Feralio that it would be filing, on behalf of Bacon and/or an organization he was associated with, an action under 28 United States Code section 1782 (the 1782 action) to seek the video footage and any other information and evidence Feralio possessed. Gibson Dunn also instructed Feralio that, due to his contracts with Nygård, he should not provide Gibson Dunn or Palladino with any information about Mr. Nygård or Feralio’s work for Nygård until authorized by the court in the 1782 action.

Several times during the meeting, Feralio expressed his concern that Mr. Nygård would retaliate against him and his family if (or when) Mr. Nygård discovered that Feralio had spoken to Bacon's representatives and was willing to share the video footage with them.

In July 2014, Feralio entered into an agreement (the indemnification agreement) with Belvedere Property Management, LLC (Belvedere), and Wilson Mesa Ranch Holdings, LLC (Wilson) as guarantor. Both Belvedere and Wilson are Bacon-related entities.

In the indemnification agreement, Feralio agreed to make himself available to testify (both pretrial and during or after trial) at the request of Bacon, Belvedere, or Wilson, in any domestic or foreign judicial or arbitral proceedings related to or concerning Nygård or Mr. Nygård, and to make himself available to respond to questions or testify under oath at the request of any federal or state government investigating authorities. Belvedere agreed to pay for independent counsel and litigation expenses to represent Feralio in the 1782 action; any civil litigation, arbitration, or investigation arising out of or in response to Feralio's provision of information and evidence to Bacon or Bacon-related entities or any other civil litigation related to Nygård or Mr. Nygård; any governmental investigation regarding Nygård or Mr. Nygård; and any prosecution of Feralio. Belvedere also agreed to pay Feralio for travel "or other" expenses he may incur in connection with any of those litigation matters. In addition, Belvedere agreed to indemnify and hold Feralio harmless from all claims, actions, judgments, awards, expenses (including reasonable attorneys' fees) and awarded damages assessed against Feralio or agreed to be paid in

settlement arising from a claim by Mr. Nygård or Nygård based on Feralio's communications with or provision of information to Bacon or Bacon-related entities. Finally, the agreement provided that in the event an independent assessment finds credible evidence of Nygård's or Mr. Nygård's intent and capability to create a risk to Feralio's personal safety and security, he and Belvedere would enter into a security agreement to address Feralio's concerns.

In addition to the indemnification agreement, Feralio stated in a declaration dated August 11, 2014 (less than two weeks after the indemnification agreement was executed) that, because of the threat to his safety, he relocated to another city, and that Belvedere agreed to pay for his apartment and to provide "subsistence payments" while he was unemployed.

C. *The 1782 Action*

On August 13, 2014, Bacon and a Bacon-related entity filed the 1782 action -- i.e., an application and petition for an order under section 1782 to conduct discovery for use in foreign proceedings -- in the United States District Court for the Southern District of New York.⁴ The filing of the 1782 action, which was supported by, among other documents, declarations from Feralio and Palladino, alerted Nygård for the first time that Feralio had possession of the video footage he created while

⁴ The foreign proceedings identified in the petition were two judicial review proceedings brought by a Bacon-related entity in the Bahamas and five civil proceedings brought by Bacon in the Bahamas.

employed by Nygård and that he was cooperating with and receiving support from Bacon, Palladino, and/or Bacon-related entities.

On September 18, 2014, Mr. Nygård and Nygård moved to intervene in the 1782 action. On October 28, 2014, the district court granted Bacon's petition and ordered that a subpoena for the video footage be issued. In granting the petition, the district court rejected Nygård's argument that the petition should be denied on the grounds that the video footage was misappropriated and Feralio's possessory rights were in dispute (which Nygård contended must be resolved in California state court). The district court found that those arguments were not "grounded in the factors the law requires courts to consider in deciding whether to exercise their discretion" to order discovery, and the court found no case in which a section 1782 petition was denied on those bases.

D. *The Present Lawsuit*

The day before Nygård moved to intervene in the 1782 action, it filed the complaint in the instant lawsuit. The complaint alleges that, under the terms of the 2011, 2013, and copyright agreements, all of the video footage Feralio shot while working for Nygård is confidential and belongs exclusively to Nygård, and that Feralio was required under the 2011 and 2013 agreements not to disclose any information he obtained while working for Nygård and to turn over to Nygård all property owned by Nygård, including all video footage, upon leaving Nygård's employ. Nygård alleges that representatives of Nygård made frequent requests for the return of Nygård's property after Feralio left, but

Nygård recently learned that Feralio had returned only a fraction of the video footage and continues to possess Nygård's property.

With regard to Bacon and Palladino, the complaint alleges that Feralio was aware that Bacon would be interested in obtaining confidential information about Mr. Nygård to use in Bacon's lawsuits and other actions against Mr. Nygård, and offered to sell all of the video footage and other information he possessed to Bacon. Nygård alleges that despite their knowledge that the video footage belonged to Nygård and was subject to a confidentiality and non-disclosure agreement, Palladino, at Bacon's direction, met with Feralio, viewed a portion of the video footage, and later arranged for Feralio to go to New York to discuss Bacon's manufactured legal action to obtain the footage and other information under the auspices of a court-ordered subpoena. Bacon then agreed that, in return for Feralio's cooperation, Bacon would insulate Feralio from any financial ramifications for his conduct by paying for his attorney fees and expenses, indemnifying him against any claims related to Nygård, paying for the rental of Feralio's apartment and all living expenses, and providing "subsistence" payments to allow Feralio to quit his job. The complaint also alleges that "[i]n furtherance of the scheme to obtain the Nygård Companies' stolen property from Feralio, on August 13, 2014, Bacon filed the 1782 [action]."

Finally, the complaint alleges that Feralio continues to possess, use, and profit from the video footage, and has used portions of it in promotional videos.

The complaint asserts 10 causes of action, seven against only Feralio, two against only Bacon and Palladino, and one against all three defendants.

The first five and the ninth and tenth causes of action are alleged against Feralio. In the first, second, third, fifth, ninth, and tenth causes of action -- for replevin, conversion, breach of the assignment provisions of the 2011 and 2013 agreements, breach of the copyright agreement, declaratory judgment, and unjust enrichment -- Nygård alleges that the video footage that Feralio shot and/or edited and other materials he obtained while employed by Nygård belong exclusively to Nygård, and that Feralio wrongfully kept that video footage and materials after the termination of his engagement with Nygård, in violation of the 2011 and 2013 agreements and the copyright agreement. The fourth cause of action, for breach of the confidentiality provisions of the 2011 and 2013 agreements, alleges that under those agreements, Feralio agreed not to disclose the personal or professional affairs of Nygård or its officers, directors, and employees, and that Feralio breached that obligation by disclosing the contents of the video footage and other materials to others, including Palladino and Bacon, and using portions of the video footage in promotional materials.

The seventh and eighth causes of action are alleged against Bacon and Palladino. In the seventh cause of action for aiding and abetting, Nygård alleges that Bacon and Palladino knew that the video footage and other materials Feralio possessed belongs exclusively to Nygård, and that they consciously decided to participate in Feralio's continued wrongful possession of those materials for the purpose of assisting the

wrongful possession. The complaint alleges that Bacon and Palladino “aided and abetted Feralio’s continued wrongful possession of the [video footage and other materials], including, but not limited to: (1) meeting with Feralio when aware that the [materials] belonged to the Nygård Companies; (2) agreeing to pay Feralio’s legal fees, travel expenses and damage awards arising out of any action by which the Nygård Companies would seek to recover the [materials] from Feralio; (3) agreeing to pay for Feralio’s apartment and living expenses; (4) agreeing to keep secret Feralio’s whereabouts and the location of the original and copy of the Video Footage; (5) arranging for the [materials] to be copied and for copies to be transported out of California; and (6) . . . entering into the [indemnification agreement].” The eighth cause of action alleges Bacon and Palladino engaged in this same conduct “in a deliberate and/or reckless course of conduct to interfere with the Nygård Companies’ contractual relationship” and to induce Feralio to breach the 2011 and 2013 agreements.

Finally, in the sixth cause of action for civil conspiracy against all three defendants, Nygård alleges that this same conduct constitutes overt acts in furtherance of the defendants’ agreement to deprive Nygård of its property.

E. *The Special Motions to Strike*

Bacon/Palladino jointly filed a special motion to strike the three claims alleged against them, and Feralio filed a separate special motion to strike the eight claims alleged against him.⁵

Bacon/Palladino argued in their motion that the claims against them arise from protected activity, i.e., their right to petition. They contended that each of the claims is based on the same acts:

- (1) Palladino's meetings and communications with Feralio;
- (2) Belvedere's payments for security and attorneys' fees and related expenses in connection with the 1782 action and the present action; and
- (3) the filing of the 1782 action. They argued that the meetings and communications were protected because they "were necessary to discover that Feralio was a whistleblower with information relevant to the Bahamian lawsuits" with which Bacon and/or Bacon-related entities were involved, and therefore were part of the investigation in anticipation of filing the 1782 action. They asserted that the security payments and litigation-related payments were "protected pre-litigation activity because 'funding' a civil action is plainly an 'act[] in furtherance of [a] person's right of petition or free speech.'" Finally, Bacon/Palladino argued that the filing of the 1782 action is protected activity.

Feralio contended that all of the claims alleged against him are subject to the anti-SLAPP statute because all of them are based upon

⁵ In light of our conclusion that none of the causes of action arise from protected activity as defined in section 425.16, our discussion of the motions focuses only on that issue.

(1) Feralio's alleged misappropriation and wrongful possession of the video footage; (2) Feralio's alleged disclosure of confidential materials; and (3) defendants' alleged conspiracy to obtain a court-ordered subpoena. He argued that the alleged misappropriation was protected because he had decided to turn over the materials while he was still working for Nygård in order to expose Mr. Nygård's purported misconduct, and therefore his retention of the video footage was done in furtherance of the preparation of the 1782 action. He argued that his disclosure to Palladino of the short video clip, the YouTube link, and Mr. Nygård's instructions also was done in furtherance of the 1782 action because it constituted communications preparatory to the bringing of an action. As for allegations regarding his use of clips of the video footage for promotional videos, Feralio contended that it was just an incidental allegation that cannot save the lawsuit from the motion to strike. Finally, Feralio contended that all of the acts that purportedly constitute the conspiracy were acts in furtherance of the 1782 action.

F. *The Trial Court's Ruling*

Following a hearing on the motions, at which counsel for Nygård made clear that Nygård is not seeking to hold Feralio liable for his disclosure of any information in compliance with the subpoena issued in the 1782 action, the trial court issued a written ruling.

With regard to Bacon/Palladino's motion, the court found that "[t]he gravamen of [Nygård's] action against Bacon and Palladino is that they assisted Feralio in disclosing the material." The court noted that Nygård's contention that Bacon/Palladino assisted Feralio in

misappropriating and assisting him in continuing to misappropriate the material is inconsistent with the undisputed facts that Feralio came to them unsolicited and that after Feralio made the initial disclosures to Palladino, Bacon/Palladino instructed him not to disclose any further information until he was compelled to do so by court order, and then they filed the 1782 action. Therefore, the court concluded that Nygård's action against Bacon/Palladino "is directed to their role in instituting the federal action," which is protected activity under section 425.16, because (1) the initial meetings and communications between Feralio and Bacon/Palladino were undertaken to verify that Feralio possessed information relevant to "Bacon's litigious relationship with Nygård"; (2) the communications with Feralio continued until the filing of the 1782 action; and (3) Bacon's funding of litigation expenses was not for the purpose of purchasing the materials Feralio possessed, but instead it simply "permitted Feralio to further assist Bacon in the preparation of the 1782 application."

Addressing Feralio's motion, the court first divided the disclosure claims into two categories: (1) the material provided to Bacon and Palladino, and (2) the material Feralio used for his own promotional purposes. The court found that the first category consists of protected activity because those disclosures were done in furtherance of the 1782 action, but the second category was not protected under section 425.16. With regard to the misappropriation-based claims, the court found that those claims arise from protected activity to the extent they are premised "on material misappropriated for the purpose of disclosing it to Palladino and Bacon," but the claims are not subject to section 425.16

to the extent they are premised on misappropriated materials outside the scope of the 1782 action.

The trial court dismissed all of the claims against Bacon/Palladino and the claims against Feralio that are based upon activity the court deemed to be protected under section 425.16,⁶ finding that those claims are barred by the litigation privilege. Feralio timely filed a notice of appeal from the order; Nygård also timely filed a notice of appeal and cross-appeal.

DISCUSSION

A. *Law Governing Special Motions to Strike Under Section 425.16*

Section 425.16 provides in relevant part: “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

⁶ The court’s ruling is somewhat confusing. Although it stated in its first step analysis that the misappropriation-based claims were based on protected activity to the extent they are based upon material misappropriated for the purpose of disclosing it to Bacon/Palladino, and found in its second step analysis that Nygård failed to establish a probability of prevailing with respect to claims arising from protected activity, it nevertheless stated that Feralio’s motion was denied as to the misappropriation-based claims (i.e., the first, second, third, fifth, ninth, and tenth causes of action). It identified the dismissed claims as “the fourth cause of action (to the extent it is based on disclosure of materials in contemplation of, associated with and/or in response to the 1782 Application)” and the sixth cause of action. The fourth cause of action is for breach of the confidentiality provisions of the 2011 and 2013 agreements; the sixth cause of action is for civil conspiracy.

determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” (§ 425.16, subd. (b)(1).) An “act in furtherance of a person’s right of petition or free speech . . . in connection with a public issue’ includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.” (§ 425.16, subd. (e).)

A trial court presented with a special motion to strike engages in a two-step process. “First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one ‘arising from’ protected activity. (§ 425.16, subd. (b)(1).) If [and only if] the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim.” (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76.)

We review the trial court’s determination de novo. “We consider “the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based.” [Citation.] However, we neither “weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and

evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.” [Citation.]’ [Citation.]” (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 326.) If the defendant has not shown that the plaintiff’s claims arise from protected activity, the defendant’s motion fails and we need not address the merits of the case under the second step of the statute.

B. *Section 425.16 Does Not Apply to Nygård’s Claims*

“The sole inquiry under the first prong of the anti-SLAPP statute is whether the plaintiff’s claims arise from protected speech or petitioning activity. [Citation.] Our focus is on the principal thrust or gravamen of the causes of action, i.e., the allegedly wrongful and injury-producing conduct that provides the foundation for the claims. [Citations.] We review the parties’ pleadings, declarations, and other supporting documents at this stage of the analysis only ‘to determine what conduct is actually being challenged, not to determine whether the conduct is actionable.’ [Citation.]” (*Castleman v. Sagaser* (2013) 216 Cal.App.4th 481, 490-491.)

1. *The Claims Against Bacon/Palladino*

As noted, the trial court rejected Nygård’s assertion that the claims against Bacon/Palladino were based upon their assisting Feralio in continuing to misappropriate materials belonging exclusively to Nygård, finding that the assertion was inconsistent with the fact that after Feralio made the initial disclosures to Bacon/Palladino (including sending them his contracts with Nygård), they instructed him not to

disclose any further information unless compelled to do so by a court order and then filed the 1782 action to obtain such an order. The court instead found that “[t]he gravamen of [Nygård’s] action against Bacon and Palladino is that they assisted Feralio in disclosing the material.” Nygård contends on appeal that in rejecting its assertion, the trial court improperly construed the evidence in the light most favorable to Bacon/Palladino, and misinterpreted the allegations of the complaint. We agree.

It is true, as the trial court found, that Bacon/Palladino instructed Feralio not to disclose any further information without a court order. But that fact is not inconsistent with Nygård’s allegations that Bacon/Palladino assisted Feralio in his continued misappropriation. Indeed, it is irrelevant to Nygård’s claims, because those claims do not seek to hold Bacon/Palladino liable for assisting Feralio in wrongfully *disclosing* the video footage or other materials. Instead, the acts Nygård alleges as the basis of liability are Bacon/Palladino’s meetings with Feralio, their agreement to pay for his litigation expenses and any damages awards against him, their agreement to pay for his apartment and living expenses, their arranging to have a copy of the video footage made and transported out of California, and their agreement to keep Feralio’s whereabouts and the location of the original and copy of the video footage secret.

The question remains, were those acts in furtherance of Bacon/Palladino’s right to petition?

The trial court found that they were. It found that “[t]he initial meetings and communications with Feralio were undertaken to

investigate the veracity of Feralio's claims that he possessed information relevant to Bacon's litigious relationship with Nygård [and that] [t]he communications continued until the actual filing of the 1782 petition"; the court therefore concluded they constituted petitioning activity because they were pre-litigation communications. The court also found that Bacon's conduct in funding Feralio's litigation expenses was petitioning activity because "[t]here is no evidence before the Court that Bacon or Palladino 'purchased' any of the materials possessed by Feralio," and thus the case relied upon by Nygård, *Renewable Resources Coalition, Inc. v. Pebble Mines Corp.* (2013) 218 Cal.App.4th 384 (*Renewable*), was distinguishable.

In making these findings, the trial court failed to view the allegations and evidence in the light most favorable to Nygård, and instead relied upon Bacon/Palladino's version of the facts. For example, when viewed in the light most favorable to Nygård for the purposes of the special motion to strike, the allegations and evidence show that Feralio sought to sell the video footage and other material to Bacon/Palladino, and Bacon/Palladino agreed to compensate him for it: less than a week after his initial meeting with Palladino, Feralio emailed Palladino asking that Bacon pay his travel expenses to New York and expressing his desire to "lock in the compensation terms." The fact that the compensation took the form of housing, subsistence payments, attorney fees, and indemnification while Bacon/Palladino sought to insulate themselves from liability for inducing Feralio to breach the *confidentiality* provisions of the contracts -- by bringing a 1782 action to obtain a court order for their production

-- does not distinguish this case from *Renewable*, *supra*, 218 Cal.App.4th 384.⁷

In *Renewable*, the defendants knowingly purchased the plaintiff's confidential documents from a former contractor of the plaintiff, and used those documents to file a lawsuit against the plaintiff. (*Renewable*, *supra*, 218 Cal.App.4th at p. 387.) The plaintiff filed an action against its former contractor and the defendants, alleging claims against the defendants for interference with contract and interference with prospective economic advantage. (*Id.* at p. 389.) In those claims, the plaintiff alleged that the defendants were aware that the plaintiff's contract with the contractor restricted the contractor's ability to disclose confidential information, but the defendants nevertheless induced the contractor to breach the contract, and that as a result of the breach, the plaintiff was damaged by, among other things, having to defend the action the defendants had brought against the plaintiff. (*Id.* at pp. 389-390.)

The defendants brought a special motion to strike, in which they presented evidence that the payment to the contractor was for a "consulting arrangement" in which the contractor would be available to assist in the preparation of the defendants' lawsuit against the

⁷ We emphasize that we are not finding this version of the facts to be true. We are simply viewing the evidence and allegations in the light most favorable to Nygård.

plaintiff,⁸ and argued that the plaintiff's claims therefore arose from activities in furtherance of their right of petition. (*Renewable, supra*, 218 Cal.App.4th at pp. 390-391.) The trial court granted the motion, finding that the acts forming the basis of the lawsuit -- which the court identified as the defendants' retention of the contractor as a consultant and their possession of allegedly confidential documents -- were acts in furtherance of the defendants' right of petition. (*Id.* at pp. 391-392.)

The court of appeal reversed. Notwithstanding that the defendants obtained the documents for the purpose of using them to file a lawsuit against the plaintiff, the appellate court observed that in ruling on a special motion to strike the focus must be on "the 'allegedly wrongful and injury-producing conduct'" giving rise to the plaintiff's damages, which the court found was the defendants' allegedly wrongful purchase of the plaintiff's confidential documents, rather than the filing of the lawsuit. (*Renewable, supra*, 218 Cal.App.4th at p. 396, quoting *Castleman v. Sagaser, supra*, 216 Cal.App.4th at p. 490.)

Here, although the complaint includes allegations referencing Bacon's filing of the 1782 action seeking a subpoena to obtain the video footage and other materials Feralio possessed, those allegations simply give some context; they do not form the basis for liability and must be disregarded for purposes of the analysis. (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 394 ["Allegations of protected activity that merely provide

⁸ The defendants admitted they received documents from the contractor as part of the arrangement, but asserted the documents had not been specifically designated as confidential. (*Renewable, supra*, 218 Cal.App.4th at p. 391.)

context, without supporting a claim for recovery, cannot be stricken under the anti-SLAPP statute”].) Instead, the allegedly wrongful and injury-producing acts are acts by Bacon/Palladino to assist Feralio in continuing to misappropriate Nygård’s property, such as agreeing to pay for any legal fees, expenses, or damage awards Feralio incurs arising from his alleged misappropriation, and paying for Feralio’s apartment and living expenses following his relocation.

The fact that those acts also made it easier for Bacon to obtain that property through a 1782 action (because Feralio agreed to maintain a copy and to make himself available for service of process) does not make their alleged assistance in continuing Feralio’s alleged misappropriation acts in furtherance of Bacon or Palladino’s right of petition or free speech. In short, we conclude the trial court erred in finding that Bacon/Palladino satisfied the first step of the anti-SLAPP analysis.⁹ Because Nygård’s claims against them do not arise from protected activity, the trial court’s order granting Bacon/Palladino’s special motion to strike must be reversed.

2. *The Claims Against Feralio*

As with the claims against Bacon/Palladino, our focus in analyzing Feralio’s special motion to strike the claims against him is on “the

⁹ Nygård makes additional arguments as to why the trial court’s finding was incorrect, including that the conduct alleged was criminal conduct and thus not protected under section 425.16. (Citing *Flatley v. Mauro*, *supra*, 39 Cal.4th at p. 305.) Because we have concluded that the conduct alleged was not protected regardless whether that conduct was criminal, we need not address these arguments.

allegedly wrongful and injury-producing conduct that provides the foundation for the claims.” (*Castleman v. Sagaser*, *supra*, 216 Cal.App.4th at pp. 490-491.) The only conduct alleged in the misappropriation-related claims -- the first, second, third, fifth, ninth, and tenth causes of action -- is Feralio’s allegedly wrongful retention of video footage and other materials that belongs exclusively to Nygård. The conduct alleged in the disclosure claim -- the fourth cause of action -- is Feralio’s disclosure of the video footage and other information to Bacon/Palladino (not including, as Nygård’s counsel made clear at argument on the motion, any disclosure made in response to a court order or subpoena), and his use of video footage in promotional videos for his new company.

As noted, the trial court found that the misappropriation-related claims arise from protected activity to the extent they are premised on material misappropriated for the purpose of disclosing it to Bacon/Palladino, but not to the extent they are premised on misappropriated materials outside the scope of the 1782 action, and the disclosure claim arises from protected activity with regard to disclosures made to Bacon/Palladino, but not with regard to disclosures for use in promotional videos.

Feralio contends on appeal the trial court erred in denying his special motion to strike with respect to the misappropriation-related claims because the all of the claims are based on his conduct as a whistleblower in furtherance of the 1782 action. Nygård contends in his cross-appeal that the trial court erred in granting Feralio’s motion with respect to the disclosure claim related to Feralio’s disclosures to

Bacon/Palladino before the 1782 action was filed, arguing that those disclosures are not protected because the 1782 action was not contemplated in good faith and under serious consideration at the time the disclosures were made. As in its appeal from the order granting Bacon/Palladino's motion, Nygård also contends the trial court erred in finding that the gravamen of its conspiracy claim was that Feralio conspired with Bacon/Palladino to assist Feralio in disclosing the video footage and other materials in connection with the 1782 action.¹⁰ We conclude that none of the claims alleged against Feralio arise from protected activity under section 425.16.

a. *Feralio's Appeal*

We first address Feralio's assertion that the alleged misappropriation that is the basis for most of the causes of action is protected activity because he was acting as a whistleblower by retaining the video footage and other materials for the purpose of offering them to Bacon/Palladino, who filed the 1782 action to obtain them.¹¹ Therefore,

¹⁰ As with the claims against Bacon/Palladino, Nygård also contends the trial court erred in granting any part of Feralio's motion because the conduct giving rise to all of the claims against him was criminal activity, and thus not protected. We need not address these arguments in light of our conclusion that none of Nygård's claims against Feralio arise from conduct protected under section 425.16.

¹¹ We note that Feralio does not identify which subdivision of section 425.16, subdivision (e), the alleged conduct falls under. But given that the conduct did not involve a written or oral statement or writing, we assume he relies upon section 425.16, subdivision (e)(4).

he contends his conduct was protected activity because it was in furtherance of the right to petition. We disagree.

First, Feralio's assertion that he retained the material because he was acting as a whistleblower is contrary to evidence Nygård presented that Feralio intended to sell the material to Bacon/Palladino. For purposes of a special motion to strike, we must accept Nygård's evidence as true. (*Flatley v. Mauro*, *supra*, 39 Cal.4th at p. 326.) This evidence suggests that Feralio was acting out of a desire to profit, rather than as a whistleblower. Thus, the court was correct in finding that the conduct at issue was not protected activity under section 425.16.¹² (See *Renewable*, *supra*, 218 Cal.App.4th at pp. 396-397.)

Second, even if we were to accept Feralio's assertion that he acted with the intent to expose Mr. Nygård's alleged wrongdoing, that would not necessarily mean his misappropriation was protected activity under section 425.16. Feralio argues that pre-litigation acts are protected under section 425.16 when made in furtherance or in anticipation of a legal action. (Citing *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106.) He also argues that "[s]teps taken by a whistleblower to prompt investigation activity are, by definition, pre-litigation acts [citing *Comstock v. Aber* (2012) 212 Cal.App.4th 931 (*Comstock*) and *Siam v. Kizilbash* (2005) 130 Cal.App.4th 1563 (*Siam*)]

¹² We note that, for this same reason, the court erred in finding Feralio's misappropriation-related conduct was protected activity to the extent he retained the material at issue in the 1782 action (although the court nevertheless denied Feralio's motion with regard to the misappropriation-related claims).

. . . including where the whistleblower turns over allegedly misappropriated materials in purported breach of his employment contracts to further an investigation against his former employer [citing *Greka Integrated, Inc. v. Lowrey* (2005) 133 Cal.App.4th 1572 (*Greka*) and *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294 (*Fox*)].”

Feralio’s first argument is easily disposed of. While it is true that acts done in anticipation of litigation can be protected under section 425.16, they are protected only when, at the time they occur, the litigation is “““contemplated in good faith and under serious consideration.””” (*Bailey v. Brewer* (2011) 197 Cal.App.4th 781, 789-790.) Feralio’s argument fails because at the time he retained the materials at issue, there was no actual litigation contemplated; according to Feralio’s own declaration, he retained the materials because he believed Bacon might be able to use them in some unidentified “disputes” with Nygård and Mr. Nygård.

Feralio’s second argument fails because the so-called whistleblower cases he relies upon bear little resemblance to the facts (and claims) of the present case. Indeed, those cases show that it is not the defendants’ status as “whistleblowers” that gives them standing to bring special motions to strike. Rather, it is the fact that their acts were in furtherance of their right to petition -- or were statements made in connection with judicial or other official proceedings -- that allowed them to bring such motions.

For example, in *Comstock* and *Siam*, the claims at issue were based upon allegations that the party bringing the special motion to

strike made false statements to various people, which resulted in proceedings or investigations against the plaintiff or cross-complainant. In *Siam* the plaintiff alleged claims based upon the defendant's allegedly false reports of child abuse. The appellate court found the claims were based upon protected activity under section 425.16, subdivision (e)(2) because the reports were made to "people who were legally required to report any child abuse allegations.' . . . That is, the statements were designed to prompt action by law enforcement or child welfare agencies. . . . Thus, defendant's reports of child abuse to persons who are bound by law to investigate the report or to transmit the report to the authorities are protected [under § 425.16, subd. (e)(2)]." (*Siam, supra*, 130 Cal.App.4th at pp. 1569-1570.) In *Comstock*, the cross-defendant made reports to the police, health care practitioners, and employees of her employer that the cross-complainant (a co-worker) sexually assaulted her. (*Comstock, supra*, 212 Cal.App.4th at p. 941.) The appellate court found those communications were protected under section 425.16, subdivisions (e)(1) and (e)(2), "as statements made in, or in connection with matters under review by, and official proceeding or body." (*Comstock, supra*, 212 Cal.App.4th at p. 941.) The court noted that communications to the police constitute statements made in connection with an official proceeding. (*Id.* at pp. 941-942.) It also observed that statements to a health practitioner, who is required by statute to report the allegation to law enforcement, was protected because it appears the Legislature intended that reporting of information to a mandatory reporter would result in a governmental investigation -- i.e., an "official proceeding"

under section 425.16, subdivisions (e)(1) and (e)(2). (*Comstock, supra*, 212 Cal.App.4th at p. 942.) Finally, it found that the cross-defendant's statements to her employer's human resources manager were protected under section 425.16, subdivisions (e)(1) and (e)(2) because those statements "were necessary to address a commonly used affirmative defense by an employer in a sexual harassment case," i.e., that the employee unreasonably failed to take advantage of preventative or corrective opportunities provided by the employer. (*Comstock, supra*, 212 Cal.App.4th at p. 944.) In other words, the defendant/cross-defendant in *Comstock* and *Siam* made statements that necessarily would result in an official proceeding, or were necessary for the lawsuit they themselves brought.

Similarly, in *Fox*, the plaintiff (the defendant's former employer) alleged claims against the defendant based upon the defendant's alleged disclosure of privileged and/or confidential documents and information to the attorney she retained to represent her in a wrongful termination lawsuit against the plaintiff. (*Fox, supra*, 89 Cal.App.4th at pp. 298-299.) The appellate court held that the defendant's maintenance and disclosure of the information and documents was protected activity because they were necessary for the preparation and prosecution of her lawsuit against the plaintiff. (*Id.* at p. 308.)

What sets these three cases apart from this case is that in those cases the acts at issue were either direct petitioning activity (e.g., reports to law enforcement or to persons statutorily required to report to law enforcement), or acts in furtherance of the defendant/cross-defendant's own petitioning activity. In contrast, in the present case,

Feralio allegedly retained material belonging exclusively to Nygård and offered it to a private citizen, apparently in the hope that the citizen would use it to expose Nygård's purported wrongdoing. In other words, the act at issue -- Feralio's alleged misappropriation (the allegedly wrongful conduct upon which the claims are based) -- is, at best, an act that might assist another person if that person decided to engage in petitioning activity.¹³ But section 425.16 applies only to "[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." (§ 425.16, subd. (b)(1), italics added.) By its plain language, it does not apply to an act of a person in furtherance of *another* person's possible exercise of their right of petition or free speech at some unknown point in the future.¹⁴

Finally, although there are some superficial similarities between this case and *Greka*, the fourth so-called whistleblower case upon which Feralio relies, the material facts and, more importantly, the claims in

¹³ At oral argument, counsel for Feralio argued that some of the material Feralio allegedly misappropriated was relevant to litigation between Bacon or Bacon-related entities and Nygård or Mr. Nygård that Feralio knew was ongoing. The problem with this argument (beside the fact that it was not raised previously and is inconsistent with Feralio's argument that he kept the material for a *future* lawsuit to "expose" Nygård) is that Nygård alleges, and the evidence shows, that Feralio kept *all* of the video footage he shot and purportedly offered to sell *all* of it to Bacon/Palladino, regardless of its possible relevance to ongoing litigation.

¹⁴ This is especially true where, as here, the act is not *necessary* to assist that other person in their exercise of their right of petition. Had Feralio merely told Bacon/Palladino about the videos he took, Bacon could have instituted a 1782 action to obtain the footage from Nygård.

that case are quite different. In *Greka*, an employer sued a former employee, alleging that the former employee took documents belonging to the employer when he left, and disclosed the documents to third parties. (*Greka, supra*, 133 Cal.App.4th at p. 1575.) The former employee admitted taking the documents home (with the employer's permission) when he took medical leave, but contended that he retained them only because he never returned to work. After he left the employer, he (1) testified at a deposition in a personal injury case filed against the employer by an agricultural worker who was injured by an explosion at one of the employer's facilities, (2) testified at a criminal trial and a civil trial brought by the district attorney's office against two employees and the employer related to the same incident, and (3) cooperated with the district attorney's office (including by providing the documents he had retained) in its investigations of the employer with respect to other worker safety and environmental contamination incidents. (*Id.* at pp. 1575-1576.)

The employer asserted claims for breach of contract and conversion. The complaint alleged that the former employee breached a nondisclosure agreement by disclosing the documents. (*Greka, supra*, 133 Cal.App.4th at p. 1576.) In the cause of action for conversion, the complaint alleged that the former employee "took various proprietary and confidential material of [the employer] and converted the same to his own use." (*Ibid.*) The trial court granted the former employee's special motion to strike, and the court of appeal affirmed. (*Id.* at p. 1575.)

The appellate court noted that both the breach of contract and conversion claims were based upon the former employee's disclosure of information and/or documents to his counsel, to governmental or law enforcement authorities, and in deposition and trial testimony in response to subpoenas. (*Greka, supra*, 133 Cal.App.4th at pp. 1579-1580.) The court found that all of these were protected activities under section 425.16, subdivision (e)(1), because they were "statements made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law." (*Greka, supra*, 133 Cal.App.4th at p. 1580.)

In contrast to *Greka*, in the present case, Nygård alleges that Feralio converted the video footage and other materials by retaining them after he left Nygård and offering to sell them to a private individual. None of the allegedly wrongful conduct upon which the misappropriation-related claims are based involves Feralio's disclosure of the materials in response to a subpoena or to governmental or law enforcement authorities. Thus, *Greka* provides no assistance to Feralio.

In short, we conclude the trial court properly denied Feralio's special motion to strike with respect to the first, second, third, fifth, ninth, and tenth causes of action

b. *Nygård's Cross-Appeal*

As noted, in granting Feralio's special motion to strike as to the fourth cause of action for breach of the confidentiality provisions of the 2011 and 2013 agreements, the trial court found that Feralio's initial disclosures to Bacon/Palladino (i.e., at and immediately after his first

meeting with Palladino) constituted protected activity because they were made in furtherance of the 1782 action. In its cross-appeal, Nygård contends the court erred in reaching this conclusion because the 1782 action was not contemplated at the time of these disclosures, and therefore they were not made in furtherance of that action. We agree.

The evidence is undisputed that when Feralio first met with Palladino, no litigation was contemplated. Palladino stated in his declaration that he first met with Feralio on April 7, 2014, and that Feralio showed him some video footage at that meeting and emailed other material to him the following day. Feralio stated in his declaration that he first learned of the contemplated litigation in May 2014, after he had already disclosed the materials to Palladino. Indeed, as Nygård observes in its opening brief on its cross-appeal, Feralio admits that at the time he met with Palladino, the 1782 action was “then-unknown.” Acts done in anticipation of “then-unknown” litigation are not protected under section 425.16. (*Bailey v. Brewer, supra*, 197 Cal.App.4th at pp. 789-790.) Therefore, the trial court erred by granting in part Feralio’s special motion to strike with respect to the fourth cause of action for breach of the confidentiality provision of the 2011 and 2013 agreements.

Nygård also contends in his cross-appeal that the trial court erred in granting Feralio’s motion with respect to the sixth cause of action for civil conspiracy. The trial court did not directly address this cause of action, which was alleged against all three defendants, when discussing Feralio’s motion. Nevertheless, the court granted his motion as to this claim, presumably based upon its conclusion that the gravamen of all

the claims against Bacon/Palladino was that they assisted Feralio in disclosing the video footage and other material. In light of our holding that the trial court's conclusion was erroneous with respect to the claims against Bacon/Palladino, we find the court's ruling with respect to Feralio is erroneous as well.

C. *Evidentiary Ruling Regarding the 2013 Agreement*

In connection with their special motions to strike, Bacon/Palladino and Feralio filed joint objections to various evidence, including evidence regarding the 2013 agreement. They contended that evidence regarding that agreement was inadmissible because the agreement was barred by the statute of frauds. Nygård asserted that the evidence should not be excluded, arguing that the absence of Feralio's signature on the document does not automatically render the agreement inadmissible, because evidence of an electronic communication indicating the making of the contract is sufficient to avoid the statute of frauds. (See Civ. Code, § 1624, subd. (b)(3)(A).) Nygård contended that, in light of evidence that Feralio admitted he signed the 2013 agreement, it would be premature to exclude the evidence related to that agreement, given the likelihood that an electronic communication satisfying the statute of frauds will be identified in discovery. The trial court sustained the defendants' objection.

In its cross-appeal, Nygård contends the trial court erred in sustaining defendants' joint objection to evidence regarding the 2013 agreement on statute of fraud grounds. Although we have concluded that all of the defendants' special motions to strike should have been

denied in their entirety regardless of the admissibility of the 2013 agreement, we will address Nygård's contention to avoid later questions regarding the continued effectiveness of the court's evidentiary ruling.

A trial court's rulings on the admissibility of evidence are reviewed for abuse of discretion. (*Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298, 1317.) Although the court generally has broad discretion in determining the admissibility of evidence, when ruling on admissibility of evidence in connection with a special motion to strike, the court generally should distinguish between evidence that could never be introduced at trial (such as evidence that is barred by the hearsay rule, or evidence that is speculative or not based on personal knowledge) and "evidence that is made inadmissible only because the plaintiff failed to satisfy a precondition to its admissibility." (*Fashion 21 v. Coalition for Humane Immigrant Rights of Los Angeles* (2004) 117 Cal.App.4th 1138, 1148.)

In light of the evidence (which we view in the light most favorable to Nygård) that Feralio admitted he signed the 2013 agreement, we conclude the trial court abused its discretion in ruling that evidence related to the 2013 agreement was inadmissible. Our conclusion, however, is based upon the procedural posture of the case at the time the ruling was made. We do not offer any opinion regarding whether that evidence would be admissible in subsequent proceedings.

DISPOSITION

The order granting Bacon/Palladino's special motion to strike and granting in part Feralio's special motion to strike is reversed. The order denying in part Feralio's special motion to strike is affirmed. The trial court is directed to enter a new order denying both motions in their entirety. Nygård shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.