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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

JANGO CAPITAL, LLC, Cross-complainant and Respondent, v. LAVELY & SINGER et al., Cross-defendants and Appellants.	B227324 (Los Angeles County Super. Ct. No. SC103177)

APPEAL from an order of the Superior Court of Los Angeles County, Craig D. Karlan, Judge. Affirmed.

Lavely & Singer, Williams J. Briggs II, Matthew E. Panagiotis; Horvitz & Levy and Jeremy Brooks Rosen for Cross-defendants and Appellants.

Smith Law Firm and Craig R. Smith for Cross-complainant and Respondent.

A law firm filed this action against a former client, a limited liability company, to recover attorney fees incurred in representing the company as a plaintiff in a prior action. The company filed a cross-complaint, alleging that the firm had defrauded it and breached the duty of loyalty by corepresenting an individual plaintiff in the prior action whose interests were adverse to the company's.

The firm responded to the cross-complaint by filing a special motion to strike, contending the cross-complaint was a strategic lawsuit against public participation (SLAPP) (Code Civ. Proc., § 425.16; undesignated statutory sections are to that code). The trial court denied the motion.

The purpose of the anti-SLAPP statute is to prevent lawsuits that chill a person's right of free speech or right to the redress of grievances. Although attorneys engage in communications and conduct in connection with litigation, they pursue those activities as the client's legal representative. Clients do not sue their former attorneys to deter the speech and petitioning activities performed by their attorneys on their behalf when the clients contest the quality of their attorneys' performance. Consequently, the cross-complaint in this action does not implicate the purpose of the statute: It was not brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition. There is no constitutional right to defraud a client or breach the duty of loyalty.

Because the purpose of the cross-complaint does not fall within the scope of the anti-SLAPP statute, we affirm.

I

BACKGROUND

The allegations and evidence in this appeal are taken from the pleadings and the exhibits filed in connection with the anti-SLAPP motion.

A. Cross-complaint

On May 19, 2009, Lavely & Singer filed this action against Jango Capital, LLC (Jango), seeking to recover attorney fees incurred in representing Jango as the sole plaintiff in *Jango Capital, LLC v. Ritcheson* (Super. Ct. L.A. County, 2009,

No. PC037474)). On July 10, 2009, Jango filed an answer to the complaint and a cross-complaint against Lavely & Singer and one of its attorneys (collectively the firm), alleging causes of action for "breach of fiduciary duty based on fraud" and rescission. After a round of demurrers, the second amended cross-complaint (cross-complaint) became the operative pleading, alleging causes of action for fraud and rescission. The fraud claim is the gravamen of the suit.

The cross-complaint alleged as follows. A real estate dispute arose between Jango, on the one hand, and Steven and Renata Ritcheson, on the other hand, over funds allegedly owed Jango. Steven Ritcheson, a California attorney, was contacted by a good friend and entrepreneur, David Weisman, who asked him to meet with Michael Blank to set up Jango. Blank was to be, and is, the only member of Jango. Ritcheson also introduced Blank to the firm. Jango was created so Blank could provide consultation services to financially troubled companies. In or about September 2005, the firm purported to represent Jango in filing suit against the Ritchesons concerning Jango's purchase of a house for them. Jango was the sole plaintiff. The suit was filed at Weisman's direction without Blank's consent. Blank had previously informed the firm that Weisman had no part of Jango. Nevertheless, the retainer agreement contained the names of both Weisman and Jango.

The firm informed Jango that it was representing the interests of the company in the action and that it was not and could not represent the interests of Weisman. On September 21, 2005, Blank, acting on behalf of Jango, informed the firm that "David Weisman is not an officer of Jango [ ], not an employee of Jango [ ], not a partner in Jango [ ] and most of all, not a lawyer for Jango [ ]." The next day, the firm informed Blank by email that it was pursuing the action for Jango, not Weisman, and explained why Weisman was not named as a plaintiff, saying: "Jango paid $1.7 million to purchase [a] house for the Ritcheson[s], not Dave Weisman. [The firm's] understanding is that the $1.7 million belongs to Jango, not Dave Weisman. Because the essence of the claim against the Ritchesons is that Jango put up $1.7 million to purchase the house for the Ritchesons with the understanding that Jango would receive a 'Note' from the

Ritchesons for a return of that money or the property plus payments of interest on that Note for a two year period, the claims for a return of that money or the property belong to Jango, not Dave Weisman."

The firm's email to Blank continued: "As you have stated to me, Dave Weisman has no interest in Jango, e.g., he is not an officer, director, [or] shareholder. Consequently, Dave Weisman has no interest in the $1.7 million or the property unless you tell me that the $1.7 million actually belongs to Dave Weisman. . . . Only Jango can be a plaintiff in the suit since it was Jango's money that was used to purchase the Property. Again this is based on your statements to me and the statements provided to me by Dave Weisman." (Boldface omitted.)

The firm concealed from Jango that it was prosecuting the action for the benefit of Weisman, not Jango. Weisman had advised the firm that he was the equitable owner of Jango and that all proceeds from the action belonged to him. The firm did not disclose this information to Blank. The firm convinced Blank to sign the retainer agreement on behalf of Jango so it could prosecute the action on behalf of Weisman. The firm took all directions in the litigation from Weisman.

As the litigation progressed, the firm's representation of both Jango and Weisman created a conflict of interest that undermined the duty of loyalty the firm owed to Jango. In or about January 2007, the firm withdrew as counsel for Jango.

In representing to Jango and Blank that it was pursuing the litigation for Jango, not Weisman, the firm knew its representations were false. The firm intentionally concealed the true relationships between itself and Weisman and between itself and Jango. As a consequence, Jango was deprived of a settlement with the Ritchesons for $1.5 million and incurred substantial attorney fees before and after the firm withdrew as counsel. The firm also asserted an unenforceable lien contained in the retainer agreement, resulting in a loss to Jango of $200,000.

B. Anti-SLAPP Motion

On May 24, 2010, the firm filed an anti-SLAPP motion, seeking the dismissal of the cross-complaint. The motion was supported by a declaration from the attorney at

the firm who handled the suit against the Ritchesons; he detailed the history of the litigation.

Jango filed opposition, including a declaration from Blank. According to the declaration, a mediation was scheduled to take place in Hawaii on May 30, 2006. The firm did not want Blank to attend and requested that he sign a special power of attorney granting Weisman authority to negotiate and settle the action on behalf of Jango. Blank refused and promptly called his personal attorney, Wes Wauson. The firm attended the mediation accompanied by Weisman; Blank attended accompanied by Wauson. Before the mediation began, the firm indicated it was Weisman's money that was used to purchase the Ritchesons' house, and Weisman, not Jango, was entitled to any settlement proceeds. During the mediation, the Ritchesons made a settlement offer of $1.5 million. Blank instructed the firm to accept the offer. Weisman directed otherwise. The firm rejected the offer at Weisman's request. The mediation resulted in an agreement to arbitrate the matter. The arbitration went forward, and Jango prevailed. The arbitrator awarded Jango approximately $1.7 million plus interest for a total of $2.14 million. On petition by Jango, the superior court confirmed the award.

The anti-SLAPP motion was heard on September 2, 2010. The trial court denied the motion on the ground that the cross-complaint did not relate to the filing of the action against the Ritchesons but to the firm's alleged misrepresentations during the litigation. In the court's words, "Jango's causes of action in the [cross-complaint] do not arise from protected activity." The firm appealed the denial of the anti-SLAPP motion.

II

DISCUSSION

Our review of an order granting or denying an anti-SLAPP motion is de novo. (See *Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.)

On appeal, the parties repeat the same arguments presented in the trial court. We affirm for the reasons the trial court gave in denying the motion: The cross-complaint did not arise from activity protected by the anti-SLAPP statute.

A. Anti-SLAPP Statute

"'Litigation which has come to be known as SLAPP is defined by the sociologists who coined the term as "civil lawsuits . . . that are aimed at preventing citizens from exercising their political rights or punishing those who have done so." . . . [¶] . . . [¶]

"'SLAPP suits are brought to obtain an *economic* advantage over the defendant, not to vindicate a legally cognizable right of the plaintiff. . . . [O]ne of the common characteristics of a SLAPP suit is its lack of merit. . . . But lack of merit is not of concern to the plaintiff because the plaintiff does not expect to succeed in the lawsuit, only to tie up the defendant's resources for a sufficient length of time to accomplish plaintiff's underlying objective. . . . As long as the defendant is forced to devote its time, energy and financial resources to combating the lawsuit its ability to combat the plaintiff in the political arena is substantially diminished.'" (*Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 890–891.)

"'The Legislature enacted the . . . statute to protect defendants . . . from interference with the valid exercise of their constitutional rights, particularly the right of freedom of speech and the right to petition the government for the redress of grievances.'" (*Contemporary Services Corp. v. Staff Pro Inc*. (2007) 152 Cal.App.4th 1043, 1052.)

The anti-SLAPP statute provides that "[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), italics added.) The statute is to "be broadly construed to encourage continued participation in free speech and petition activities." (*Wanland v. Law Offices of Mastagni, Holstedt & Chiurazzi* (2006) 141 Cal.App.4th 15, 22; accord, § 425.16, subd. (a).)

"[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. . . . 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. . . . 'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e) . . . .'" (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78, some italics added, citations omitted; accord, *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 734 ["arising from" encompasses any act "based on" speech or petitioning activity]; *Episcopal Church Cases* (2009) 45 Cal.4th 467, 477 [same]; *City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 72 [same].)

"As used in [section 425.16], '*act in furtherance of* a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e); see *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1117–1118, 1123.)

"Clauses (3) and (4) of section 425.16, subdivision (e), concerning statements made in public fora and 'other conduct' implicating speech or petition rights, include an express 'issue of public interest' limitation; clauses (1) and (2), concerning statements made before or in connection with issues under review by official proceedings, contain no such limitation." (*Briggs v. Eden Council for Hope & Opportunity*, *supra*,

19 Cal.4th at p. 1117.) Thus, if a communication falls within either of the "official proceeding" clauses, the anti-SLAPP statute applies without a separate showing that a public issue or an issue of public interest is present. (See *id.* at pp. 1117–1121, 1123; *Moore v. Shaw* (2004) 116 Cal.App.4th 182, 196.) In drafting the statute, the Legislature concluded that authorized official proceedings necessarily involve a public issue or an issue of public interest. (*Briggs*, at p. 1117.)

In ruling on an anti-SLAPP motion, the trial court "engage[s] 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. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute. (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. Under section 425.16, subdivision (b)(2), the trial court in making these determinations considers 'the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.'" (*Equilon Enterprises v. Consumer Cause, Inc*. (2002) 29 Cal.4th 53, 67.)

Put another way, "[t]he party making a special motion to strike must make a prima facie showing that the plaintiff's cause of action arises from the defendant's free speech or petition activity. . . . Once the defendant makes a prima facie showing, 'the burden shifts to the plaintiff to . . . "make a prima facie showing of *facts* which would, if proved at trial, support a judgment in plaintiff's favor."'" (*Rezec v. Sony Pictures Entertainment, Inc.* (2004) 116 Cal.App.4th 135, 139, citations omitted; accord, *Club Members for an Honest Election v. Sierra Club* (2008) 45 Cal.4th 309, 315–316; *McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 108.)

"[T]he mere fact that an action was filed after protected activity took place does not mean the action arose from that activity for the purposes of the anti-SLAPP statute. . . . [T]hat a cause of action arguably may have been 'triggered' by protected

activity does not [mean] that it is one arising from such." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89, citation omitted.) "'"The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability — and whether that activity constitutes protected speech or petitioning." . . .'" (*Feldman v. 1100 Park Lane Associates* (2008) 160 Cal.App.4th 1467, 1478, citation omitted; accord, *Navellier*, at pp. 91–93.) "Nothing in the statute itself categorically excludes any particular type of action from its operation." (*Navellier*, at p. 92.)

B. Protected Activity

In general, a client's suit against its former counsel, alleging a breach of the duty of loyalty as a result of the simultaneous representation of clients with conflicting interests does not fall within the scope of the anti-SLAPP statute. "We focus, as we must, not on the label of the cause of action, but on . . . cross-defendants' *activities* challenged in the cross-complaint." (*Feldman v. 1100 Park Lane Associates*, *supra*, 160 Cal.App.4th at p. 1478.)

In *Kolar v. Donahue, McIntosh & Hammerton* (2006) 145 Cal.App.4th 1532, the Kolars retained the Donahue firm to file suit against their neighbors for constructing property improvements in violation of the covenants, conditions, and restrictions. The Kolars lost and filed a legal malpractice action against Donahue. The complaint was met with an anti-SLAPP motion, which the trial court denied.

The Court of Appeal affirmed, saying: "Our interpretation of the 'arising from' requirement of section 425.16, subdivision (b), is consistent with the anti-SLAPP statute's express purpose: 'The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.' . . .

"A malpractice claim focusing on an attorney's incompetent handling of a previous lawsuit does not have the chilling effect on advocacy found in malicious prosecution, libel, and other claims typically covered by the anti-SLAPP statute. In a malpractice suit, the client is not suing because the attorney petitioned on his or her behalf, but because the attorney did not competently represent the client's interests while doing so. Instead of chilling the petitioning activity, the threat of malpractice encourages the attorney to petition competently and zealously. This is vastly different from a third party suing an attorney for petitioning activity, which clearly could have a chilling effect." (*Kolar v. Donahue, McIntosh & Hammerton*, *supra*, 145 Cal.App.4th at pp. 1539–1540, citation omitted.)

In *Benasra v. Mitchell Silberberg & Knupp LLP* (2004) 123 Cal.App.4th 1179 (*Benasra*), the Court of Appeal "determined the anti-SLAPP statute did not apply to a former client's suit against a law firm for breach of loyalty. There, the law firm, which previously represented the [client], represented the [client's] opponent in an arbitration proceeding. Although pursuit of arbitration proceedings is a protected activity, the court nonetheless held the breach of loyalty claim did not arise from that activity, reasoning: 'The breach occurs not when the attorney steps into court to represent the new client, but when he or she abandons the old client. . . . In other words, once the attorney accepts a representation in which confidences disclosed by a former client may benefit the new client due to the relationship between the new matter and the old, he or she has breached a duty of loyalty. The breach of fiduciary duty lawsuit may follow litigation pursued against the former client, but does not arise from it. Evidence that confidential information was actually used against the former client in litigation would help support damages, but is not the basis for the claim. . . . [T]heir claim is not based on "filing a petition for arbitration on behalf of one client against another, but rather, for failing to maintain loyalty to, and the confidences of, a client."'" (*Kolar v. Donahue, McIntosh & Hammerton*, *supra*, 145 Cal.App.4th at pp. 1538–1539.)

Similarly, in *Freeman v. Schack* (2007) 154 Cal.App.4th 719 (*Freeman*), "[p]laintiffs sued Schack[, their former attorney,] for breach of contract, professional

negligence and breach of fiduciary duty based on allegations that he had entered into a contract by which he assumed attorney-client duties toward plaintiffs but abandoned them in order to represent adverse interests in the same and different litigation, thus breaching the contract as well as the fiduciary duties owed them." (*Id.* at p. 722.) The trial court granted Schack's anti-SLAPP motion.

The Court of Appeal reversed, stating: "We agree with [the clients] that the principal thrust of the conduct underlying their causes of action is not [their attorney's] filing or settlement of litigation. Stated another way, the 'activity that gives rise to [the attorney's] asserted liability' . . . is his undertaking to represent a party with interests adverse to [his initial clients], in violation of the duty of loyalty he assertedly owed them in connection with the . . . litigation. '[I]f 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.'" (*Freeman*, *supra*, 154 Cal.App.4th at p. 732.)

In *PrediWave Corp. v. Simpson Thacher & Bartlett LLP* (2009) 179 Cal.App.4th 1204 (*PrediWave*), the client, PrediWave Corporation, filed suit against its former counsel, Simpson Thacher & Bartlett (Simpson Thacher) and two of its attorneys, alleging causes of action for breach of fiduciary duty, constructive fraud, legal malpractice, and unfair competition. PrediWave's complaint alleged as follows.

PrediWave's chief operating officer, Jainping "Tony" Qu, defrauded one of PrediWave's customers, New World, by making false representations and withholding material information about PrediWave's products. Qu induced New World to purchase all of the preferred shares of PrediWave and its affiliated companies and to buy PrediWave's defective hardware and software products. Pursuant to the stock purchase agreement, New World appointed two members to PrediWave's board of directors. They became suspicious of Qu's activities when they discovered that the board had approved bonuses exceeding $95 million to Qu, in addition to authorizing other corporate spending for his benefit. The two independent board members began an investigation into Qu's compensation and notified Qu and others of possible

improprieties. Simpson Thacher promptly moved to stop the investigation, filing suit against the two directors in Los Angeles Superior Court, accusing them of breach of fiduciary duty and seeking to enjoin their efforts. Simpson Thacher also applied for a temporary restraining order to prevent the directors from examining PrediWave's books and records. The superior court denied the application.

Eventually, New World filed suit against PrediWave, its affiliated companies, and Qu in Santa Clara Superior Court, alleging fraud, breach of contract, misrepresentation, and breach of fiduciary duty. Qu had "looted" PrediWave of more than $100 million. He had fled the country. He failed to appear for his deposition, a mandatory settlement conference, and the trial. The superior court granted New World's motion for terminating sanctions. Judgment was entered for New World and against PrediWave in the amount of $2.8 billion.

PrediWave alleged that Simpson Thacher had breached its fiduciary duty to the company by failing to disclose Qu's wrongful conduct. Further, Simpson Thacher allegedly committed constructive fraud by not fully disclosing to PrediWave all material facts in the litigation, including conflicts of interest. PrediWave also alleged a cause of action for legal malpractice. Last, the company alleged a violation of the unfair competition law (Bus. & Prof. Code, §§ 17200–17210) based on Simpson Thacher's simultaneous representation of PrediWave and Qu.

Simpson Thacher responded to the complaint with an anti-SLAPP motion, arguing that the causes of action were based upon protected speech and petitioning activity in the underlying lawsuits. The trial court granted the motion.

The Court of Appeal reversed, explaining: "In this case, the principal thrust of PrediWave's causes of action is that [its counsel] simultaneously represented both PrediWave and Qu in matters in which they had an irreconcilable conflict of interest. This conflict of interest allegedly adversely affected [counsel's] choice of legal strategy and caused [them] to aggressively oppose and stonewall New World and its two outside directors on PrediWave's Board in PrediWave's disputes with them and resulted in [counsel's] repeated failures to take action to safeguard PrediWave against Qu's

misconduct. Those multiple failures allegedly included, among others, failing to investigate Qu's conduct, failing to provide to PrediWave's board of directors material information or advice regarding Qu's conduct and regarding the apparent or actual conflict of interest in representing both PrediWave and Qu, and failing to take affirmative action to prevent Qu's self dealing and the associated financial losses to PrediWave. Clearly, [counsel's] continuation of joint representation, their legal strategy and implementing noncommunicative conduct, and their alleged failures to act are not statements or writings within the meaning of section 425.16, subdivision (e). There was no showing that any of [counsel's] allegedly wrongful conduct, not consisting of statements or writings, occurred 'in connection with a public issue or an issue of public interest.' . . .

"Even assuming, as [counsel] assert, PrediWave is seeking to hold them 'liable in damages for litigation activities they allegedly performed on PrediWave's behalf,' this does not necessarily make PrediWave's causes of action subject to the anti-SLAPP statute. Although [counsel] impliedly engaged in speaking and writing in connection with [litigation], [they] engaged in those activities as . . . PrediWave's legal representative. . . . [C]lients do not bring . . . lawsuits [against their former counsel] to deter the speech and petitioning activities done by their own attorneys on their behalf but rather to complain about the quality of their former attorneys' performance. . . .

"In determining the applicability of the anti-SLAPP statute, we think a distinction must be drawn between (1) clients' causes of action against attorneys based upon the attorneys' acts on behalf of those clients, (2) clients' causes of action against attorneys based upon statements or conduct solely on behalf of *different* clients, and (3) *nonclients*' causes of action against attorneys. In the first class, the alleged speech and petitioning activity was carried out by attorneys on behalf of [their clients] in the lawsuits now being attacked as SLAPP's, although the attorneys may have allegedly acted incompetently or in violation of Professional Rules of Conduct. The causes of action in this first class categorically are not being brought 'primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition . . . .' . . .

"We recognize that the [anti-SLAPP] statute makes '[a] cause of action against a person arising from *any act of that person in furtherance of the person's* [constitutional] right of petition or free speech . . . in connection with a public issue . . . subject to a special motion to strike' . . . . Although this statutory language has been interpreted broadly to protect qualifying statements made or conduct undertaken by a person on another person's behalf against a cause of action by a third person . . . , it is unreasonable to interpret this language to include a client's causes of action against the client's own attorney arising from litigation-related activities undertaken for that client. 'The cardinal rule of statutory construction is to ascertain and give effect to the intent of the Legislature. . . . Although a broad interpretation of the anti-SLAPP statute is statutorily mandated . . . , an overly broad interpretation of section 425.16, subdivision (b), that includes such client lawsuits unreasonably expands the language beyond the clear legislative purpose and leads to absurd results." (*PrediWave*, *supra*, 179 Cal.App.4th 1226–1228, citations omitted, some italics added.)

Based on the foregoing authority, we conclude that Jango's cross-complaint against Lavely & Singer did not arise from protected speech or petitioning activity. Rather, it was based on the firm's alleged fraudulent conduct in naming Jango as the sole plaintiff in the suit against the Ritchesons with the intention of pursuing the litigation to benefit Weisman, who had no interest in Jango or any recovery. The firm's alleged breach of the duty of loyalty was, according to Blank, evident at the mediation when he instructed the firm to accept the Ritchesons' settlement offer and the firm refused based on instructions from Weisman. Clients do not sue their former attorneys to deter the speech and petitioning activities performed by their attorneys on their behalf when the clients contest the quality of their attorneys' performance. Consequently, the cross-complaint in this action does not implicate the purpose of the anti-SLAPP statute: It was not brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition.

The firm's reliance on *Fremont Reorganizing Corp. v. Faigin* (2011) 198 Cal.App.4th 1153 (*Fremont*) is misplaced. There, Faigin, an in-house attorney for

Fremont General Corporation (Fremont General) performed legal services for Fremont General and its subsidiaries: Fremont Reorganizing Corporation (FRC) and Fremont Indemnity Company (Fremont Indemnity). Faigin was employed pursuant to a written contract.

In June 2003, the Insurance Commissioner commenced an involuntary liquidation proceeding against Fremont Indemnity, which was declared insolvent. The commissioner was appointed the liquidator. The liquidation court issued an order in July 2003, "prohibiting Fremont Indemnity, its officers, directors, agents, and employees from disposing of or transferring the assets of Fremont Indemnity. The order also directed Fremont Indemnity, its officers, directors, agents, and employees to deliver immediately to the Commissioner all assets and records of Fremont Indemnity in their custody or control and to disclose to the Commissioner the whereabouts of all assets and records not in their custody or control." (*Fremont*, *supra*, 198 Cal.App.4th at pp. 1160–1161.)

On March 12, 2008, Fremont General terminated Faigin's employment, effective immediately. The following day, Faigin contacted the commissioner and informed him that Fremont General and FRC intended to auction artwork that purportedly belonged to Fremont Indemnity. In response, the commissioner initiated an adversary action against Fremont General and FRC in May 2008 in the pending liquidation proceeding. In April 2009, Fremont General and FRC entered into a settlement agreement providing for payment to the commissioner of the proceeds from the sale of the artwork and an additional payment of $5 million.

In January 2009, Faigin filed a wrongful termination action against FRC, alleging breach of the employment agreement, wrongful termination in violation of public policy, and violations of the Labor Code.

In April 2009, FRC filed a cross-complaint against Faigin, alleging that his informing the commissioner on March 13, 2008, about the intended sale of the artwork breached his fiduciary and ethical obligations as an attorney. FRC also alleged that Faigin had failed to preserve his clients' confidences and that his communication with

the commissioner created a conflict of interest between the Fremont entities. For his part, Faigin filed an anti-SLAPP motion, contending that his statements to the commissioner were made in connection with the liquidation proceeding and therefore arose from protected activity under the anti-SLAPP statute. The trial court granted the motion.

The Court of Appeal affirmed in part, concluding that FRC's cross-complaint against Faigin was within the scope of the anti-SLAPP statute. The court stated: "[O]ther cases holding that the anti-SLAPP statute does not apply to a cause of action by a client against the client's own attorney based on litigation-related conduct undertaken on behalf of the client are distinguishable. FRC does not allege that Faigin breached his professional duties *in the course of representing FRC as a client in litigation*. Faigin *did not represent FRC in connection with the liquidation proceeding* at the time of his statements to the Commissioner, and he was *not acting on behalf of FRC in making those statements*. Instead, FRC alleges that Faigin breached his professional duties owed to FRC as a former client by informing the Commissioner that FRC was going to auction artworks purportedly belonging to an insolvent insurer. The concerns expressed in . . . other cases regarding an attorney's representation of a client *in litigation* therefore are inapposite here." (*Fremont*, *supra*, 198 Cal.App.4th at pp. 1171–1172, italics added.)

The court further commented: "Several cases have held that the anti-SLAPP statute was inapplicable in actions by clients against their own attorneys because the gravamen or principal thrust of the particular causes of action did not concern a statement made in connection with litigation, but instead concerned some other conduct allegedly constituting a breach of professional duty. [Citations.] Thus, those courts concluded that any statements made in connection with the litigation were merely incidental to the causes of action. [Citations.] These cases are distinguishable because the gravamen of FRC's counts for breach of confidence, breach of fiduciary duty, and equitable indemnity is that Faigin violated his professional duties owed to his former clients by making the statements to the Commissioner, rather than by some other

conduct. Faigin's *statements* made to the Commissioner *are not merely incidental* to these causes of action." (*Fremont, supra*, 198 Cal.App.4th at p. 1170, fn. omitted, italics added.) The court described *PrediWave* as involving "simultaneous representation of clients with conflicting interests" (*Fremont*, at p. 1170), *Freeman* as concerning "acceptance of representation adverse to the plaintiff" (*ibid.*), and *Benasra* as "stating that the action arose from the acceptance of representation adverse to the plaintiff rather than the litigation conduct that followed" (*ibid.*).

In the present case, Lavely & Singer was representing *both Jango and Weisman simultaneously in litigation* when the conflict of interest and the breach of the duty of loyalty allegedly occurred. Unlike Faigin, who had been terminated when he contacted the commissioner, the firm's alleged wrongful conduct took place *while it was retained by Jango and supposedly acting on its behalf*. And the firm's alleged wrongdoing was based on *various conduct*, not, as in *Fremont*, on *nonincidental statements*. *Fremont* repeatedly distinguished itself from cases like this one, where a client sues a former attorney for simultaneously representing clients in litigation with conflicting interests. (See *Fremont, supra*, 198 Cal.App.4th at pp. 1170, 1171.)

Finally, we lack jurisdiction over that portion of the trial court's order overruling the demurrer because it is not appealable. (See *Fontani v. Wells Fargo Investments, LLC* (2005) 129 Cal.App.4th 719, 735–736, disapproved on another point in *Kibler v. Northern Inyo County Local Hospital Dist*. (2006) 39 Cal.4th 192, 203, fn. 5.) Accordingly, we do not decide whether the trial court should have sustained the demurrer to the causes of action for fraud and rescission.

III

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED.

MALLANO, P.J.

We concur:

CHANEY, J.

JOHNSON, J.