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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

HSIEN LI PENG et al., Plaintiffs and Appellants, v. FREDRICK WILLIAM VOIGTMANN et al., Defendants and Respondents.	B278988, B282880 (Los Angeles County Super. Ct. No. LC103269)

APPEALS from orders of the Superior Court of Los Angeles County, Frank J. Johnson, Judge. Affirmed in part and reversed in part.

WHGC, P.L.C., and Michael G. York for Plaintiffs and Appellants (case Nos. B278988 and B282880).

Kaufman Dolowich & Voluck, Barry Z. Brodsky, and Jodi L. Girten for Defendants and Respondents Fredrick William Voigtmann and Law Office of Fred Voigtmann, P.C. (case Nos. B278988 and B282880).

Ezzati Law and H. Henry Ezzati for Defendants and Respondents Fredrick N. Voigtmann and Concordia Consulting Ltd. (case No. B282880).

Plaintiffs Hsien Li Peng, Shou-En Wang, Chang Wu, Ssu Han Liu, Shwu Shing Wu, Chun-Fang Wu, and Chun-Yi Chen sued (1) Fredrick William Voigtmann (F.W. Voigtmann) and Law Office of Fred Voigtmann, P.C. (collectively, the California defendants), and (2) Fredrick N. Voigtmann (F.N. Voigtmann) and Concordia Consulting Ltd. (collectively, the foreign defendants). The plaintiffs alleged a cause of action for breach of fiduciary duty against all defendants and a second cause of action for fraud against the foreign defendants only.

The California defendants filed an anti-SLAPP motion (Code Civ. Proc., § 425.16)[1] against all plaintiffs other than Chen, which the court granted. The six plaintiffs affected by the order appealed, commencing case No. B278988.

The trial court thereafter granted the California defendants' motion for attorney fees against the same six plaintiffs pursuant to section 425.16, subdivision (c).

The foreign defendants filed motions to quash service of summons for lack of personal jurisdiction, which the trial court granted.

The plaintiffs filed a second notice of appeal, commencing our case No. B282880. As discussed below, we construe this notice as an appeal from both the order granting the California defendants' motion for attorney fees and from the order granting the foreign defendants' motion to quash service of summons. We consolidated case Nos. B278988 and B282880 for purposes of argument and decision.

For the reasons set forth below, we reverse the order granting the anti-SLAPP motion and the order awarding attorney fees to the

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[1] Unless otherwise specified, subsequent statutory references are to the Code of Civil Procedure.

California defendants, and we affirm the order granting the foreign defendants' motion to quash service of summons.

FACTUAL AND PROCEDURAL SUMMARY[2]

Plaintiffs are Taiwanese and Chinese citizens who desired visas to live in the United States under a program known as the EB-5, or immigrant investor, program. The EB-5 program is administered by the U.S. Citizenship and Immigration Services (USCIS), a component of the U.S. Department of Homeland Security. (8 U.S.C. § 1153(b)(5); 8 C.F.R. §§ 100.1, 204.6.) To qualify for an EB-5 visa, plaintiffs were required to invest at least $500,000 in a USCIS-approved "Regional Center." (See 8 C.F.R. § 204.6(m)(4).) Among other requirements, a regional center must "promote economic growth through increased export sales, improved regional productivity, job creation, and increased domestic capital investment." (8 C.F.R. § 204.6(m)(3)(i).)

Velocity Regional Center, LLC (VRC) solicited plaintiffs to participate in a commercial real estate development project that would support EB-5 visa petitions. VRC referred plaintiffs to the foreign defendants—a lawyer and his Taiwan-based firm—for assistance with the EB-5 petition process. The referrals were made pursuant to an arrangement between VRC and the foreign defendants whereby VRC would refer prospective investors to the foreign defendants for immigration assistance, and the foreign defendants would pay referral fees to VRC and promote VRC's EB-5

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[2] In accordance with the standards for evaluating anti-SLAPP motions and our de novo standard of review, our factual summary is based upon the allegations in the operative pleading and the evidence submitted in support of and in opposition to the anti-SLAPP motion. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 291.)

projects to prospective U.S. immigrants. As a result of this relationship, plaintiffs alleged, the foreign defendants' "main loyalty was to VRC."

Plaintiffs paid a $25,000 fee to the foreign defendants, and the foreign defendants agreed to evaluate the plaintiffs' eligibility to participate in VRC's projects, to prepare and file plaintiffs' EB-5 petitions with the USCIS, to adequately monitor the process of the petitions, and to consult with plaintiffs regarding their petitions. The foreign defendants further agreed to render "their 'best professional services and expertise' toward the success of [the plaintiffs'] respective immigration petitions." In reliance on the foreign defendants' experience with U.S. immigration law, plaintiffs each invested at least $500,000 in VRC's EB-5 projects.

The foreign defendants used the California defendants to assist with filing the plaintiffs' EB-5 petitions. Fredrick William Voigtmann—one of the California defendants and the owner of the other California defendant—held himself out to plaintiffs "as an experienced legal and business investment consultant" who acted as "[p]laintiffs' EB-5 immigration attorney" and "as a 'consultant' responsible for remaining informed about the EB-5 project."

In January 2015, the USCIS denied plaintiff Chen's EB-5 petition because (1) there had been a material change in the nature of the EB-5 project after Chen filed her petition, (2) the structure of the limited partnership that VRC had created for the project did not meet applicable requirements, and (3) according to the project's business plan, the project would create fewer jobs than the EB-5 program required. In addition, USCIS stated that the Securities Exchange Commission (SEC) had filed an action against the owners of VRC alleging that the owners had operated investment funds "in Ponzi-like fashion." These allegations, USCIS stated, "cast considerable doubt on the credibility of all projects flowing from [VRC] and its current principals." The plaintiffs alleged that, as a

result of the problems disclosed in the denial of Chen's EB-5 petition, all of the petitions were "doomed to fail from the start."

Plaintiffs filed their operative second amended complaint in May 2016, alleging one cause of action for breach of fiduciary duty against each of the California and foreign defendants, and a second cause of action for fraud against the foreign defendants only. In addition to the facts summarized above, the plaintiffs alleged that the foreign defendants failed to disclose to plaintiffs material facts concerning VRC, including the foreign defendants' relationship with VRC and "substantial irregularities involving VRC . . . of such seriousness that the SEC instituted legal action against VRC's former owners and/or managers." Despite the foreign defendants' knowledge of VRC's "investment-related misfeasance and malfeasance," the foreign defendants "blindly filed the investment-related paperwork [they] received from VRC with the USCIS on Plaintiffs' behalf, without ever advising Plaintiffs as to either [their] direct affiliation with VRC or the fundamental irregularities in VRC's EB-5 Projects." The foreign defendants also allegedly concealed from plaintiffs their intention to use the California defendants to assist in filing their EB-5 petitions.

The California defendants were allegedly aware "that VRC's EB-5 Project was problematic on its face, and/or that it would fail due to mismanagement by VRC that included both questionable and clearly-illegal conduct, and would not, and could not, serve as a viable basis for a final approval of [p]laintiffs' visa petition[s]." The defendants should have advised plaintiffs not to base their EB-5 petitions on VRC's projects.

In support of the breach of fiduciary duty cause of action, plaintiffs further alleged that the defendants breached their fiduciary duty to plaintiffs by: "(a) Engaging in a direct conflict of interest by representing [p]laintiffs as their EB-5 immigration attorney[s] while promoting VRC's EB-5 Projects; (b) failing to

adequately disclose the nature and scope of their relationship with VRC and the conflict created [by that relationship]; (c) failing to communicate to [p]laintiffs, including, [failing to provide] material information about the unsuitability of VRC, the EB-5 Projects, and the deficiencies in the documentation supporting the EB-5 Projects . . . ; [and] (d) failing to keep Plaintiffs updated and informed about significant developments relating to the representation."

The California defendants "provided legal services to certain of the [p]laintiffs [and] owed to such [p]laintiffs a fiduciary duty" "to act in the best interests of [p]laintiffs and to put the interests of [p]laintiffs ahead of the interests of VRC and those associated with VRC." The California defendants were also aware that the foreign defendants were breaching their fiduciary duties to plaintiffs, but "nevertheless gave substantial assistance and/or encouragement to [the foreign defendants] in connection with such tortious conduct."

The California defendants filed their anti-SLAPP motion in June 2016 against each plaintiff except Chen. They supported the motion with declarations by F.W. Voigtmann and F.N. Voigtmann. According to these declarations, F.W. Voigtmann "appear[ed] and submit[ted] documents to the USCIS on behalf of certain [F.N. Voigtmann] clients" during a period of time when F.N. Voigtmann's law license was inactive. F.W. Voigtmann agreed to do so, and did so for Chen and other clients of F.W. Voigtmann, but not for any of the other plaintiffs.

The plaintiffs (other than Chen) opposed the motion on the ground that their breach of fiduciary duty claim did not arise from any acts in furtherance of defendants' right of free speech or petition in a connection with a public issue. They did not address the question whether there was a probability that they would prevail on their claim.

The trial court granted the anti-SLAPP motion on the grounds that (1) defendants established that plaintiffs' cause of action for breach of fiduciary duty arose from an act in furtherance of the right of petition or free speech; and (2) defendants failed to establish a probability that they would prevail on the claim. Accordingly, the court dismissed the California defendants from that cause of action with prejudice as to all plaintiffs except Chen.

In October 2015, the foreign defendants filed motions to quash service of summons based upon lack of personal jurisdiction.

In November 2016, the California defendants filed a motion for an award of attorney fees pursuant to subdivision (c) of section 425.16.

On March 23, 2017, the court granted the foreign defendants' motion to quash service of summons and the California defendants' motion for attorney fees.

DISCUSSION

I. The May 26, 2017 Notice of Appeal

On May 26, 2017, all plaintiffs, including Chen, filed the notice of appeal commencing case No. B282880 on Judicial Council form APP-002. They indicated they were appealing from an order entered on March 23, 2017. The court had entered two orders on that date: (1) the order granting the California defendants' motion for attorney fees as to all plaintiffs other than Chen; and (2) the order granting the foreign defendants' motion to quash service of summons.

A checkbox on the notice of appeal is marked to indicate that the appeal is taken from an order appealable under subdivisions (a)(3) through (a)(13) of section 904.1. These subdivisions cover the order granting the motion to quash service of summons (§ 904.1, subd. (a)(3); *Strathvale Holdings v. E.B.H.* (2005) 126 Cal.App.4th 1241, 1248), but not the order granting the

award of attorney fees. As plaintiffs acknowledge in the opening brief they filed in case No. B282880, the award of attorney fees under the anti-SLAPP motion is appealable under subdivision (a)(2) of section 904.1. (See *Melbostad v. Fisher* (2008) 165 Cal.App.4th 987, 996.) The checkbox for orders appealable under that subdivision is not checked on plaintiffs' notice of appeal.

If we view the notice of appeal in isolation, it appears to initiate an appeal from the order granting the foreign defendants' motion to quash service of summons, and not from the order awarding the California defendants their attorney fees: The notice is filed on behalf of all plaintiffs (including plaintiff Chen, who was not subject to the anti-SLAPP order), the notice uses the singular "order," and the plaintiffs checked a box that covers the granting of the motion to quash and did not check the box that applies to the granting of the motion for attorney fees.

Plaintiffs subsequently filed in this court their case information statement in case No. B282880, which referred to both of the March 23 orders. They also designated for inclusion in the appellate record documents pertaining to both orders. Thereafter, the California defendants filed a respondents' brief addressing the attorney fees award, and the foreign defendants filed a respondents' brief addressing the order granting the motion to quash; each defendant implicitly interpreting the notice of appeal as applying to the orders affecting them. None of the defendants asserted any defect in the notice of appeal.

In the absence of any prejudice to a party, courts construe notices of appeal liberally to protect the right of appeal. (Cal. Rules of Court, rule 8-100(a)(2); *Luz v. Lopes* (1960) 55 Cal.2d 54, 59.) In light of plaintiffs' case information statement, the inclusion in the record of documents pertaining to each of the Marsh 23, 2017 orders, and the absence of any prejudice to the defendants arising from the ambiguous notice of appeal, we construe the notice of

appeal in case No. B282880 as an appeal from each of the March 23 orders.

II. The California Defendants' Anti-SLAPP Motion

Under the anti-SLAPP statute, a defendant in a civil case may move to strike a claim that arises "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." (Code Civ. Proc., § 425.16, subd. (b)(1).) If the challenged claim arises from an act protected by the anti-SLAPP statute, the court should grant the motion "unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (*Ibid.*)

Trial courts evaluate anti-SLAPP motions using a two-step process. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 712.) Under the first step, the defendant must make a threshold showing that the challenged claim arises from activity protected by the anti-SLAPP statute. (*Ibid.*) A claim arises from protected activity when the act underlying the claim is itself an act in furtherance of the right of petition or free speech. (*Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1062-1063 (*Park*).)

The act underlying a claim for purposes of an anti-SLAPP statute is determined from the plaintiff's allegations (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 396), which, at this stage, "we accept as true" (*Central Valley Hospitalists v. Dignity Health* (2018) 19 Cal.App.5th 203, 217 (*CVH*); *Young v. Tri-City Healthcare Dist.* (2012) 210 Cal.App.4th 35, 54). Thus, although courts consider the moving defendant's affidavits, as well as the pleadings, in deciding whether the " 'arising from' requirement" is met (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 79), the defendant may not "[i]gnore what was pleaded" or attempt to characterize the plaintiffs' claims

as claims based on protected activity " 'that has not in fact been specifically alleged.' " (*CVH, supra*, 19 Cal.App.5th at p. 218.)

We review an order granting an anti-SLAPP motion de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.)

The parties do not dispute that the act of filing petitions with the USCIS to obtain EB-5 visas constitutes protected petitioning activity under the anti-SLAPP statute. (Cf. *D'Arrigo Bros. of California v. United Farmworkers of America* (2014) 224 Cal.App.4th 790, 799-800 [statements made in connection with official adjudicatory proceedings before a federal agency are protected under anti-SLAPP statute].) Plaintiffs assert, however, that the filing of the petitions is merely incidental to their claim for breach of fiduciary duty. The acts underlying the claim, they argue, are: (1) representing plaintiffs with a conflict of interest due to defendants' promotion of VRC's EB-5 projects; (2) failing to disclose to plaintiffs the relationship between the defendants and VRC; (3) failing to inform plaintiffs of material information regarding VRC's EB-5 projects, including deficiencies in the projects' documentation; and (4) failing to keep plaintiffs informed about significant developments. These acts and omissions, plaintiffs contend, are not protected activity under the anti-SLAPP statute. We agree.

Generally, "actions based on an attorney's breach of professional and ethical duties owed to a client are not [subject to an anti-SLAPP motion], even though protected litigation activity features prominently in the factual background." (*Castleman*, *supra*, 216 Cal.App.4th at p. 491; accord, *Sprengel v. Zbylut* (2015) 241 Cal.App.4th 140, 151 (*Sprengel*); *Loanvest I, LLC v. Utrecht* (2015) 235 Cal.App.4th 496, 505; *Chodos v. Cole* (2012) 210 Cal.App.4th 692, 702; *Hylton v. Frank E. Rogozienski, Inc.* (2009) 177 Cal.App.4th 1264, 1272.) As one court has explained, the person who sues his or her former attorney "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 [an action by the client] encourages the attorney to petition competently and zealously." (*Kolar v. Donahue, McIntosh & Hammerton* (2006) 145 Cal.App.4th 1532, 1540; see also *PrediWave Corp. v. Simpson Thacher & Bartlett LLP* (2009) 179 Cal.App.4th 1204, 1227 ["clients do not bring such lawsuits 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"].)

Jespersen v. Zubiate-Beauchamp (2003) 114 Cal.App.4th 624 (*Jespersen*), *Freeman v. Schack* (2007) 154 Cal.App.4th 719 (*Freeman*), and *Sprengel, supra*, 241 Cal.App.4th 140, are instructive. In *Jespersen*, Roger Jesperson retained attorneys to defend him in a lawsuit. In the course of that litigation, the attorneys negligently: (1) failed to serve timely discovery responses on Jesperson's behalf; (2) failed to comply with a court order to serve responses without objections; and (3) failed to comply with a second court order. (*Jespersen*, *supra*, 114 Cal.App.4th at p. 631.) As a result of the attorneys' failings, the court ultimately struck Jespersen's answer and entered his default. (*Id.* at p. 628.) Jesperson then sued the attorneys "for litigation related malpractice." (*Id.* at p. 627.) The trial court denied the attorneys' anti-SLAPP motion, and the court of appeal affirmed. The acts upon which the malpractice claim was based, the court explained, "did not consist of any act in furtherance of anyone's right of petition or free speech, but [the attorneys'] negligent failure to do so on behalf of their clients." (*Id.* at p. 631, italics omitted.)

In *Freeman*, the plaintiffs retained attorney David Barry in connection with a class action lawsuit referred to as "*Freeman II*." (*Freeman*, *supra*, 154 Cal.App.4th at p. 723.) Barry entered into a

fee sharing agreement with another attorney, Alexander Schack, who agreed to assist Barry on the case. (*Id.* at pp. 723-724.) Schack subsequently withdrew from his association with Barry and undertook to represent Alan Hemphill, who sought to intervene in *Freeman II* as the representative of a different plaintiff class. (*Id.* at p. 724.) Eventually, Schack filed a separate class action lawsuit on behalf of Hemphill in which he obtained a settlement that excluded the original, Freeman plaintiffs. (*Id.* at p. 725.) The Freeman plaintiffs sued Schack for breach of contract, professional negligence, and breach of fiduciary duty. (*Ibid.*) Schack filed an anti-SLAPP motion, asserting that plaintiffs' claims " 'arose out of petitioning activity, to-wit, it all relates to the two underlying class actions.' " (*Id.* at p. 726.)

The Court of Appeal held that the Freeman plaintiffs' claims were not subject to Schack's anti-SLAPP motion. "There is no doubt," the court stated, that "plaintiffs' causes of action have as a major focus Schack's actions in representing Hemphill in *Freeman II,* filing a new action on Hemphill's behalf and settling Hemphill's action. However, the fact [that] plaintiffs' claims are related to or associated with Schack's litigation activities is not enough. 'Although a party's litigation-related activities constitute "act[s] in furtherance of a person's right of petition or free speech," it does not follow that any claims associated with those activities are subject to the anti-SLAPP statute.' " (*Freeman*, *supra*, 154 Cal.App.4th at pp. 729-730.) The conduct that gave rise to Schack's alleged liability, the court explained, was not his "filing or settlement of litigation," but rather "his undertaking to represent a party with interests adverse to plaintiffs, in violation of the duty of loyalty he assertedly owed them in connection with the [prior] litigation." (*Id.* at p. 732.) Schack's acts in filing and settling the Hemphill litigation, the court added, "are incidental to the allegations of breach of contract, negligence in failing to properly

represent their interests, and breach of fiduciary duty arising from his representation of clients with adverse interests." (*Ibid.*; see also *Benasra v. Mitchell Silberberg & Knupp LLP* (2004) 123 Cal.App.4th 1179, 1189 [anti-SLAPP statute did not apply to client's breach of loyalty claim against former attorney, which arose from attorney's representation of new client with conflicting interest, not from attorney's acts in the new client's arbitration proceeding].)

In *Sprengel*, *supra*, 241 Cal.App.4th 140, Jean Sprengel was one of two members of a limited liability company (LLC). (*Id.* at p. 144.) She alleged that in prior litigation involving a dispute between the LLC's members, the defendant attorneys, who purportedly represented the LLC, actually rendered their services for the benefit of the other LLC member. (*Id.* at pp. 145-146.) In her action against the attorneys, Sprengel alleged that, by representing the LLC, the attorneys owed her the duties that attorneys owe to their clients, and that the attorneys breached these duties by, among other acts, failing to provide reasonable care and skill in undertaking legal services, failing to communicate with Sprengel and inform her of material facts and information, and "engaging in and concealing a conflict of interest." (*Id.* at p. 146.)

In affirming the trial court's denial of the attorneys' anti-SLAPP motion, Division Seven of this court explained that Sprengel's claims were not subject to the anti-SLAPP statute because the attorneys' acts upon which she based her claims were: "undertaking a representation in which they had an irreconcilable conflict of interest; failing to competently represent Sprengel's interests in the underlying litigation; and failing to obtain Sprengel's permission before using her funds to pay for the litigation. Although Sprengel's claims may have been ' " 'triggered by' or associated with" ' [the attorneys'] litigation activities, they do not arise out of those acts. [Citations.] Instead, they arise out

of defendants' breach of professional obligations they allegedly owed to Sprengel as the result of an implied attorney-client relationship arising out of defendants' representation of [the LLC]." (*Sprengel*, *supra*, 241 Cal.App.4th at p. 155.)

The rule developed in this line of cases, among others, applies here. Plaintiffs in the instant case are not suing the California defendants because they filed, or were preparing to file, EB-5 petitions on plaintiffs' behalf, but because the defendants: (1) represented plaintiffs while harboring a conflict of interest arising from the defendants' "very profitable relationship with VRC"; (2) failed to disclose to plaintiffs the relationship between the defendants and VRC; (3) failed to inform plaintiffs of material deficiencies regarding VRC's EB-5 projects; and (4) failed to keep plaintiffs informed about significant developments. As in *Freeman* and *Sprengel*, where the plaintiffs alleged that the defendant attorneys had conflicts of interest and, as in *Jesperson*, where the defendant attorneys failed to competently represent Jesperson in litigation, the acts upon which the instant plaintiffs base their breach of fiduciary duty cause of action do not arise from protected petitioning activity or speech for purposes of the anti-SLAPP statute.

The California defendants' reliance on *Contreras v. Dowling*, *supra*, 5 Cal.App.5th 394 is misplaced. In that case, a tenant asserted that her landlords and a property manager had committed "tenant harassment" against her, and that the landlord's attorney, Curtis Dowling, was liable for aiding, abetting, and encouraging the property manager's unlawful entry into the premises and then concealing evidence of the illegal entries. (*Id.* at pp. 402, 408.) The appellate court concluded that Dowling's allegedly wrongful acts were protected because "all communicative acts performed by attorneys as part of their representation of a client in a judicial proceeding or other petitioning context are per se

protected as petitioning activity by the anti-SLAPP statute." (*Id.* at pp. 408-409.) This statement, however, is subject to the "foundational principle" that the " ' "language of an opinion must be construed with reference to the facts presented by the case, and the positive authority of a decision is coextensive only with such facts." ' " (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1157.) *Contreras* involved a suit by a plaintiff against defendants and *the defendants' attorney* for conduct the attorney took *on the defendants' behalf*. The action was thus similar to a malicious prosecution action, which is subject to an anti-SLAPP motion because, "[b]y definition," it arises from petitioning activity, specifically, "filing a lawsuit." (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 735.) The *Contreras* court's characterization of Dowling's activity as "per se protected" (*Contreras v. Dowling*, *supra*, 5 Cal.App.5th at p. 409) is thus appropriate on its facts; it cannot, however, supplant the rule established by the authorities cited above, which applies to cases, such as the instant case, in which the plaintiff is suing *his or her own attorney or former attorney* for breach of a duty arising from the attorney-client relationship. (See *PrediWave Corp. v. Simpson Thacher & Bartlett LLP, supra*, 179 Cal.App.4th at pp. 1221, 1227 [although the anti-SLAPP statute protects an attorney's "communicative conduct such as the filing, funding, and prosecution of a civil action," it does not apply to a client's claim "against attorneys based upon the attorneys' acts on behalf of those clients"].) We therefore reject the California defendants' reliance on *Contreras*.

The California defendants further contend that the rule we rely upon does not apply in this case because they were not the plaintiffs' attorneys. They supported this contention with F.W. Voigtmann's declaration. At this stage, however, " '[t]he question is what is pled—not what is proven.' " (*CVH, supra*,

19 Cal.App.5th at p. 217, quoting *Comstock v. Aber* (2012) 212 Cal.App.4th 931, 942.) Although it does not appear from the second amended complaint that the plaintiffs had expressly retained the California defendants, the attorneys the plaintiffs did retain—the foreign defendants—allegedly "use[d]" the California defendants "to substantially assist and facilitate" the preparation and filing of the EB-5 petitions. F.W. Voigtmann, the individual California defendant, was allegedly "an attorney hired as a 'consultant' responsible for remaining informed about the EB-5 project" and acted as "[p]laintiffs' EB-5 immigration attorney." This informal relationship, resulting from the California defendants' association with the foreign defendants, may be sufficient to establish an attorney-client relationship between the plaintiffs and the California defendants. "Although the [attorney-client] relationship usually arises from an express contract between the attorney and the client, it may also arise by implication. [Citations.] ' "Neither contractual formality nor compensation nor expectation of compensation is required." ' [Citations.] [¶] The relationship may arise without any direct dealings between the client and the attorney," and may arise " 'from a simple *association* for a particular case.' [Citations.]" (*Streit v. Covington & Crowe* (2000) 82 Cal.App.4th 441, 444-445.)

Moreover, the argument that the California defendants were not the plaintiffs' attorneys misses the mark. Even if we credit the California defendants' evidence that they have no relationship with the relevant plaintiffs, such evidence does not demonstrate that plaintiffs' claims arise from allegations of protected activity. (See *Baral v. Schnitt*, *supra*, 1 Cal.5th at p. 396.) As discussed above, the allegations supporting plaintiffs' claims for relief are defendants' representation of plaintiffs while harboring a conflict of interest and their failure to disclose material information regarding VRC and the EB-5 projects. The California defendants

were thus required to show that such activity is protected under the anti-SLAPP statute. Although the fact, if proven, that the California defendants did not represent plaintiffs or had any duty to disclose the undisclosed information may well defeat plaintiffs' claims for relief, that fact does not establish that the alleged activity upon which the plaintiffs' claims are based is protected activity.

The *Sprengel* decision is again instructive. In that case, the appellate court rejected the defendants' argument that there was " 'no evidence that an attorney-client relationship was ever created between Sprengel and [defendants]." (*Sprengel*, *supra*, 241 Cal.App.4th at p. 156.) The court stated, in language that applies equally here, that the "[d]efendants' arguments regarding the absence of an attorney-client relationship with Sprengel improperly conflate[s] the first and second prongs of the [anti-SLAPP analysis]. 'The sole inquiry' under the first prong of the test is whether the plaintiff's claims arise from protected speech or petitioning activity. [Citation.] In making this determination, '[w]e do not consider the veracity of [the plaintiff's] allegations [citation] nor do we consider '[m]erits based arguments.' [Citation.]" (*Ibid.*) "Whether Sprengel actually shared an attorney-client relationship with defendants," the court concluded, "relates to the merits of her claims and is therefore not relevant to our first prong analysis." (*Id.* at p. 157.) As in *Sprengel*, the California defendants may ultimately defeat the plaintiffs' claims "by proving the absence of an attorney-client relationship, [but] that does not alter the substance of [plaintiffs'] claims." (*Ibid.*)

For the foregoing reasons, we conclude that the plaintiffs' breach of fiduciary cause of action against the California defendants does not arise from protected activity under the anti-SLAPP statute, and the court therefore erred in granting the California defendants' motion.

Because we reverse the order granting the anti-SLAPP motion, the order awarding the California defendants their attorney fees is also reversed. (*Graffiti Protective Coatings, Inc. v. City of Pico Rivera* (2010) 181 Cal.App.4th 1207, 1225.)

III. The Order Granting the Foreign Defendants' Motion to Quash

Plaintiffs opening brief in case No. B282880 addresses only the order granting the California defendants' motion for attorney fees; it does not mention the order granting the foreign defendants' motion to quash service of summons.

The foreign defendants filed a respondents' brief in which they argued that plaintiffs have abandoned their appeal as to the order granting their motion to quash.

Plaintiffs did not file a reply brief or otherwise respond to the foreign defendants' argument.

We agree with the foreign defendants that the plaintiffs have abandoned the appeal from the order granting the motion to quash, and therefore affirm that order. (See *County of Kern v. Dillier* (1999) 69 Cal.App.4th 1412, 1425 [failure to present argument or authority in appellate brief may be deemed an abandonment of appeal].)

DISPOSITION

The order granting the anti-SLAPP motion by the California defendants—Fredrick William Voigtmann and Law Office of Fred Voigtmann, P.C.—is reversed.

The order granting the California defendants' motion for an award of attorney fees is reversed.

The order granting the motion by the foreign defendants—Fredrick N. Voigtmann, and Concordia Consulting Ltd.—to quash service of summons is affirmed.

Plaintiffs Hsien Li Peng, Shou-En Wang, Chang Wu, SSU Han Liu, Shwu Shing Wu, and Chun-Fang Wu shall recover their costs on appeal from the California defendants.

The foreign defendants shall recover their costs on appeal from plaintiffs.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

BENDIX, J.

CURREY, J.*

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