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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

ZHAO HUI SHI et al., Plaintiffs and Appellants, v. WOLFSDORF ROSENTHAL, LLP et al. Defendants and Respondents.	B290792 (Los Angeles County Super. Ct. No. BC662775)

APPEAL from a judgment of the Superior Court of Los Angeles County, David S. Cunningham III, Judge. Affirmed, in part, and reversed, in part.

Law Offices of Steven P. Scandura and Steven P. Scandura; Howard Posner, for Plaintiffs and Appellants.

Haight Brown & Bonesteel, Valerie A. Moore, Jennifer K. Saunders, for Defendant and Repondent Wolfsdorf Rosenthal, LLP.

Kaufman Dolowich Voluck, Andrew J. Waxler, Jennifer E. Newcomb, for Defendant and Respondent Miller Mayer LLP.

Named plaintiffs and appellants, Zhao Hui Shi and Jun Lu, are members of a class of 54 investors (plaintiffs) who each lost $500,000, after investing in Pacific Proton Therapy Center, LLC (Pacific Proton) and its proposed Beverly Proton Center, LLC (Beverly Proton), as part of the EB-5 Immigrant Investor Program. Plaintiffs sued two law firms allegedly involved in the investment scam, defendants and appellants Wolfsdorf Rosenthal, LLP (Wolfsdorf) and Miller Mayer, LLP (Miller), claiming fraud, negligent misrepresentation, and entitlement to treble damages and attorney fees for violation of Penal Code section 496 (Pen. Code, § 496, subd. (c)).[1] Plaintiffs appeal the trial court's order granting defendants' special motions to strike under

[1] Plaintiffs also alleged legal malpractice as to Wolfsdorf, however that claim is not at issue in this appeal.

Code of Civil Procedure section 425.16,[2] commonly known as anti-SLAPP motions,[3] as to all three causes of action.

Plaintiffs argue that their claims (1) were not based on, and do not arise from, activity protected under section 425.16; and (2) have the requisite minimal merit necessary to survive a special motion to strike.

We conclude plaintiffs' causes of action against Miller were not based on, and do not arise from, an exercise of the constitutional rights of petition or free speech protected under section 425.16, subdivision (e). With respect to Wolfsdorf, however, the allegations arise from the firm's prosecution of plaintiffs' visa applications, and Wolfsdorf has made a prima facie showing that prosecution of visa petitions with the USCIS is protected activity. We further conclude that plaintiffs cannot meet their burden of establishing their claims have the requisite minimal merit, as there is nothing in plaintiffs' pleadings or accompanying documents that ties Wolfsdorf to the wrongdoing alleged in the first amended complaint or demonstrates that the firm

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[2] All future statutory references are to the Code of Civil Procedure unless otherwise indicated.

[3] "A special motion to strike under section 425.16—the so-called anti-SLAPP statute—allows a defendant to seek early dismissal of a lawsuit that qualifies as a SLAPP. 'SLAPP is an acronym for "strategic lawsuit against public participation."' (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, fn. 1.)" (*Nygard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1035.)

was aware of the scam. We therefore reverse the trial court's judgment with respect to the allegations against Miller, but affirm as to the allegations against Wolfsdorf.

FACTS AND PROCEDURAL HISTORY

The First Amended Complaint

The operative first amended complaint alleged as follows: Plaintiffs wished to invest in the EB-5 Immigrant Investor Program administered by U.S. Citizenship and Immigration Services (USCIS), which promotes economic growth in the United States by granting visas to foreign investors. Immigrants who have invested or are in the process of investing $500,000 in a targeted employment area in a new commercial enterprise that will benefit the U.S. economy and create at least 10 full-time positions for qualifying employees may be eligible for conditional permanent residency status under the program. The commercial enterprise must either be, or be affiliated with, an entity designated as a "regional center" to administer EB-5 investment projects by the USCIS.

Charles C. Liu founded Pacific Proton, which would purportedly develop Beverly Proton, a proton therapy cancer treatment center in Southern California. Beverly Proton would be funded by eligible EB-5 immigrant investors. Liu also formed the Pacific Proton EB-5 Fund, LLC (EB-5 Fund), into which foreign investors would make EB-5 eligible

investments. On June 28, 2012, the USCIS approved Liu's Form I-924, the form application to designate Pacific Proton as an EB-5 regional center.

Between October 2014 and April 2016, plaintiffs each invested $500,000 in limited liability company funds in the EB-5 Fund. The total investment from all investors was at least $26,967,918. Each investor was provided a May 2013 Private Offering Memorandum (POM), which set forth the terms of the investment and emphasized the crucial roles of both Liu and Dr. John Thropay, a radiation oncologist, to the project. The POM and other marketing materials were materially misleading. The POM represented that capital contributions would only be used to fund development and operation of Beverly Proton; administrative fees would be utilized to pay commissions and offering expenses.

Liu, his wife Lisa Wang, and Dr. Thropay conspired to create the appearance that Beverly Proton was a legitimate project. Liu had a 75 percent ownership interest in Beverly Proton; Dr. Thropay had a 25 percent ownership interest. Liu was paid a salary of $350,000 by Pacific Proton, and $200,000 by the EB-5 Fund. Liu gave Dr. Thropay $680,000, and spent $300,000 improving a parcel of land that Dr. Thropay owned, although Dr. Thropay did not perform any work for Beverly Proton. They never intended that the cancer center be built, but instead used it as a pretext to defraud plaintiffs of their investments. Liu and Wang were aided and abetted in their fraudulent venture by many

professionals, including defendants, whose participation gave the project a veneer of legitimacy.

Miller was "retained by the perpetrators of the fraud to prepare the documents used to lure in . . . [p]laintiffs and to create the appearance of a legitimate EB-5 program. . . . [Miller] knew of the fraudulent scheme to steal money by false pretenses from potential immigrants, or should have known of said scheme but for their willful ignorance, and nonetheless assisted the perpetrators knowing that plaintiffs' money would be stolen." It prepared the POM knowing that it would be presented to potential investors like plaintiffs as marketing material.

Wolfsdorf was retained by approximately 35 of the plaintiffs to prosecute immigration petitions on their behalf. Wolfsdorf either knew of the scheme to defraud potential immigrants or should have known but for their willful ignorance, or negligently and recklessly ignored the high probability that its clients' money would be stolen, yet allowed and encouraged plaintiffs to invest in the scheme. "[E]ach . . . [p]laintiff was referred to [Wolfsdorf] by the perpetrators of the fraud. . . . [N]one (or nearly none) of the . . . [p]laintiffs ever met [with Wolfsdorf attorneys], and . . . each . . . [p]laintiff was assigned a lawyer by the perpetrators of the fraud. [Wolfsdorf] knew that [it was] receiving clients *en masse* by the opposing party in the transactions, and therefore [was] aware of [its] heightened ethical duty to investigate the circumstances of the retention and the ethical duty to conduct due diligence to insure that the

representation was not being obtained for an improper purpose (which in fact is was). In short, [Wolfsdorf] [was] paid hundreds of thousands of dollars . . . for taking . . . clients in bulk by the perpetrators of a scam which should have been obvious to [Wolfsdorf], without meeting the clients and without doing any basic due diligence, and all the while purposely limiting [its] own duties to [its] clients to exclude any responsibility to investigate the legitimacy of the underlying transaction. In so doing, [Wolfsdorf] violated ethical standards and improperly limited the scope of [its] representation so as to allow [it] to keep making money off the scheme without having to report anything negative to [its] clients which might scare them off."

"The documents drafted by [Wolfsdorf] contained no real safeguards to protect investors, and basically left the door wide open to allow the thieves to steal the money. . . . [Wolfsdorf] allowed [its] clients' money to be released directly to the perpetrators' enterprise without restrictions such as escrow accounts or rudimentary controls. . . . [Wolfsdorf did not] communicate[] to any of [its] clients the fact that the enterprise lacked basic capital controls and that no mechanisms were in place to protect their money."

Little, if any, work was performed on the project. In 2015, invested funds were used to demolish a building Dr. Thropay owned, which inured solely to his benefit. Liu and Wang diverted almost $21.1 million from the EB-5 Fund for personal use and to pay overseas marketers. By June 3, 2016, only $234,899.19 of the original $26.9 million

contributed by foreign investors remained, despite this total lack of progress.

As relevant here, plaintiffs alleged causes of action in fraud, negligent misrepresentation, and entitlement to treble damages and attorney fees for violation of Penal Code section 496 (Pen. Code, § 496, subd. (c)) against defendants.

With respect to Miller, plaintiffs claimed that Miller conspired with Liu and the other defendants to give an air of legitimacy to the project and drafted documents that it knew would be used to take plaintiffs' money. Miller did so although it knew or should have known that the investment was not real and "all of the representations in the POM were essentially fraudulent." Miller was "fully aware that their representations would be conveyed to persons such as [p]laintiffs through the POM." Plaintiffs reasonably relied on the POM. As a direct and proximate result of the representations in the POM and Miller's failure to alert plaintiffs to the fraud, plaintiffs each lost over $500,000. Miller acted with a conscious disregard for plaintiffs rights, entitling plaintiffs to punitive damages. Miller received money for its involvement.

Plaintiffs claimed that Wolfsdorf conspired in the fraud. Plaintiffs were referred to Wolfsdorf specifically because it had experience with the Beverly Proton project and could vouch for its viability and legitimacy. Wolfsdorf knew that these representations would be conveyed through their representation, but did not express any doubts to plaintiffs. Plaintiffs relied on these representations and

Wolfsdorf's credibility when deciding to invest. Wolfsdorf failed to place certain protections in the relevant documents, did not conduct even rudimentary investigations on plaintiffs' behalf, did not advise plaintiffs of potential concerns, and purposefully limited its own liability. As a direct and proximate result of these actions, plaintiffs each lost over $500,000. Wolfsdorf acted with a conscious disregard for plaintiffs rights, entitling plaintiffs to punitive damages. Wolfsdorf received money for its involvement.

Special Motions to Strike

Miller

Miller moved to strike as to all three causes of action. It argued that the first amended complaint was based on constitutional protected activity it took on its client's behalf—submitting an application to the USCIS for the right to operate as a regional center under the EB-5 immigration program. Miller argued that the filing of the application was protected under section 425.16, subdivisions (e)(2) and (e)(4). It asserted that the lawsuit lacked minimal merit, because it made no representations to plaintiffs, had no duty to make representations, and had no knowledge of the alleged wrongdoing until after its work was completed. Moreover, plaintiffs were attempting to hold it liable for conspiracy with its client Liu, but failed to comply with Civil Code section 1714.10. Failure to comply required complete

dismissal of their claims. Miller filed a request for judicial notice of documents in *SEC v. Charles C. Liu et al.*, United States District Court, Central District of California, Case No. 8:16-cv-00974-CJC-AGR, in support of its motion.

Wolfsdorf

Wolfsdorf also moved to strike as to all three causes of action. It argued that the first amended complaint was designed to deter it from engaging in constitutionally protected activities of its clients in the form of preparing and filing their immigration visa petitions. This activity was protected under section 425.16, subdivisions (e)(1), (e)(2), and (e)(4). It argued that plaintiffs could not demonstrate minimal merit. The named plaintiffs lacked standing—they were not clients of Wolfsdorf and had no connection to the firm whatsoever. Plaintiffs did not discover Wolfsdorf's involvement until August 2017, well after their decisions to invest, and thus could not have relied on its participation in determining the investment was legitimate. As another bar to the action, the attorney-client privilege between Wolfsdorf and its non-party clients would prevent Wolfsdorf from presenting a meaningful defense. Finally, plaintiffs' first amended complaint failed to state facts to support any of the causes of action against it. Wolfsdorf filed a request for judicial notice of documents in *SEC v. Charles C. Liu et al.*, United States District Court, Central District of California, Case No. 8:16-cv-00974-CJC-AGR, in support of its motion.

Oppositions to Special Motions to Strike

Miller

Plaintiffs opposed Miller's motion to strike, arguing that, although the acts of advising Liu and submitting applications to the USCIS might be conditionally privileged, creating documents that an attorney believes will be used to commit a fraud and turning a blind eye to that fraud are not protected. The cause of action for entitlement to treble damages and attorney fees for violation of Penal Code section 496 cannot be the subject of an anti-SLAPP because the receipt of money is not a protected act. The causes of action have the requisite merit.

Wolfsdorf

Plaintiffs opposed Wolfsdorf's motion to strike, arguing that the anti-SLAPP statute did not apply because the conduct alleged in the first amended complaint was not presentation of their visa petitions, but rather aiding and abetting fraud, malpractice, negligent ratification of the project, and retention of funds procured by fraud—none of which fall under the statute. Plaintiffs argued they were injured by Wolfsdorf's actions even if they were not direct clients, and therefore have standing. The anti-SLAPP statute does not protect conduct that is not communicative. Plaintiffs' claims did not concern anything that Wolfsdorf

said in the petitions it filed, but rather Wolfsdorf's willful ignorance of the fraud and its representation of clients en masse, which assisted in keeping the fraud hidden. Wolfsdorf neglected to advise plaintiffs of obvious risks. Retention of funds obtained by fraud is not a form of communication. With respect to the merits, there was evidence that Wolfsdorf's willful blindness amounted to aiding and abetting. Plaintiffs alleged that documents from *SEC v. Charles C. Liu et al.*, United States District Court, Central District of California, Case No. 8:16-cv-00974-CJC-AGR, attached to its concurrently-filed request for judicial notice provided ample evidence to support plaintiffs' causes of action.

Trial Court's Rulings

The trial court granted Miller's and Wolfsdorf's anti-SLAPP motions as to all three causes of action.

It also granted the parties' requests for judicial notice of the existence and effect of *SEC v. Charles C. Liu et al.*, United States District Court, Central District of California, Case No. 8:16-cv-00974-CJC-AGR, but emphasized that disputable assertions of fact are not judicially noticeable.

DISCUSSION

"'Code of Civil Procedure section 425.16 sets out a procedure for striking complaints in harassing lawsuits that

are commonly known as SLAPP suits . . . , which are brought to challenge the exercise of constitutionally protected free speech rights.' [Citation.] A cause of action arising from a person's act in furtherance of the 'right of petition or free speech under the [federal or state] 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 claim will prevail. (§ 425.16, subd. (b)(1).)" (*Sweetwater Union High School Dist. v. Gilbane Building Co*. (2019) 6 Cal.5th 931, 940 (*Sweetwater*).) An "'act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in 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).)

Arguments

With respect to the first prong of the analysis, plaintiffs contend that their claims against Miller arise from its action of "draft[ing] the fraudulent private investment documents used to bait [them]," and that their claims against Wolfsdorf arise from its "process[ing] the majority of [plaintiffs'] matters without asking questions, reviewing key documents, or alerting their clients to the repeated thefts of money," neither of which is protected conduct under the anti-SLAPP statute.

Defendants view the first amended complaint differently, and argue that plaintiffs' claims arise from protected conduct. Miller contends that the claims against it arise from its drafting and presentation of Pacific Proton's application materials to the USCIS. Wolfsdorf argues that the claims against it arise from its prosecution of immigration petitions on its clients' behalf.

We share plaintiffs' view of the allegations contained in the first amended complaint as to Miller, and agree that the activity from which their claims against it arise is not protected under section 425.16. We therefore conclude that the trial court erred in granting Miller's anti-SLAPP motion, and reverse the judgment as to those claims. We affirm with respect to Wolfsdorf, however, as plaintiffs' claims against it arise from prosecution of its clients' Form I-526 petitions for permanent residency, which is petitioning activity protected

by the anti-SLAPP statute, and plaintiffs have failed to show that their claims possess the requisite minimal merit.

Legal Principles

"Section 425.16 posits . . . a two-step process for determining whether an action is a SLAPP. 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).) '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)' (*Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1043). If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim. (§ 425.16, subd. (b)(1); see generally *Equilon* [*Enterprises v. Consumer Cause, Inc.* (2002)] 29 Cal.4th [53,] 67.)" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.) "Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." (*Id.* at p. 89.) "'We review de novo the grant or denial of an anti-SLAPP motion.' [Citation.]" (*Sweetwater*, *supra*, 6 Cal.5th 931 at p. 940.)

The act underlying a claim for purposes of an anti-SLAPP statute is determined from the plaintiffs' 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). We will not "'insert into a pleading claims for relief based on allegations of activities that plaintiffs simply have not identified, even if the parties suggest on appeal how plaintiffs might have intended to frame those claims or attempt to identify the specific conduct or assertions of statements alleged to be false on which plaintiffs intended to base such claims for relief. It is not our role to engage in what would amount to a redrafting of the first amended complaint in order to read that document as alleging conduct that supports a claim that has not in fact been specifically alleged, and then assess whether the pleading that we have essentially drafted could survive the anti-SLAPP motion directed at it.'" (*CVH*, *supra*, 19 Cal.App.5th at p. 218, quoting *Medical Marijuana, Inc. v. ProjectCBD.com* (2016) 6 Cal.App.5th 602, 621, fn. omitted.)

"'"[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. [Citation.] . . . In the anti-SLAPP context, the critical consideration is whether the cause of action is *based on* the defendant's protected free speech or petitioning activity.'" [Citation.]" (*Turnbull v. Lucerne Valley Unified School Dist.* (2018) 24 Cal.App.5th 522, 529 (*Turnbull*).) "[Courts] focus upon the 'activity that gives rise to [the

defendant's] asserted liability.' [Citations.]" (*Freeman v. Schack* (2007) 154 Cal.App.4th 719, 733 (*Freeman*).)

"[M]erits based arguments have no place in our threshold analysis of whether plaintiffs' causes of action arise from protected activity. Where [the defendant] cannot meet his threshold showing, the fact he 'might be able to otherwise prevail on the merits under the "probability" step is irrelevant.' [Citation.]" (*Freeman*, *supra*, 154 Cal.App.4th at p. 733.) However, "'[a] defendant need not prove that the challenged conduct is protected by the First Amendment as a matter of law; only a prima facie showing is required.' [Citation.]" (*People ex rel. Fire Ins. Exchange v. Anapol* (2012) 211 Cal.App.4th 809, 822.)

With the second prong of the anti-SLAPP analysis, "the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success." (*Baral v. Schnitt*, *supra*, 1 Cal.5th at p. 384.) At this stage, we consider "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based." (§ 425.16, subd. (b)(2).) The plaintiff may rely on affidavits and transcripts of testimony in court proceedings made under penalty of perjury in California. (*Sweetwater, supra*, 6 Cal.5th at pp. 942, 945). Plaintiffs are required to have "'"'stated and *substantiated* a legally sufficient claim.'" [Citation.]' . . . [Citation.]" (*Steed v. Department of Consumer Affairs* (2012) 204 Cal.App.4th 112, 120).

Analysis

Miller

Miller contends that the harm underlying plaintiffs' claims is its protected activity of preparing and filing Pacific Proton's Form I-924 application. It argues that if the drafted documents had not first been submitted to USCIS, plaintiffs would not have suffered harm. It asserts that its "sole purpose of the drafting was to obtain approval and designation of the regional center by USCIS. If there was no such designation by USCIS there would not have been—years later—a solicitation of investors (done by third-parties), and a decision to invest (where they were represented by separate counsel), or any other activity for [plaintiffs] to complain about."

Miller's contention mischaracterizes the allegations in the first amended complaint. The gravamen of plaintiffs' claims with respect to Miller is not that Miller included the POM in the application that it filed with the USCIS, but that Miller drafted the POM either knowing or turning a blind eye to the fact that Beverly Proton was a scam, and knowing that the POM would be presented to plaintiffs as marketing material. The protected activity is merely incidental. In fact, the harm to plaintiffs occurred years after the application was filed, when plaintiffs were presented with the POM as a means of inducing them to invest. (See *Turnbull*, *supra*, 24 Cal.App.5th at p. 529 [fact that an

action was filed after protected activity took place is not dispositive].) Plaintiffs alleged that they relied on the fraudulent representations in the POM in making the decision to invest, and suffered the loss of $500,000 each as a result of their reliance.

We do not consider Miller's arguments with respect to the merits of the allegations at this stage in the analysis. However, in arguing that the POM Miller drafted was materially altered without Miller's approval after being submitted as part of Pacific Proton's form application to the USCIS, Miller implicitly acknowledges that the harm alleged is that the plaintiffs were given the POM and relied upon it, *not* that the POM or some iteration of it had been previously filed with the USCIS. It is entirely possible that Miller will be able to demonstrate that the POM complained of was materially different from the POM it drafted, and that it is therefore not liable for damages to plaintiffs. But the merits of a claim are irrelevant when evaluating whether the harm alleged was protected activity. We therefore reverse the trial court's judgment with respect to Miller.

Wolfsdorf

Wolfsdorf first contends that the harm underlying plaintiffs' claims is its prosecution of its clients' Form I-526 petitions for permanent residency, which is protected activity under section 425.16, subdivision (e). We agree.

The first amended complaint identifies Wolfsdorf as having been "retained by about 35 Class Plaintiffs to prosecute immigration petitions on their behalf." It does not allege that the firm was retained for any other purpose. The allegations against the various defendants are not well-differentiated, but it appears that the wrong Wolfsdorf is alleged to have committed in each cause of action is being referred to clients by the opposing party for the limited role of "drafting the documents and petitions needed to consummate the fraud." The gravamen of the claims is therefore the prosecution of I-526 visa petitions with the USCIS, a government agency, for its consideration. We conclude that Wolfsdorf has made a prima facie showing of petitioning activity under section 425.16, subdivisions (e)(1) and (2), which protect "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, [and] (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," respectively.

Accordingly, the burden shifts to plaintiffs to demonstrate that their claims have minimal merit. Although the parties have devoted significant time to arguing whether documents that plaintiffs sought to have judicially noticed in an SEC case against Liu and Wang were properly judicially noticed, and whether the facts contained in the affidavits and transcripts were judicially noticeable, it

is not necessary for us to decide those questions, as we conclude that, even if we were to consider the documents at issue, plaintiffs have not demonstrated minimal merit.

To sustain their burden on the second prong on their fraud claims, plaintiffs must show "'(1) misrepresentation (false representation, concealment, or nondisclosure); (2) knowledge of falsity . . . ; (3) intent to defraud . . . ; (4) justifiable reliance; and (5) resulting damage.' [Citations.]" (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) Negligent misrepresentation is a "species of fraud" and, like fraud, requires a showing of misrepresentation, justifiable reliance, and damage. (*Wilson v. Century 21 Great Western Realty* (1993) 15 Cal.App.4th 298, 306.) Penal Code section 496 provides for recovery of treble damages (Pen. Code, § 496, subd. (c)) against any person "who buys or receives any property that has been stolen or that has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds, or aids in concealing, selling, or withholding any property from the owner, knowing the property to be so stolen or obtained."[4] (Pen. Code, § 496, subd. (a).)

Our review of the pleadings and the relevant documents, including documents excerpted from the SEC case, discloses nothing to connect Wolfsdorf to the alleged wrongdoing. There is simply no evidence that Wolfsdorf's actions went beyond the bare act of prosecuting visa

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[4] We express no opinion as to whether section 496 applies to this case.

petitions, that Wolfsdorf agreed to provide services beyond the prosecution of visas, that Wolfsdorf made any false representations to plaintiffs, or that Wolfsdorf either had, or should have had, knowledge of a scam. Because the pleadings and accompanying documents do not contain facts tending to show that Wolfsdorf was involved in, or in any way aware of, the Beverly Proton scam, we affirm the trial court's judgment with respect to plaintiffs' claims against it.

DISPOSITION

The judgment is reversed as to the claims against Miller, and the trial court is directed to enter an order denying Miller's section 425.16 special motion to strike. We affirm the judgment with respect Wolfsdorf. Plaintiffs are to recover their costs on appeal relating to the claims against Miller. Wolfsdorf is to recover its costs relating to plaintiffs' claims against it.

MOOR, J.

WE CONCUR:

RUBIN, P. J.

KIM, J.