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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

DEUK LEE et al., Cross-complainants and Respondents, v. HITEJINRO CO., LTD., et al., Cross-defendants and Appellants.	B280923 (Los Angeles County Super. Ct. No. BC558271)

APPEAL from an order of the Superior Court of Los Angeles County, Elizabeth Allen White, Judge. Affirmed.

Quinn Emanuel Urquhart & Sullivan, Christopher Tayback, Michael L. Fazio, and Daniel H. Bromberg for Cross-defendants and Appellants.

Bird, Marella, Boxer, Wolpert, Nessim, Drooks, Lincenberg & Rhow, Thomas R. Freeman, Ekwan E. Rhow, and Emerson H. Kim for Cross-complainants and Respondents.

Appellants HiteJinro Co., Ltd. (HiteJinro), and its Chairman Mon Deuk Park (Park) filed a motion under California's anti-SLAPP statute (Code Civ. Proc., § 425.16) to strike causes of action alleged in the fifth amended cross-complaint filed by respondents Hite USA (HUSA) and Deuk Lee (Lee).[1] The trial court denied the motion on the grounds that the challenged causes of action did not arise from conduct protected by the anti-SLAPP statute. We agree with the trial court and affirm the order.

FACTUAL AND PROCEDURAL SUMMARY

HiteJinro is a Korean corporation that produces Hite brand beer and Jinro brand soju. Park is its chairman. HiteJinro imports its beer and soju into the United States through its subsidiary, Jinro America, Inc. (JAI).

Between 1988 and 2011, Lee was an employee of HiteJinro or a predecessor or affiliate of HiteJinro. From 2006 to 2010, he was the president of JAI.

In 2003, Lee formed, and has since operated, HUSA, which distributes HiteJinro products in the United States.

In 2007, HUSA and JAI entered into distributorship agreements that gave HUSA the exclusive right to distribute HiteJinro's beer, and a nonexclusive right to distribute HiteJinro's soju, in the United States. The distributorship agreements provide that they "may not be terminated without cause," as defined in the agreements. The agreements state that they have a term of four

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[1] SLAPP is an acronym for "strategic lawsuit against public participation." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 57.)

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

years and, at the end of each term, "shall be renewed automatically for additional periods of 4 years."[2]

In April 2011, Park and Lee discussed the possibility of a long-term consultancy agreement between Lee and JAI, as well as amendments to the distributorship agreements that would include expansion of HUSA's soju territory to include Washington and Oregon. Park told Lee that he would instruct JAI to retain Lee as a consultant and to expand HUSA's territory under the soju distributorship agreement. Park represented that JAI had the authority to enter into such agreements, and he instructed Lee to "consummate agreements with JAI consistent with [Park's] statements."

In September 2011, Lee entered into a consultancy agreement with JAI. Under the agreement, JAI agreed to provide certain benefits to Lee and to pay Lee "incentive compensation" of one percent of JAI's gross sales for each year that JAI's "gross sales exceeds [$20 million]." The agreement would remain in effect through 2022 and could be cancelled only with cause. If the agreement was cancelled for any reason, JAI would be obligated to pay Lee an amount equal to his most recent, pre-resignation salary through 2022, plus the incentive compensation.

In December 2011, JAI and HUSA amended their distributorship agreements. Among other changes, the termination provisions were modified to read: " 'This Agreement may not be terminated, amended, or modified without cause. If [JAI] and/or

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[2] The parties dispute whether the distributorship agreements shall be renewed in perpetuity unless terminated for cause. The trial court resolved this dispute when it granted HiteJinro's motion for summary adjudication of a declaratory relief cause of action, stating that "a party could choose to notify the other party that the current 4-year term would be permitted to expire, instead of renew, without cause."

HiteJinro, with or without cause, amends, cancels, terminates, modifies or fails to renew this Agreement, or withholds consent to any assignment, transfer or sale of [HUSA's] business assets or its rights under this Agreement, [JAI] and/or HiteJinro shall pay for all damages provided by law, including but not limited to, lost profits, just compensation for [HUSA's] efforts in building up the goodwill, brand awareness, and sales of Products since January 2003 [for Hite products and May 2006 for Jinro products], as well as [HUSA's] then fair market value, including distribution rights, which have been lost or diminished as the result of [JAI's] and/or HiteJinro's actions.' " The amendments purport to bind HiteJinro, as well as the signators, JAI and HUSA.

Beginning in July 2014, HiteJinro and JAI began to implement a "scheme to slowly rid itself of . . . Lee and the [HUSA] distributorship." Pursuant to this scheme, HiteJinro informed Lee and HUSA that it was commencing an investigation of JAI's finances and JAI's relationships with its United States distributors. HiteJinro and JAI then ceased shipments of beer and soju to HUSA and instructed HUSA to cease marketing of HiteJinro's products. These actions caused the "scuttling" of a proposed deal between HUSA and Ralphs grocery company. JAI also stopped providing Lee with the benefits he was entitled to receive under his consultancy agreement.

In August 2014, JAI gave Lee and HUSA notice that it would not renew the distributorship agreements and that the agreements would expire on December 31, 2015. Around the same time, JAI served HUSA with multiple notices of alleged breaches of the distributorship agreements, which Lee and HUSA contend did not constitute grounds for termination of the agreements. Indeed, Lee and HUSA allege that JAI's notices and actions constituted breaches of the distributorship agreements.

In September 2014, JAI filed a complaint against HUSA and Lee in which it alleged that the September 2011 consultancy agreement and the December 2011 amendments to the distributorship agreements were unenforceable sham agreements that were "unauthorized" and "procured by bribery." JAI filed a first amended complaint in February 2015 that repeated these allegations. Among other relief, JAI sought judicial declarations that the consultancy agreement and the amendments to the distributorship agreements are "null, void, invalid, and unenforceable."

Lee and HUSA filed a cross-complaint in December 2014 and, in October 2016, their operative fifth amended cross-complaint against JAI, HiteJinro, and Park. The fifth amended cross-complaint alleges the facts summarized above and asserts eight causes of action, two of which are relevant to this appeal: the second cause of action for fraud by HUSA and Lee against HiteJinro and Park; and the seventh cause of action by HUSA against HiteJinro for interference with prospective economic advantage.

In the second cause of action, Lee and HUSA allege that it "arises because of an inconsistency that now exists based on the contradictory positions taken by JAI, HiteJinro and Chairman Park." The contradiction, they allege, is between JAI's entry into the consultancy agreement and distributorship amendments and the position that JAI has taken in its complaint "that [JAI] did not have the authority to enter into the [agreements]." "If JAI's position is accepted," Lee and HUSA allege, "then it follows that the representations previously made by JAI, HiteJinro and Chairman Park that these agreements would be binding . . . are conclusively false and misleading and thereby support a fraud claim. If JAI's position is rejected, then the written agreements are in fact binding."

The second cause of action then sets forth the particular representations Park previously made: "Park specifically stated that: (1) he would instruct JAI to retain Lee as a consultant; (2) he would expand [HUSA's] soju territory to [include] Washington and Oregon; and (3) he would ensure the automatic renewal of the [distributorship] agreements into perpetuity. As the Chairman of HiteJinro, Chairman Park had the authority to make these representations which would be binding on HiteJinro and its subsidiary JAI. Chairman Park represented that these terms would remain in place as long as . . . Lee and [HUSA] remained committed to selling HiteJinro products. [Park] then stated that JAI had the authority to enter into agreements and would instruct them to enter into amendments consistent with his statements." "Each of these representations," Lee further alleges, "are now known to be false because [HiteJinro, Park, and JAI] have claimed that the Consultancy Agreement and the Amendments are invalid."

In the seventh cause of action, HUSA and Lee allege that HiteJinro and JAI interfered with a prospective business deal between HUSA and Ralphs grocery stores when JAI, at HiteJinro's direction, expressly forbade HUSA "from moving forward with the deal." "Four days later, JAI filed its original [c]omplaint alleging that the [c]onsultancy [a]greement and the [distributorship a]mendments were not properly executed and were allegedly never approved by HiteJinro and Chairman Park—all in contradiction to what was previously and continuously represented by [Park, HiteJinro, and JAI]." The interference was independently wrongful, they allege, because it was based upon the "misrepresentation to induce . . . Lee and [HUSA] to expand the distributorship network and then reap the benefits of the groundwork that . . . Lee and [HUSA] had laid."

HiteJinro, Park, and JAI filed an anti-SLAPP motion to strike the second, third, fifth, sixth, and seventh causes of action in the fifth amended cross-complaint. The court denied the motion as to each cause of action on the ground that the claims did not arise from protected activity for purposes of the anti-SLAPP statute. The court also denied Lee and HUSA's request for attorney fees.[3]

HiteJinro and Park appealed, challenging the ruling as to the second and seventh causes of action only. JAI did not appeal.

DISCUSSION

I.

Under the anti-SLAPP statute, a defendant in a civil case may move to strike a cause of action 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).) 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." (§ 425.16, subd. (b)(1).)

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[3] After the court denied appellants' anti-SLAPP motion, the court sustained their demurrers to the second and seventh causes of action without leave to amend. As HiteJinro and Park contend, their appeal of the anti-SLAPP rulings are not moot because the denial of their anti-SLAPP motion precluded the recovery of their attorney fees under the anti-SLAPP statute. (See *ARP Pharmacy Services, Inc. v. Gallagher Bassett Services, Inc.* (2006) 138 Cal.App.4th 1307, 1323, disapproved on another point in *Beeman v. Anthem Prescription Management, LLC* (2013) 58 Cal.4th 329, 364; *Pfeiffer Venice Properties v. Bernard* (2002) 101 Cal.App.4th 211, 218.)

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 moving party must make a threshold showing that the challenged claim arises from activity protected by the anti-SLAPP statute. (*Ibid.*) If that showing is made, the court then determines whether the party asserting the claim has demonstrated a probability of prevailing. (*Ibid.*)

The "critical consideration" in the first step "is whether the cause of action is *based on* the defendant's protected free speech or petitioning activity." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89 (*Navellier*).) A cause of action is based upon 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 the California State University* (2017) 2 Cal.5th 1057, 1063 (*Park*).) A claim is not based on protected activity merely because the challenged cause of action was filed after or because the defendant engaged in protected activity (*Navellier*, *supra*, 29 Cal.4th at p. 89; *Park, supra*, 2 Cal.5th at p. 1064); the fact that a claim "may have been triggered by protected activity does not entail that it is one arising from such." (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78 (*City of Cotati*).) Moreover, protected activity that merely leads to liability-creating activity, provides evidentiary support for a claim, or is offered to explain the parties' dispute is not activity upon which a claim arises for purposes of the anti-SLAPP statute. (*Park*, *supra*, 2 Cal.5th at pp. 1067-1068; *Episcopal Church Cases* (2009) 45 Cal.4th 467, 478.)

To distinguish between acts that underlie a claim and acts that merely lead to the liability-creating activity, trigger the filing of a claim, or provide evidentiary support for a claim, "courts should consider the elements of the challenged claim" and ascertain the actions that "supply those elements." (*Park, supra*, 2 Cal.5th at p. 1063.) The moving party bears the burden of identifying the

allegations of protected activity and the claims for relief they support. (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 396 (*Baral*).)

We review a trial court's ruling on an anti-SLAPP motion de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.)

II.

HiteJinro and Park contend that HUSA and Lee's second cause of action for fraud arises out of protected activity because the cross-complaint expressly states that the claim "arises because of the inconsistent positions that JAI, HiteJinro and . . . Park have made during the course of this litigation." The inconsistency is reflected in (1) the allegations in JAI's operative complaint that JAI did not have authority to enter into the challenged agreements, and (2) Park's representations to Lee in 2011 that JAI did have the authority to enter into the agreements.

HiteJinro and Park argue, and HUSA and Lee do not dispute, that the positions JAI took in its complaint "fall squarely within" the statutory definition of protected activity of "any written or oral statement or writing made before a . . . judicial proceeding."[4] (See § 425.16, subd. (e)(1).) Because HUSA and Lee expressly allege that their fraud cause of action arose "because" JAI took those positions, HiteJinro and Park contend that the cause of action arises from protected activity. We disagree. Although the allegations in JAI's complaint may have been the trigger that led to

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[4] Although the anti-SLAPP statute indicates that the party making the anti-SLAPP motion must be the party that engaged in protected activity (§ 425.16, subd. (a)), HUSA and Lee do not contend that the anti-SLAPP statute is unavailable to HiteJinro and Park on the ground that it was JAI, not HiteJinro or Park, that engaged in the protected activity of asserting statements in a complaint. We do not, therefore, address this arguable point.

HUSA and Lee's assertion of their fraud claim, those allegations are not the acts upon which the fraud claim is based.

The elements of fraud are: " '(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or "scienter"); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.' " (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.) The allegations supporting these elements are set forth in paragraphs 72 through 77 of the cross-complaint.

In paragraph 72, HUSA and Lee allege the misrepresentations upon which the fraud claim is based: the statements Park made to Lee in 2011. These include the representations that Park would instruct JAI to retain Lee as a consultant, and that he would expand HUSA's soju territory to include Washington and Oregon and ensure the automatic and perpetual renewal of the distribution agreements. They also include Park's representation that "JAI had the authority to enter into agreements and would instruct [JAI] to enter into amendments consistent with his statements." HiteJinro and Park do not contend that any of these representations constitute protected activity under the anti-SLAPP statute. The remaining elements of fraud are supplied by allegations that the representations were "known to be false" and made with the intent to induce HUSA's and Lee's reliance, that HUSA and Lee reasonably relied on the representations, and, as a result, suffered damages.

The statements JAI made in its complaint, by contrast, do not supply any element of HUSA and Lee's fraud claim. Rather, the references to those statements appear in paragraph 71 of the fifth amended cross-complaint as explanatory material to show how and when HUSA and Lee learned that Park's representations were false; specifically, in and upon the filing of JAI's complaint.

As HUSA and Lee allege, Park's 2011 representations to Lee "are now known to be false because [JAI, HiteJinro, and Park] have claimed that the [challenged agreements] are invalid."[5] Stated differently, HUSA and Lee learned that Park's 2011 representations were false when JAI filed its complaint alleging that the challenged agreements were unauthorized and invalid. Although such knowledge may have triggered the claim for fraud, it does not itself supply any element of fraud.

In this light, HUSA and Lee's allegation that the fraud cause of action "arises because of" the positions JAI took in its complaint is not an admission that the claim arises out of protected activity, but merely identifies the reason—or trigger—for asserting the fraud claim. As explained above, however, the fact that protected activity precedes or triggers a challenged cause of action does not mean that the cause of action arose from such activity. (See *City of Cotati*, *supra*, 29 Cal.4th at p. 78; *Navellier*, *supra*, 29 Cal.4th at p. 89; *Park, supra*, 2 Cal.5th at p. 1064.)

HiteJinro and Park rely on *Baral*, *supra*, 1 Cal.5th at p. 392, for the proposition that a pleader may not avoid scrutiny of claims involving protected activity by mixing allegations of protected and unprotected activity. This reliance is misplaced. *Baral* was concerned with the analysis of so-called mixed causes of action: Pleadings that allege, in a single pleaded count, multiple acts, at least one of which constitutes protected activity and at least one of which does not constitute protected activity. (*Id.* at p. 381.) *Baral* held that in that situation, the court must distinguish the two types of claims and evaluate the claims that are based on protected activity under the second step of the anti-SLAPP analysis.

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[5] The allegations also provide a means for HUSA and Lee to assert the fraud claim as an alternative to their primary position that the challenged agreements are valid and enforceable.

(*Id.* at pp. 392, 396.) HUSA and Lee's fraud claim, however, does not constitute a mixed cause of action. To the extent it alleges any protected activity—JAI's allegations in its pleadings—such activity is not asserted as a basis for relief, but merely to explain when and how respondents learned of the alleged fraud.

Because HUSA and Lee's fraud claim does not arise out of protected activity, the anti-SLAPP motion as to that claim was properly denied.

III.

With respect to the seventh cause of action for intentional interference with prospective economic advantage, HiteJinro and Park make a perfunctory argument that that cause of action is a SLAPP because it arises from the same alleged misrepresentations that supported the second cause of action. The actionable misrepresentations alleged in the interference cause of action, however, are misrepresentations by Park and others to Lee in 2011, not any statements made in JAI's pleadings. Because HiteJinro and Park have failed to identify any protected activity from which the interference cause of action arises, the anti-SLAPP motion as to that claim was properly denied.

DISPOSITION

The court's order denying appellants' special motion to strike is affirmed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

JOHNSON, J.