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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

ALAN WAYNE LINDEKE et al., Plaintiffs and Respondents, v. ADAM LEVINE, Defendant and Appellant.	B336072 (Los Angeles County Super. Ct. No. 23STCV18166)

APPEAL from an order of the Superior Court of Los Angeles County, Timothy P. Dillon, Judge. Affirmed.

Kibler Fowler & Cave, John D. Fowler, Tracy B. Rane, Stephen Raiola and Zien Halwani for Defendant and Appellant.

Troutman Amin, Eric J. Troutman, Puja J. Amin and Brittany A. Andres for Plaintiffs and Respondents.

INTRODUCTION

Plaintiffs filed a lawsuit alleging defendant Adam Levine violated California's eavesdropping laws, Penal Code sections 632 and 632.7. Levine responded by filing a special motion to strike the complaint as a strategic lawsuit against public participation under the anti-SLAPP statute, Code of Civil Procedure section 425.16. The trial court denied the anti-SLAPP motion.

On appeal, Levine argues the alleged illegality of his conduct does not bar his anti-SLAPP motion because it arises from newsgathering, i.e., protected activity. He further argues plaintiffs failed to demonstrate they had a probability of prevailing on the merits of their claims as they did not produce evidence establishing that Levine illegally recorded them.

We disagree with Levine and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

I. *Relevant Factual Background*

Defendant Adam Levine currently provides public analysis and commentary as founder and chief executive officer of Words Matter Media. He previously held various public service positions focused on media relations, including a senior position on the United States Senate Committee on Finance, as senior aide to United States Senator Daniel Patrick Moynihan, and as Assistant White House Press Secretary under President George W. Bush.

From 2021 until April 28, 2023, Levine was employed by The Change Company LLC (TCC), a for-profit mortgage lending company operating as a United States Department of Treasury

certified Community Development Financial Institution (CDFI)[1] (per 12 C.F.R. § 1805.200 et seq. (2025)). Levine's title was chief of staff at TCC and one of his primary roles was media relations.

In February 2023, Levine uncovered potential CDFI regulatory violations by TCC and false information on TCC's annual CDFI certification; he reported these concerns to government regulatory authorities on March 6, 2023. TCC terminated Levine's employment on April 28, 2023, and Levine initiated a whistleblower lawsuit against TCC on June 20, 2023. On August 17, 2023, TCC received notice from the United States Department of Treasury that TCC's CDFI certification was terminated, effective immediately.

Steven Sugarman (Sugarman) is the founder and chief executive officer of TCC. Alan Wayne Lindeke (Lindeke) is the general counsel of TCC. Carlos Salas (Salas) is the president of TCC. Thedora Nickel (Nickel) is the executive director of TCC. We collectively refer to Lindeke, Sugarman, Nickel, and Salas as plaintiffs.

II. *Civil Complaint*

On August 2, 2023, plaintiffs initiated the underlying lawsuit against Levine asserting two causes of action: 1) a violation of Penal Code section 632; and 2) a violation of Penal

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[1] CDFI certification status allows TCC to offer home loans to borrowers and underserved communities without meeting certain regulatory requirements that apply to most financial institutions and non-bank lenders. Over 60 percent of the borrowers whom TCC funds are minorities, low-income individuals, and borrowers in low-income communities.

Code section 632.7. Plaintiffs filed multiple ex parte applications for a preliminary injunction restraining Levine from 1) making any further illegal recordings of plaintiffs; and 2) using, distributing, disseminating, sharing, sending, posting online or providing to any person, entity, or the public at large the recordings (or transcripts thereof) of plaintiffs taken by Levine. All ex parte requests were taken off calendar or denied by the trial court.

On October 9, 2023, plaintiffs filed the operative first amended complaint (FAC) against Levine alleging the same Penal Code section violations. Plaintiffs' FAC alleged:

On January 24, 2023, Levine attended a meeting with the plaintiffs where plaintiffs believed the content of their communications with Levine was not being overheard or recorded and was therefore "confidential." Levine "surreptitiously" recorded the meeting without plaintiffs' consent, thereby "invading their privacy and violating their rights under [Penal Code section] 632." Attorney-client privileged information was discussed at the meeting. Each participant in the meeting signed a non-disclosure agreement (NDA).

On February 16, 2023, Levine attended another meeting with plaintiffs where confidential information was discussed. Levine recorded the meeting without so disclosing to plaintiffs, who reasonably expected their communications were not being overheard or recorded, amounting to an invasion of their privacy. Each participant signed an NDA. Had plaintiffs known that the communications were being recorded, they would have discontinued the meeting.

Plaintiffs Lindeke, Sugarman, and Salas had attended both meetings via cellular phone, which resulted in a violation of their rights under Penal Code section 632.7 as well.

Lindeke conducted numerous telephone meetings with Levine using his cellular phone at various times on: October 10, 17, and 22, 2022; November 8 and 16, 2022; December 3, 6, and 15, 2022. "Based on information and belief, Levine recorded the entirety of each of these communications during these telephonic meetings" without disclosing that he was recording. Lindeke did not learn that Levine recorded the communications until after the recording events occurred. Levine is "holding onto these recordings in an attempt to exploit him."

Sugarman, via his cell phone, had telephonic meetings with Levine "several times a week." At no point did Levine disclose to Sugarman that he was recording their confidential communications. "The precise number of such [recorded] calls will be determined in discovery in this suit." Sugarman did not have a reasonable expectation that his communications with Levine were being recorded; had Sugarman known, he would have "conducted himself differently and/or terminated the call."

"Based on information and belief, all such recordings Levine has with Plaintiffs . . . are saved on his Dropbox account and online transcription and storage application called 'Sonix.' " Plaintiffs were "shocked to discover" Levine's "clandestine recordings" which plaintiffs found "highly offensive due to the delicacy of the topics discussed during said conversations."

Plaintiffs requested preliminary and permanent injunctive relief enjoining Levine from "using, distributing, disseminating, sharing, transferring, publishing, uploading, sending, mailing, and/or posting online and providing to any person, persons,

entities, or the public at large, the recordings already taken . . . , any transcript of the same, and/or any information derived from such recordings." Plaintiffs also requested permanent injunctive relief prohibiting Levine from unilaterally recording communications without informing the other party. Finally, plaintiffs requested statutory, actual, compensatory, exemplary, and punitive damages, attorney fees and costs.

III. *Levine's Special Motion to Strike the Complaint*

On October 20, 2023, Levine filed a special motion to strike the complaint as a strategic lawsuit against public participation under the anti-SLAPP statute, Code of Civil Procedure[2] section 425.16. Levine argued he discovered TCC committed securities fraud and reported it to federal authorities, leading to an investigation by the U.S. Securities and Exchange Commission (SEC) and revocation of TCC's CDFI certification by the United States Department of Treasury. Levine argued the "alleged recordings" central to plaintiffs' FAC arise from protected speech activity (newsgathering) in connection with TCC's misconduct—an issue of public concern and interest—and thus fall within the ambit of section 425.16, subdivision (e)(4). He also argued plaintiffs cannot demonstrate a probability of prevailing on their causes of action against Levine because plaintiffs cannot present admissible evidence to support their claims that Levine illegally recorded them or TCC meetings, including the meetings held on January 24 and February 16, 2023.

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[2] Undesignated statutory references are to the Code of Civil Procedure.

In support, Levine filed his declaration on October 20, 2023, which provides:

While employed at TCC, Levine noticed TCC used "false and deceptive tactics in their lending practices and marketing" and engaged in "securities fraud by mischaracterizing underlying loans in residential mortgage-backed securities . . . that it was selling on the credit market." More specifically, Levine discovered TCC misled investors and government authorities in its annual CDFI certification by representing that 60 percent of the loans were made to specific markets certified by the United States Department of Treasury in order to maintain its CDFI certification. Levine raised these concerns with Sugarman and Lindeke, but neither addressed the issue. Levine then "reported TCC's conduct to the federal authorities." In response, on March 2, 2023, Levine was put on administrative leave by TCC, and on April 28, 2023, he was wrongfully terminated by TCC. Levine provided as an exhibit his complaint for whistleblower retaliation and wrongful termination filed against TCC on June 20, 2023 in the Orange County Superior Court. We note here that in his whistleblower complaint, Levine alleged having "uncovered . . . illegal activity" by TCC in "mid-February 2023."

Levine "never illegally recorded" plaintiffs at any time, including during phone calls, nor did he ever record only his side of any phone calls with plaintiffs. The statements of Lindsay Valdeon (Valdeon), a TCC employee, where "she stated that I told her on multiple occasions that it is my practice to record phone calls and meetings" and "that I stored the recordings of those conversations" are "entirely false and disingenuous. With the exception of recording official TCC press calls and presentations

with the approval of Plaintiff Sugarman, I had no practice of recording meetings at TCC."

While employed at TCC, Levine "would sometimes be asked to make recordings of press calls and presentations, which [he] later edited for Plaintiff Sugarman. These recordings were made as part of [Levine's] media relations role and were made at Plaintiff Sugarman's direction and with his consent and knowledge." Levine never recorded Sugarman without his consent and knowledge. Levine never recorded meetings with Nickel or Lindeke.

Levine also submitted, as exhibits, the following supporting documents:

1) TCC's complaint against the United States Department of Treasury, filed on August 30, 2023, requesting declaratory relief from the decision to decertify TCC's CDFI status and immediate reinstatement of its CDFI certification.

2) The declarations of Sugarman, Lindeke, and Valdeon filed in support of plaintiffs' August 18, 2023 motion for preliminary injunction, where they sought to enjoin the release of any illegal recordings.

Sugarman's declaration executed August 15, 2023 provides: Levine continues to "smear" Sugarman through "media leaks." On July 30, 2023, Sugarman was notified by Valdeon that she had logged onto the Sonix site and confirmed Levine had over 100 recordings of conversations with plaintiffs, including Sugarman. Sugarman believed Levine was "actively shopping the recordings to his friends in the media and the stories will be published as soon as Levine finds someone willing to write an article based on Levine's illegal recordings."

Lindeke's declaration executed August 15, 2023 provides: Lindeke had "personal knowledge" of an email Levine sent to Reverend Everett Bell on August 1, 2023 where Levine made a "false claim" that "a loan to a well-known actor was designated to the United States Department of Treasury's CDFI Fund as made to a Low-Income borrower."

Valdeon's declaration signed August 15, 2023 provides: She has been friends with Levine "for 20+ years." Levine personally told her, on multiple occasions, that it is "his practice to record phone calls and meetings, including conversations with [plaintiffs] and storing the recordings of those conversations utilizing his Drop Box account and an online transcription and storage application I believe to be known as 'Sonix.' " Valdeon had "personally been granted access to a Drop Box account held in Levine's name and personally saw over 100+ recordings in Levine's possession of meetings which [she] has personal knowledge that they were confidential in nature which included [plaintiffs]." Valdeon informed plaintiffs on July 11, 2023 about what she had seen in connection with the recordings.

3) The transcript of the September 13, 2023 hearing on plaintiffs' fourth motion for preliminary injunction, where the trial court found "plaintiffs' case is . . . pretty anemic."

4) The trial court's September 15, 2023 order denying the motion, where it made various findings including: "From the court's perspective, the evidence Defendant violated Penal Code section 632 is far from direct and clear." "Based on the evidence before the court, the court finds Plaintiffs have demonstrated some ability to prevail on the merits of their Penal Code section 632 claim."

5) Multiple news articles published online on August 27, 2023 by The Washington Post, Bloomberg, Reuters, Barron's, and the Orange County Register about the SEC's investigation into TCC over "mortgage-backed securities" and "looking into some of the actions of its chief executive officer, Steven Sugarman."

IV. *Opposition to Special Motions to Strike*

On January 4, 2024, plaintiffs filed their opposition to Levine's special motion to strike. They argued the FAC alleged only Levine's criminal actions of illegally recording calls and not Levine's subsequent *use* of the recordings or any protected conduct; "the only pleaded claims relate to [Levine's] illegal recording of confidential communications without permission" and "do not assert any claim or cause of action related to the *use* of any illegally obtained materials." (Some italics omitted.) Plaintiffs also argue Levine's alleged criminal conduct is not protected speech and that Levine cannot demonstrate he engaged in criminal conduct in the public's interest, i.e., for a protected purpose. Plaintiffs contend Levine was recording plaintiffs "well before any purported effort to become a whistleblower" and "well before he had any reason to believe anything newsworthy would occur during his employment." Finally, plaintiffs argue they "easily prevail on the merits" in prong two of the anti-SLAPP analysis.

Plaintiffs filed declarations of Sugarman and Valdeon in support of their opposition.

Sugarman's declaration filed on January 4, 2024 provides: On March 11, 2023, Sugarman received a text message from Levine that stated, in relevant part, "in every State it is 100% legal for me to record MY OWN VOICE and my end of a conversation. Given the importance of my words in the execution

of my duties as a communications professional, it is a practice I have employed since 2004." A copy of the text message was provided as an exhibit.

Valdeon's declaration filed on January 4, 2024 provides: Valdeon and Levine have been friends for over 20 years. "Throughout this time, he has told me that it has been his consistent practice to record all communications and meetings he is involved with in professional settings. He began engaging in this activity years before he went to work for [TCC]." Levine "personally told" Valdeon on multiple occasions that he "has recorded phone calls and meetings, including conversations with [Sugarman, Salas, Lindeke, and Nickel] and stored the recordings of those conversations utilizing his Drop Box account." Levine told Valdeon that he "would place the call [with Plaintiffs] on speaker phone and record the conversation via his laptop." Levine "directed" Valdeon to record meetings with plaintiffs on her cellphone and upload them on Sonix for transcription. Valdon has recorded meetings and conversations with plaintiffs "[p]ursuant to Levine's request." Valdeon has "personally been granted access to a Drop Box account held in Levine's name and personally saw over 100+ recordings in Levine's possession of meetings which included Plaintiffs."

Plaintiffs also submitted the following exhibits:

1) Sugarman's declaration filed August 2, 2023 in support of plaintiffs' ex parte application for preliminary injunction. It sets forth that Sugarman attended, via cell phone, a meeting with Levine on January 24, 2023 and February 16, 2023, where confidential information was discussed. Levine signed an NDA to participate in those meetings. "Based on information and belief,

Levine used his cell phone to record the entirety of the meetings held on January 24, 2023 and February 16, 2023."

2) Lindeke's declaration filed on August 17, 2023 in support of plaintiff's ex parte application for preliminary injunction. It provides that at no time during the January 24 and February 16, 2023 meetings did Levine disclose to Lindeke that he was recording the communications in the meetings.

3) The nearly identical declarations of Salas and Nickel filed August 17, 2023. "Based on information and belief, Levine used his cell phone to record the entirety of the meetings held on January 24, 2023 and February 16, 2023." Levine never disclosed that he was recording the meetings. Salas attended via his cell phone.

V. *Reply in Support of Motion to Strike*

On January 10, 2024, Levine filed a reply in support of his anti-SLAPP motion. He argued plaintiffs' FAC arises from his "newsgathering activity" protected by the anti-SLAPP statute. He further argued "the mere allegation of criminal conduct is simply not enough" where, as here, "Levine does not concede he illegally recorded Plaintiffs (he denies it)" and that nothing in plaintiffs' evidence "establishes [Levine] illegally recorded their confidential communications."

VI. *Trial Court's Ruling*

The hearings on the special motion to strike took place on January 18, 2024 and February 7, 2024. The court took the matter under submission.

On February 20, 2024, the trial court issued its order denying Levine's anti-SLAPP motion. It found Levine did not carry his burden at prong one and that plaintiffs "carr[ied] their

burden at step two even if Levine had carried his burden at step one."

Levine timely appealed.

DISCUSSION

I. *Standard of Review*

We review a trial court's ruling on a special motion to strike pursuant to section 425.16 under the de novo standard. (*Li v. Jenkins* (2023) 95 Cal.App.5th 493, 499; *Trinity Risk Management, LLC v. Simplified Labor Staffing Solutions, Inc.* (2021) 59 Cal.App.5th 995, 1002 (*Trinity*); *Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1067 (*Park*).) "In other words, we employ the same two-pronged procedure as the trial court in determining whether the anti-SLAPP motion was properly granted." (*Mendoza v. ADP Screening & Selection Services, Inc.* (2010) 182 Cal.App.4th 1644, 1652.)

In making our determination, our job is to review the trial court's ruling, not its reasoning. (*Trinity*, *supra*, 59 Cal.App.5th at p. 1002.) 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).) In considering the pleadings and declarations, we do not make credibility determinations or compare the weight of the evidence; instead, we accept the opposing party's evidence as true and evaluate the moving party's evidence only to determine if it has defeated the opposing party's evidence as a matter of law. (*Trinity*, at p. 1003; *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3.)

II. *The Anti-SLAPP Statute*

Section 425.16 provides: "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 . . . 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).)

The Legislature enacted section 425.16 to prevent and deter "lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (§ 425.16, subd. (a).) The purpose of the anti-SLAPP law is "not [to] insulate defendants from *any* liability for claims arising from the protected rights of petition or speech. It only provides a procedure for weeding out, at an early stage, *meritless* claims arising from protected activity." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384 (*Baral*).) To accomplish this purpose, the Legislature expressly specifies that section 425.16 "be construed broadly." (§ 425.16, subd. (a).)

The anti-SLAPP statute sets forth four categories of "protected activity." (See § 425.16, subd. (e).) An " 'act in furtherance of a person's right of petition or free speech . . . in connection with a public issue' " is defined in section 425.16, subdivision (e) to include: (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 . . . free speech in connection with a public issue or an issue of public interest." (*Id*., subd. (e)(1)–(4).)

Section 425.16 does not define "an issue of public interest." (See generally § 425.16.) However, we derive relevant guiding principles from decisional authority. First, courts should consider the content and context of the speech when assessing whether an issue is one of public interest. (*FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133, 149–150.) Second, "a matter of public interest should be something of concern to a substantial number of people." (*Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, 1132.) Third, "there should be some degree of closeness between the challenged statements and the asserted public interest." (*Ibid*.) "The fact that 'a broad and amorphous public interest' can be connected to a specific dispute is not sufficient to meet the statutory requirements" of section 425.16. (*Dyer v. Childress* (2007) 147 Cal.App.4th 1273, 1280.) "At a sufficiently high level of generalization, any conduct can appear rationally related to a broader issue of public importance. What a court scrutinizing the nature of speech in the anti-SLAPP context must focus on is the speech at hand, rather than the prospects that such speech may conceivably have indirect consequences for an issue of public concern." (*Rand Resources, LLC v. City of Carson* (2019) 6 Cal.5th 610, 625.) And fourth, to warrant protection under section 425.16, "the focus of the speaker's conduct should be the public interest rather than a mere effort 'to gather ammunition for another round of . . . controversy.' " (*Weinberg,* at pp. 1132–1133.)

When a party moves to strike a cause of action under the anti-SLAPP law, a trial court evaluates the special motion to strike using a two-prong test: (1) has the moving party "made a threshold showing that the challenged cause of action arises from protected activity" (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056); and if it has, (2) has the non-moving party demonstrated that the challenged cause of action has "minimal merit" by making "a prima facie factual showing sufficient to sustain" a judgment in its favor. (*Baral*, *supra*, 1 Cal.5th at pp. 384–385; see *Navellier v. Sletten* (2002) 29 Cal.4th 82, 93–94; see also § 425.16, subd. (b)(1).) After the first prong is satisfied by the moving party, "the burden [then] shifts to the [non-moving party] to demonstrate that each challenged claim based on protected activity is legally sufficient and factually substantiated." (*Baral*, at p. 396.)

III. ***Penal Code Sections 632 and 632.7***

The California Invasion of Privacy Act (Pen. Code, § 630 et seq.) was enacted to protect the right of privacy by, among other things, requiring all parties' consent to a recording of their conversation. (*Rojas v. HSBC Card Services Inc.* (2023) 93 Cal.App.5th 860, 871 (*Rojas*); see *Kearney v. Salomon Smith Barney, Inc.* (2006) 39 Cal.4th 95, 122 ["it is unlawful under California law for a party to a telephone conversation to record the conversation without the knowledge of all other parties to the conversation"].)

Penal Code section 632, subdivision (a) "provides for liability when '[a] person . . . intentionally and without the consent of all parties to a confidential communication . . . uses [a] recording device to . . . record the confidential communication, whether the communication is carried on among the parties in

the presence of one another or by means of a . . . telephone, or other device, except a radio.' " (*Smith v. LoanMe, Inc.* (2021) 11 Cal.5th 183, 191 (*LoanMe*).) A conversation is "confidential" for purposes of section 632 if a party to that conversation has an objectively reasonable expectation that the conversation is not being overheard or recorded. (*Rojas*, *supra*, 93 Cal.App.5th at p. 872; see *Flanagan v. Flanagan* (2002) 27 Cal.4th 766, 768 (*Flanagan*); see § 632, subd. (c) [full definition of "confidential communication"].)

Penal Code section 632.7, subdivision (a) imposes liability on "[e]very person who, without the consent of all of the parties to a communication, intercepts or receives and intentionally records, or assists in the interception or reception and intentional recordation of, a communication transmitted between two cellular radio telephones, a cellular radio telephone and a landline telephone, two cordless telephones, a cordless telephone and a landline telephone, or a cordless telephone and a cellular radio telephone." (Pen. Code, § 632.7, subd. (a); see *LoanMe, supra*, 11 Cal.5th at pp. 191–192 & fn. 2 ["section 632.7 does not prohibit the 'intentional interception or recording' of a covered communication [citation]; it is concerned instead with the intentional recording of an intercepted or received communication"]; see also *Flanagan, supra*, 27 Cal.4th at p. 771, fn. 2 [§ 632.7 "applies to all communications, not just confidential communications"].)

IV. ***The Claims Do Not Arise from Protected Activity***

Levine argues the trial court incorrectly found that he did not satisfy the first prong of section 425.16 test. We conduct our de novo review. (*Trinity*, *supra*, 59 Cal.App.5th at p. 1002.)

Step one of the anti-SLAPP analysis requires us to decide whether the moving party—here, Levine—has shown the claims in the FAC arise from protected speech or petitioning activity. (§ 425.16, subd. (b)(1); *Castleman v. Sagaser* (2013) 216 Cal.App.4th 481, 490.) "A claim arises from protected activity when that activity underlies or forms the basis for the claim." (*Park*, *supra*, 2 Cal.5th at p. 1062.) We review the parties' pleadings, declarations, and other supporting documents at this stage of the analysis "only 'to determine what conduct is actually being challenged, not to determine whether the conduct is actionable.' " (*Castleman*, at p. 491.)

Levine argues the "alleged recordings" central to plaintiffs' FAC arise from protected speech activity—his newsgathering[3] of TCC's misconduct—which he contends is an issue of public concern and interest, placing his conduct within the ambit of section 425.16, subdivision (e)(4).

It is evident on the face of the FAC that plaintiffs' claims that Levine violated Penal Code sections 632 and 632.7 are entirely premised on repeated incidents of Levine's conduct of recording conversations and meetings with plaintiffs (either in person or via cell phone) on January 24, 2023, February 16, 2023, and various other dates, without disclosing his conduct to plaintiffs. Thus, the first three of the four categories of "protected

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[3] "It is beyond dispute that reporting the news is an exercise of free speech. [Citations.] California courts have also held prereporting and postreporting conduct, such as investigating, newsgathering, writing, and interviewing is conduct in furtherance of free speech." (*Simmons v. Bauer Media Group USA, LLC* (2020) 50 Cal.App.5th 1037, 1044–1045.)

activity" set forth in section 425.16, subdivision (e)(1)–(4) do not apply here, as subdivision (e)(1)–(3) apply to a written or oral statement either made in legislative, executive, judicial, or any other official proceeding authorized by law, or in a public forum. Here, the fourth category—subdivision (e)(4), i.e., the catchall provision of section 425.16, is at issue—"*any other conduct* in furtherance of the exercise of the constitutional right of petition or . . . free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e)(4), italics added.)

Levine must establish that his conduct of allegedly recording communications, which form the subject of plaintiffs' FAC, were "in furtherance of [his] exercise of the constitutional right of . . . free speech" (§ 425.16, subd. (e)(4)), i.e., newsgathering on the issue of TCC's potential CDFI violations and securities fraud. To that end, Levine contends he submitted evidence that demonstrated plaintiffs were "concerned that [Levine] had allegedly recorded conversations containing statements relating to the fact that TCC was fraudulently providing loans to high wealth recipients and engaging in securities fraud." He argues: "There is also no question [his] activity is clearly connected to a matter of public interest. Levine is a whistleblower who allegedly recorded statements concerning TCC's fraudulent activity that he already exposed to government authorities. Such conduct falls within the ambit of the public interest."

We disagree with Levine.

The issue, as we see it, is this.

There is nothing to suggest or indicate that the topic of TCC's misconduct as to its CDFI certification was discussed by plaintiffs or Levine on the dates pleaded, including but not

limited to the meetings held January 24 and February 16, 2023. The *content* of the communications and/or alleged recordings on those dates are not alleged in the FAC nor is it available to us in any declaration or via any other evidence. All that is pleaded via the FAC and evinced via the declarations and exhibits is that Levine and plaintiffs had communications or meetings with one another on those dates. We do not know what those communications or meetings were about—the pleadings and evidence do not provide us with that information. Levine submitted no evidence that demonstrates any recordings he allegedly made were connected to his newsgathering of wrongdoing by TCC and any investigations purportedly being undertaken against TCC.

The only information provided about the content of the meetings and alleged recordings include the FAC's allegation that plaintiffs found the recordings "highly offensive due to the *delicacy of the topics discussed* during said conversations" (italics added). While Levine states in his October 20, 2023 declaration that he raised his concerns about TCC's "securities fraud" to Sugarman and Lindeke (prior to his reporting same to the federal authorities), he does not state that he did so on January 24 or February 16, 2023, or any of the other dates alleged—nothing to connect Levine's conduct of recording to the protected activity of newsgathering and investigating the topic or issue of TCC's alleged misconduct.

Moreover, the evidence in this case demonstrates Levine engaged in the practice of recording conversations throughout his professional career *since 2004*, and not in connection with any matter of public interest.

Sugarman's January 4, 2024 declaration provides he received a text message from Levine on March 11, 2023 where Levine stated, in relevant part, "in every State it is 100% legal for me to record MY OWN VOICE and my end of a conversation. *Given the importance of my words in the execution of my duties as a communications professional, it is a practice I have employed since 2004*." (Italics added.) Plaintiffs provided a copy of Levine's text message to Sugarman as an exhibit. In addition, Valdeon's declaration filed January 4, 2024 provides that Levine, her friend for over 20 years, told her "it has been his consistent practice to record all communications and meetings he is involved with in professional settings. He began engaging in this activity years before he went to work for [TCC]."

Levine's own whistleblower complaint filed on June 20, 2023 in Orange County Superior Court alleged that Levine uncovered illegal activity by TCC "[i]n mid-February 2023." How could Levine's recording of the January 24, 2023 meeting, which was before his "mid-February 2023" discovery of TCC's misconduct, be in furtherance of his newsgathering of TCC's misconduct? It cannot. Levine's conduct of recording communications with plaintiffs pre-dates Levine's discovery of any wrongdoing by TCC, meaning, before he had reason to believe something newsworthy or a matter of public concern was to be discussed.

Also significant is that nowhere in the entire FAC does it state that the causes of action at issue arise out of Levine's *use or misuse* of any illegal recordings. Plaintiffs' pleaded claims in the FAC arise entirely from Levine's act of allegedly illegally recording confidential communications without plaintiffs' consent. The FAC is narrowly pleaded and focused solely on

Levine's conduct of recording conversations/meetings on various dates, and not on any subsequent possible expressive conduct related to the use of the recordings, that might be protected by public policy. We conclude Levine did not record these communications as part of a newsgathering operation. His actions are not protected by the anti-SLAPP statute.

Plaintiffs raise other contentions which we reject. They argue Levine's "illegal conduct" is not protected speech subject to any public policy protection because it was against the law. Relying on various case law, including *Flatley v. Mauro* (2006) 39 Cal.4th 299, 320 (*Flatley*) and *Gerbosi v. Gaims, Weil, West & Epstein, LLP* (2011) 193 Cal.App.4th 435, 444 (*Gerbosi*), plaintiffs argue "where the underlying conduct is itself illegal, it cannot be subject to anti-SLAPP protection."

Plaintiffs' assertions of illegality are not properly addressed as part of our prong one analysis and fall under prong two. "At the first prong, courts consider whether a defendant has made a prima facie showing that activity underlying a plaintiff's causes of action is statutorily protected, 'not whether it has shown its acts are ultimately lawful.' " (*RGC Gaslamp, LLC v. Ehmcke Sheet Metal Co., Inc*. (2020) 56 Cal.App.5th 413, 425–426; see also *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 910–911 ["[C]onduct that would otherwise come within the scope of the anti-SLAPP statute does not lose its coverage . . . simply because it is *alleged* to have been unlawful or unethical. If that were the test, the statute (and the privilege) would be meaningless."].)

Moreover, *Flatley* and *Gerbosi* are inapposite because in those cases, "either the defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law," precluding the

defendants from using the anti-SLAPP statute to strike plaintiffs' action. (*Flatley*, *supra*, 39 Cal.4th at p. 320.) In *Flatley,* the issue was whether assertedly protected activity—a letter and subsequent telephone calls by a lawyer demanding "a seven-figure payment" to avoid litigation—was protected activity. (*Id.* at p. 305.) The defendant claimed the communications were a prelitigation settlement offer, while the plaintiff claimed they were activities constituting criminal extortion. (*Id*. at pp. 305–306.) The Supreme Court found that the letter and telephone calls were criminal extortion *as a matter of law*; on that foundation it ruled that the lawyer could not invoke the anti-SLAPP statute. (*Id*. at p. 320.)

Plaintiffs' reliance on *Gerbosi* does not compel a contrary conclusion. In *Gerbosi,* a Hollywood executive was embroiled in litigation with his former girlfriend, and his attorneys hired a private investigator to investigate the girlfriend. The investigator wiretapped the former girlfriend's phone and, in doing so, intercepted her private conversations with a neighbor. (*Gerbosi*, *supra*, 193 Cal.App.4th at pp. 440–441.) The neighbor filed a lawsuit against the law firm, alleging claims for, among other things, unlawful wiretapping and eavesdropping. (*Id.* at p. 441.) In resolving other issues raised on appeal, the *Gerbosi* court concluded the law firm's special motion to strike failed under the first prong of the anti-SLAPP analysis because "[u]nder no factual scenario offered by [the law firm] is such wiretapping activity protected by the constitutional guarantees of free speech and petition." (*Id*. at p. 446.) *Gerbosi* distinguished between unprotected activity that is criminal as a matter of law, such as wiretapping and other assertedly protected activity, stating that "when a defendant's assertedly protected activity

may or may not be criminal activity, the defendant may invoke the anti-SLAPP statute." (*Ibid*.)

Here, we cannot categorically conclude Levine's conduct was illegal as a matter of law. "Illegal conduct as a matter of law . . . must be based on a defendant's concession or on uncontroverted and conclusive evidence—neither of which is present at this stage of the proceedings." (*Belan v. Ryan Seacrest Productions, LLC* (2020) 65 Cal.App.5th 1145, 1159.) Levine alleged he did not "illegally" record plaintiffs and that the "recordings were made as part of [Levine's] media relations role and were made at Plaintiff Sugarman's direction and with his consent and knowledge." While we do not opine on the merits of Levine's position, we note this argument is more than a " '*mere assertion* that [defendant's] underlying activity was constitutionally protected.' " (*Gerbosi*, *supra*, 193 Cal.App.4th at p.446.)

Plaintiffs also make much of the fact that Levine denied the allegedly illegal recordings ever happened. Levine, however, contends the fact that he denied the illegal recordings actually exist do not equate to a lack of petitioning activity.

We find this question sufficiently answered via case precedent. *Bel Air Internet LLC v. Morales* provides: "Where a defendant denies engaging in protected conduct, one might argue that a motion to strike a plaintiff's claim that alleges such conduct does not meet the purpose of an anti-SLAPP motion. Section 425.16 explains that the Legislature intended the anti-SLAPP procedure to protect against 'lawsuits brought primarily to chill the valid exercise of the constitutional right of freedom of speech and petition for the redress of grievances.' (§ 425.16, subd. (a).) If a defendant has not actually exercised such a right,

how can a lawsuit chill it? However, the argument is ultimately both irrelevant and wrong. It is irrelevant because our Supreme Court has explained that a party bringing an anti-SLAPP motion need not prove that a plaintiff's claim was intended to, or actually did, chill any protected activity. [Citations.] And it is wrong because a meritless lawsuit asserting a claim based on alleged protected activity can chill such activity even if it did not occur in a particular case. For example, a plaintiff might file a series of meritless claims against a public interest organization based upon the organization's free speech or petitioning activity with the goal of imposing burdensome litigation costs. The fact that the organization did not actually engage in the protected conduct alleged in a particular case would not diminish the cost of defending the lawsuit. Permitting a plaintiff to proceed with a lawsuit intended to burden protected activity on the ground that the lawsuit has no basis in fact would be a perverse outcome indeed." (*Bel Air Internet, LLC v. Morales* (2018) 20 Cal.App.5th 924, 938, fn. 4, italics omitted.)

Because Levine's alleged conduct in plaintiffs' FAC falls outside the bounds of section 425.16, the trial court properly denied the anti-SLAPP motion. Based on this conclusion, we need not address plaintiffs' likelihood of prevailing under the second prong of the anti-SLAPP analysis. (*ValueRock TN Properties, LLC v. PK II Larwin Square SC LP* (2019) 36 Cal.App.5th 1037, 1050; *Gotterba v. Travolta* (2014) 228 Cal.App.4th 35, 43–44.)

V. ***Plaintiffs' Motion for Sanctions***

Lastly, we address plaintiffs' motion for sanctions filed on May 12, 2025. Plaintiffs argue sanctions are warranted against Levine because his anti-SLAPP motion did not involve protected

activity within the meaning of section 425.16, subdivision (e), his "illegal conduct cannot be protected under applicable law," and because his "tactics in filing this appeal and original anti-SLAPP motion were frivolous" and "filed solely to cause unnecessary delay." Plaintiffs request that we award them reasonable attorney fees in defending this appeal, payable by Levine, in the amount of $87,986.50, as well as $8,500 in sanctions payable by Levine's counsel directly to the court. They cite section 907 and California Rules of Court, rule 8.276(a)(1).

Section 907 provides, "When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, it may add to the costs on appeal such damages as may be just." (§ 907.) California Rules of Court, rule 8.276(a)(1) provides that the Court of Appeal may impose sanctions on a party or an attorney for "[t]aking a frivolous appeal or appealing solely to cause delay."

An appeal may be found frivolous and sanctions imposed when (1) the appeal was prosecuted for an improper motive—to harass the respondent or delay the effect of an adverse judgment; or (2) the appeal indisputably has no merit, i.e., when any reasonable attorney would agree that the appeal is totally and completely without merit. (*Singh v. Lipworth* (2014) 227 Cal.App.4th 813, 826.) An unsuccessful appeal, however, should not be penalized as frivolous if it presents a unique issue which is not indisputably without merit, or involves facts which are not amenable to easy analysis in terms of existing law, or makes a reasoned argument for the extension, modification, or reversal of existing law. (*Ibid.*) We are aware sanctions should be " 'used most sparingly to deter only the most egregious conduct' [citation] and that an appeal lacking merit does not,

alone, establish it is frivolous." (*In re Marriage of Gong & Kwong* (2008) 163 Cal.App.4th 510, 518.)

We have not requested a response to plaintiffs' motion for sanctions,[4] and we deny the motion. We see no basis to conclude the appeal was brought "solely" to cause unnecessary delay, nor do we find that Levine's appeal was frivolous and *completely* without merit. Levine's arguments were objectively sound and rooted in published, albeit distinguishable, authorities. Accordingly, we deny plaintiffs' motion.

DISPOSITION

The trial court's order denying the anti-SLAPP motion is affirmed. Plaintiffs are entitled to their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).)

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

STRATTON, P. J.

We concur:

WILEY, J. VIRAMONTES, J.

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[4] See California Rules of Court, rule 8.276(c), (d)—We "must give notice in writing if . . . considering imposing sanctions" and an "opposition may not be filed unless the court sends such notice."