SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE

MINUTE ORDER

DATE: 02/24/2022 TIME: 01:30:00 PM DEPT: 53

JUDICIAL OFFICER PRESIDING: Richard K. Sueyoshi
CLERK: K. Madden
REPORTER/ERM: Raquel Sharp # 10619
BAILIFF/COURT ATTENDANT: J. Frenger, J. Reilly

CASE NO: **34-2021-00304675-CU-MC-GDS** CASE INIT.DATE: 09/29/2020
CASE TITLE: **Yes on 21, Homeowners and Tenants United to Keep Families in Their Homes, Sponsored by AIDS Healthcare Foundation vs. No on Prop 21, Californians to Protect Affordable Housing, A Coalition of Housing Advocates, Renters, Businesses, Taxpayers, and Vet**
CASE CATEGORY: Civil - Unlimited

EVENT TYPE: Motion to Strike (SLAPP) - Civil Law and Motion - MSA/MSJ/SLAPP

APPEARANCES
Beverly Grossman Palmer, counsel, present for Plaintiff(s) remotely via video.
Brian T Hildreth, counsel, present for Defendant(s) remotely via video.
Christopher Skinnell, counsel, present for Defendant(s) remotely via video.

Nature of Proceeding: Motion to Strike (SLAPP)

TENTATIVE RULING

Defendants California Business Roundtable Issues PAC and No on Prop 21 - Californians to Protect Affordable Housing's motion to strike Plaintiff Yes on 21 - Homeowners and Tenants United to Keep Families in Their Homes' first cause of action as a strategic lawsuit against public participation pursuant to Code of Civil Procedure section 425.16 is GRANTED as follows.

FACTUAL BACKGROUND
This case centers on Proposition 21, an initiative that appeared on the California ballot on November 3, 2021. If approved by the voters, Proposition 21 would have permitted local governments to impose rent control on a wider range of properties. (Complaint, ¶ 13.) Plaintiff Yes on 21, Homeowners and Tenants United to Keep Families in Their Homes, Sponsored by AIDS Healthcare Foundation ("Plaintiff") is a California political committee formed to support Proposition 21. (*Id*., ¶ 6.) Defendant No on Prop 21 - Californians to Protect Affordable Housing - a Coalition of Housing Advocates, Renters, Businesses, Taxpayers, and Veterans ("Affordable Housing") is a California political committee formed primarily to oppose Proposition 21. (*Id*., ¶ 7.) Defendant California Business Roundtable Issues PAC ("Roundtable") is a California political committee, classified as a general purpose committee by the California Secretary of State. (*Id*., ¶ 9.)

Plaintiff alleges a single cause of action for violating the Political Reform Act of 1974 ("Political Reform Act" or "the Act") against Affordable Housing and Roundtable (collectively, "Defendants"). In particular, Plaintiff alleges: (1) significant political donors like Blackstone Property Partners, L.P. ("Blackstone") and Michael K. Hayde ("Hayde") "appear likely to have earmarked their contributions to [Roundtable] for contribution to [Affordable Housing]," (2) Roundtable has failed to disclose the earmarking of contributions by those donors and has thereby violated the earmarking provisions of the Act, and (3)

Affordable Housing has violated the Act's reporting and disclaimer provision by failing to properly disclose its largest donors through the proper reporting of earmarked contributions. (*Id*., ¶¶ 36-38.) Plaintiff's Complaint seeks injunctive and declaratory relief.

Plaintiff originally filed its complaint in Los Angeles County Superior Court, but that court granted Defendants' motion to transfer the case to this Court on May 14, 2021. (Register of Actions ("ROA"), 65.) This matter was originally set for hearing before this Court on December 23, 2021, but was continued for further briefing on the application of *Exline v. Gillmore* (2021) 67 Cal.App.5th 129 to this case. The Court notes Plaintiff's supplemental opposition brief was filed late, but the Court nevertheless considered it.

LEGAL STANDARD

The anti-SLAPP statute provides that a cause of action "against a person arising from any act of that person in the 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" is subject to a special motion to strike, "unless the court determines that the plaintiff has established there is a probability that the plaintiff will prevail on the claim." (Code Civ. Proc., § 425.16 (section 425.16), subd. (b)(1).) This statute does not "insulate defendants from *any* liability for claims arising from protected rights or speech. It only provides a procedure for weeding out, at an early stage, meritless claims arising from protected activity." (*Exline v. Gillmor* (2021) 67 Cal.App.5th 129, 137 (emphasis in original), quoting B*ara v. Schmitt* (2016) 1 Cal.5th 376, 384.)

Resolution of an anti-SLAPP motion involves two steps. (*Ibid*.) First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. (*Ibid*.) Second, if the defendant makes the required showing, the burden shifts to the plaintiff to demonstrate the merit of the claim by establishing a probability of success. (*Ibid*.)

JUDICIAL NOTICE

Plaintiff requests that the Court take judicial notice of (1) legislative analyses of Senate Bill No. 515 of the 2003-2004 Regular Session, which added Code of Civil Procedure section 425.17; (2) the text of former Government Code section 85704, as added by Chapter 102 of the Statutes of 2000 and approved by the voters at the November 7, 2000 general election (Prop. 34.); and (3) legislative analyses of Assembly Bill No. 249 of the 2017-2018 Regular Session, which amended Government Code section 85704. Plaintiff's request is unopposed and granted. (Evid. Code, § 452, subds. (a), (c), (h).)

Defendants request judicial notice of the Statement of Organization (Fair Political Practices Commission Form 41) filed by Affordable Housing on May 1, 2020. Defendants' request is also unopposed and granted. (Evid. Code, § 452, subds. (c), (h).) However, the Court's notice is limited to the fact that this form was filed with the Secretary of State and not the truth of its contents. (See *Stevens v. Superior Court* (1999) 75 Cal.App.4th 549, 607-608; *StorMedia Inc. v. Superior Court* (1999) 20 Cal.4th 449, 457, fn. 9 [taking judicial notice of existence of Form S-3 Registration Statement filed with the Securities and Exchange Commission, but declining to take judicial notice of the truthfulness and proper interpretation of the document].)

ANALYSIS

First Prong: Whether Challenged Action Arises from Protected Activity

The first prong in analyzing an anti-SLAPP motion involves deciding whether the moving defendant has made a threshold showing that the challenged cause of action is one 'arising from' protected activity. Here, the parties agree that the challenged cause of action is one arising from protected activity, but dispute whether it falls within the public interest exception to the Anti-SLAPP law provided by Code of Civil Procedure section 425.17 (section 425.17). (See Oppo., p. 12: 18-20 [conceding that challenged cause of action is one arising from protected activity].)

Subdivision (b) of 425.17 exempts lawsuits filed in the "public interest" from the purview of the anti-SLAPP law. Whether a lawsuit falls within the public interest exemption is a "threshold issue, and [the court] address[es] it prior to examining the applicability of section 425.16." (*People ex rel. Strathman v. Acacia Research Corp.* (2012) 210 Cal.App.4th 487, 498.) The public interest exemption is narrowly construed and the plaintiff bears the burden of proof as to the applicability of the exemption. (*Exline v. Gillmor* (2021) 67 Cal.App.5th 129, 138.) Section 425.17(d) imposes express limitations on the scope of the public interest exemption, including an exception for complaints based on the "creation, dissemination, exhibition, advertisement, or other similar promotion of" a political work. (§ 425.17, subd. (d)(2).) Thus, regardless of whether the plaintiff's action is a public interest lawsuit, if this exception applies, the defendant may bring an anti-SLAPP motion. (*San Diegans for Open Government v. San Diego State University Research Foundation* (2017) 13 Cal.App.5th 76, 93.)

Here, Defendants argue that this action concerns the asserted failure of Defendants to file correct campaign reports, that such reports are political works under section 425.17(d)(2), and therefore this cause of action falls within the exception to the public interest exemption. (Reply, p. 9: 2-8.) In opposition, Plaintiff argues the political work exception does not apply because cases interpreting that exemption have focused on the lawsuit's effort to restrict the content of political speech in published political writings, while the "gravamen of the instant action is that Defendants failed to properly disclose campaign contributions in violation of the Political Reform Act." (Oppo., p. 11: 20-22.) To resolve this issue, the Court analyzes the few published decisions considering the term "political works" as used in section 425.17, subdivision (d)(2) (subdivision (d)(2)).

1. Cases Interpreting "Political Works" As Used in Subdivision (d)(2)

Foundation for Taxpayer & Consumer Rights v. Garamendi (2005) 132 Cal.App.4th1375 (*Garamendi*) briefly examined subdivision (d)(2). In this case, a public interest group filed a petition for writ of mandate and complaint to invalidate legislation regulating insurance companies. (*Id*. at pp. 1379-1380.) An insurer intervened and filed an anti-SLAPP motion against the complaint, which contained references to the insurer's political contributions, but did not assert any claims against the insurer. The trial court denied the anti-SLAPP motion. The Second Appellate District affirmed the trial court's ruling. Within that affirming ruling, the court rejected the insurer's contention that its political contributions constituted political works within the meaning of subdivision (d)(2) because subdivision (d)(2) applies only to actions involving a "work that might be subject to copyright protection." (*Id*. at p. 1391.) In a later case, however, the Second Appellate District treated this comment on political contributions as dicta and lacking supporting analysis. (*Major v. Silna* (2005) 134 Cal.App.4th 1485, 1493, fn. 5 (*Major*).) The court in *Major* also stated its agreement with the court in *Garamendi* that "political contributions do not constitute political 'works.'" (*Ibid*.)

In *Major*, a case of first impression, the plaintiff filed a complaint for injunctive relief under the City of Malibu's campaign finance law based on the defendant's mailing of a letter to residents of Malibu supporting candidates for seats on the Malibu City Council. (*Id*. at p. 1489.) The plaintiff's complaint alleged the mailing exceeded $100 in value and was made at the behest of the candidates in violation of the Malibu law. (*Ibid*.) The defendant filed a motion to strike the complaint under the anti-SLAPP law and the plaintiff thereafter dismissed his action. (*Id*. at p. 1490.) The defendant then requested an award of attorney fees under the anti-SLAPP law. (*Ibid*.) The trial court denied that request, reasoning that the plaintiff's action fell within the public interest exemption. (*Ibid*.) The Second Appellate District reversed the trial court's denial. (*Id.* at p. 1490.) The appellate court turned to the political work exception to the public interest exemption. (*Id*. at p. 1493.) The court determined that the public interest exemption should be narrowly construed and treated the political work exception as a qualification to that exemption. (*Ibid*.) The court concluded that the defendant's mailings and advertisements constituted "political works." (*Id*. at p. 1495.) In reaching that conclusion, the court applied the definition of the term works - something produced or accomplished by effort, exertion, or exercise of skill - and the principle of

ejusdem generis to determine that the defendant's letters and advertisement were not different in kind from the illustrative examples provided in subdivision (d) (2) (i.e., an article published in a newspaper or magazine of general circulation). (*Id*. at pp. 1494-1495.) The court did not see a material distinction between the defendant's letter and an article or editorial of similar length and content in a newspaper or magazine. (*Id*. at p. 1495.)

In *Sandlin v. McLaughlin* (2020) 50 Cal.App.5th 805 (*Sandlin*), the plaintiff filed a petition for writ of mandate challenging the candidate statements submitted by three individuals in their candidacy for positions on the Irvine City Council. (*Id*. at 813.) The candidates filed an anti-SLAPP motion, which the trial court denied because it was moot and barred by the public interest litigation exemption. (*Ibid*.) The trial court also denied the candidates' applications for attorney fees under the anti-SLAPP law. (*Ibid*.) The Fourth Appellate District reversed the trial court's decision. The court held that the candidates' creation and submission of candidate statements were "by definition political writings" and plainly fell within the political work exemption of subdivision (d)(2). (*Id*. at p. 824.) Consequently, the appellate court held the public interest litigation exemption to the anti-SLAPP statute did not apply. (*Ibid*.)

Most recently, in *Exline v. Gillmor* (2021) 67 Cal.App.5th 129 (*Exline*), the plaintiff filed a complaint against the defendant alleging that during defendant's time as a city council member and then as mayor of the City of Santa Clara, defendant violated the Political Reform Act by failing to disclose on Form 700 filing her interest in, and income she received from, an entity known as Public Property Advisors. The defendant filed an anti-SLAPP motion. (*Id*. at p. 134.) The trial court concluded that the political work exception applied to the Form 700 filings. (*Id*. at p. 136.) The Fourth Appellate District affirmed the trial court's decision. (*Id*. at pp. 138-.143.) The appellate court saw no question that Form 700 is political in nature. (*Id*. at p. 141.) Applying the definition of the term "work" in *Major*, the court concluded that Form 700 filings also constitute political work as the defendant filled out "these complex, comprehensive, and public forms through her effort as required by law," and agreed with the trial court that "Form 700 filings are not meaningfully different in kind" from the illustrative examples identified in (d)(2). (*Id*. at p. 142.)

With these cases in mind, the Court turns to Plaintiff's cause of action against Defendants.

2. Application of Cases Interpreting "Political Works" in Subdivision (d)(2) to Plaintiff's Cause of Action against Defendants

Plaintiff's sole cause of action against Defendants alleges that (1) Roundtable failed to properly disclose earmarked contributions, (2) Affordable Housing failed to properly report the receipt of earmarked contributions; and (3) Affordable Housing failed to properly list its top contributors in its advertising disclaimers. (Complaint, ¶ 42.)

With respect to the allegation regarding the failure to make proper disclosures in advertising disclaimers, the Political Reform Act requires that most advertisements paid for by a ballot measure committee include the words "committee major funding from" followed by the names of the three top contributors to the committee paying for the advertisement. (Gov. Code, § 84503.) Plaintiff argues the exemption in (d)(2) does not apply to this allegation regarding improper disclosures in advertising because *Major* and *Sandlin* were limited to attacks on the legality of "expressive content" of political advertisements, while Plaintiff's Complaint focuses on the disclosure of political contributions in advertisements. Defendants disagree with Plaintiff, arguing that "[a]dvertisements distributed as part of a political campaign are quintessential 'political works' within the meaning of § 425.17(d)(2)," also relying on *Major* and *Sandlin*. (Reply, p. 9: 20-23.)

The Court finds Defendants' argument is better supported by the language of subdivision (d)(2) as interpreted by *Major, Sandlin,* and *Exline*. The plain language of subdivision (d)(2) provides that it covers "[a]ny action against any person or entity based upon the *creation, dissemination*, exhibition, *advertisement*, or other similar promotion of any dramatic, literary, musical, *political*, or artistic *work*,

including, but not limited to, a motion picture or television program, or an article published in a newspaper or magazine of general circulation." (Emphasis added.) As is clear from this language, subdivision (d) applies to the creation or dissemination of a political work. The advertisements with which Plaintiff takes issue are no doubt political in nature. In addition, they are "works" under *Major* and *Exline* as they are "produced or accomplished by effort, exertion, or exercise of skill" or "produced by the exercise of creative talent or expenditure of creative effort." (*Major, supra*, 134 Cal.App.4th at p. 1494; *Exline, supra*, 67 Cal.App.5th at p. 142.) Furthermore, as explained in *Major* and *Sandlin*, the legislative history of subdivision (d)(2) indicates that it preserves the application of the anti-SLAPP statute to actions that implicate important forms of protected speech and the "right to speak on political matters" is the "quintessential subject" of our constitutional protections of the right to free speech. (See *Sandlin, supra*, 50 Cal.App.5th 805 at p. 824; *Major, supra*, at p. 1495-1496.) The Court sees nothing in these cases that limits their application to actions based on the "expressive content" of political works. (See *Edward v. Ellis* (2021) 72 Cal.App.5th 780, 789 [stating without qualification that "[t]he distribution of campaign mailers and other political literature about candidates' qualifications is undoubtedly protected activity under the anti-SLAPP statute."].) Nor does this conclusion disturb the statement in *Major* that "political contributions do not constitute political works," as this case concerns the disclosure of political contributions and not the contributions themselves. (*Major, supra*, 134 Cal.App.4th at p. 1493, fn. 5.)

In addition, Plaintiff's cause of action against Defendants is rooted in the two other allegations listed above that Defendant failed to make the proper disclosures regarding earmarked contributions. These allegations are the basis for Plaintiff's allegation that, as a result of Roundtable failing to make those disclosures, Affordable Housing failed to properly list its top contributors in its advertising disclaimers. With respect to the earmarking disclosures, the applicable law prohibits a person from making any contribution to a committee or candidate that is earmarked for a contribution to any other particular committee, ballot measure, or candidate unless the contribution is fully disclosed pursuant to Government Code section 84302. (Gov. Code, § 85704.) The committee making the earmarked contribution must provide the committee receiving that contribution with the name, address, occupation, and employer or place of business for the contributors who earmarked the funds and the amount of the contribution. (*Ibid*.)

Defendant argues this issue is identical to the issue addressed in *Exline*: "At issue in *Exline* was the plaintiff's allegations that Lisa Gillmore, former mayor of Santa Clara, violated the Political Reform Act by failing to properly disclose certain financial interests on her Form 700 Statement of Economic Interests Report, as required by the Act, 67 Cal.App.5th at 135, just as Plaintiff in this case alleges that Defendants have violated the Act by purportedly failing to properly disclose certain campaign contributions on their Form 460 and Form 497 campaign finance reports." (Supp. Brief, p. 5: 21-27.) By contrast, Plaintiff makes two arguments regarding the application of *Exline* to this case. First, Plaintiff argues Exline was wrongly decided and should not be followed by this Court. (Supp. Oppo. Brief, pp. 5-7.) However, the decisions of every division of the District Court of Appeal are binding on all superior courts of this state. (*Cuccia v. Superior Court* (2007) 153 Cal.App.4th 347, 353-354 "Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of the higher court." (*Ibid*.) Second, Plaintiff argues that the gravamen of this cause of action is the wrongful contributions themselves, not "political works." While the Court understands Plaintiff's argument, the Court agrees with Defendant that the thrust of Plaintiff's cause of action against Defendants concerns the propriety of disclosures made by Defendants. As with summary judgment motions, the "issues in an anti-SLAPP motion are framed by the pleadings." (*Medical Marijuana, Inc. v. ProjectCBD.com* (2020) 46 Cal.App.5th 869, 883.) Plaintiff's allegations that Defendant violated the Political Reform Act are as follows: (1) Roundtable, "by *failing to disclose* the earmarking of these contributions has violated the Political Reform Act's earmarking provisions" (Complaint, ¶ 37); and (2) Affordable Housing, "by failing to properly disclose its largest donors through the proper reporting of earmarked contributions, has violated the Political Reform Act's reporting and disclaimer provisions" (*id*., ¶ 38).

As in *Exline*, there is no question these disclosures are political in nature. Those contribution disclosures are made via public forms, including Forms 460, 461, and 497. (See Palmer Decl., Exhs. 5-10.) These are forms prepared by the Fair Political Practices Commission and filed with the Secretary of State: Form 460 is filed by recipient committees to report expenditures and contributions; Form 461 is filed by major donors, independent expenditure committees, and multipurpose organizations; and Form 497 is filed by state and local committees making or receive contributions whose combined total is $1,000 or more in the 90 days before an election, committees reporting contributions of $5,000 or more in connection with a state ballot measure, and state candidates as well as state ballot measure committees that receive $5,000 or more at any time other than a 90-day election cycle. The Court agrees with Defendants that as in *Exline*, the process of making the required disclosures involves effort and exertion as used in the definition of work set forth in *Major* and *Exline*. The individuals or entities making the disclosures "must discern what the law requires [them] to disclose." The Forms listed above include extensive instructions, an "Advice Email" address, and an "FPPC Toll-Free Helpline." In light of the complexity of filling out these forms and making the disclosures required by the PRA, it is hard to contest the argument that the disclosures involve exertion and thereby constitute "work."

However, before reaching a conclusion, the Court considers a significant distinction when comparing the case at bar to *Major*, *Sandlin*, and *Exline*. *Major*, *Sandlin*, and *Exline* all involved actions filed against individual defendants and the courts in *Major* and *Sandlin* found support for their conclusions in legislative history indicating an intent to preserve the application of the anti-SLAPP law to actions against *individuals*. In *Major*, the court found that the legislative analyses of the measure that added subdivision (d)(2) "disclose that the Legislature's goal in enacting section 425.17 was to limit corporate abuse of the anti-SLAPP law, and not to exclude *individuals* who have distributed political literature from the scope of the anti-SLAPP." (*Ibid*. (Emphasis added).) "Accordingly, the Legislature checked the reach of the 'public interest' exception by enacting subdivision (d)(2), which preserved the application of the anti-SLAPP law to actions against *individuals* that implicate important forms of protected speech." (*Ibid*. (Emphasis added.).) The courts in *Sandlin* and *Exline* quoted this preservation for actions against individuals in reaching their conclusions. (*Sandlin, supra*, 50 Cal.App.5th at p. 824; *Exline, supra*, 67 Cal.App.5th at p. 140.) By contrast, Defendants are not natural persons, but rather political committees. Under the Political Reform Act, a committee is "any person or combination of persons who directly or indirectly receives contributions totaling two thousand dollars ($2,000) or more in a calendar year, makes independent expenditures totaling $1,000 or more in a calendar year, or makes contributions totaling $10,000 or more in a calendar year to or at the behest of candidates or committees. (Gov. Code., § 82013.) A "person" under the Act is "an individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, limited liability company, association, committee, and any other group of persons acting in concert." (Gov. Code, § 82047.) The Act sets forth rules governing the organization of committees. (Gov. Code, §§ 84100 et seq.) Thus, a committee may be part of an entity like a corporation or limited liability company.

Before examining the legislative history of the addition of subdivision (d)(2), it is important to recall the plain language of that provision, which reads as follows:

Subdivision (b) does not apply to "[a]ny action against any person *or entity* based upon the creation, dissemination, exhibition, advertisement, or other similar promotion of any dramatic, literary, musical, political, or artistic work, including, but not limited to, a motion picture or television program, or an article published in a newspaper or magazine of general circulation." (Emphasis added.)

Thus, the limitation in subdivision (d)(2) clearly applies to entities and is not limited to work produced by individuals. Limiting the application of this provision to work produced by individuals would make the term "entity" surplusage, which courts cannot presume the Legislature intended. (*Wolski v. Fremont Investment & Loan* (2005) 47 Cal.4th 381, 390.) Moreover, application of subdivision (d)(2) beyond

individuals is supported by the legislative history of that provision as well. In particular, with respect to the application of subdivision (d)(2) to the media, the Senate Judiciary Committee analysis explains that this provision "would exempt the news media and other media defendants (such as the motion picture industry)" from subdivision (b). (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 515 (2003-2004 Reg. Sess.) as amended May 1, 2003, p. 14.) The Assembly Judiciary Committee analysis explains that this provision was crafted "in order to preserve the anti-SLAPP motion for the protection of those frequent targets it was intended to protect"; thus, the bill excludes from the exemptions "specified persons and entities, such as those engaged in speech-related activities, specified nonprofits, and actions against persons or entities based on the creation or promotion of constitutionally protected artistic works and the like." (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 515 (2003-2004 Reg. Sess.) as amended June 27, 2003, p. 12.)

In sum, based on the plain language of subdivision (d)(2), the interpretation of the term "political work" as applied to Form 700 filings in *Exline*, and the legislative history of subdivision (d)(2), the Court concludes that this action falls under subdivision (d)(2) and outside the reach of the public interest exemption in subdivision (b).

Second Prong: Whether Plaintiff Establishes Probability of Prevailing
Once a defendant satisfies the first prong, the burden shifts to the plaintiff to establish under the second prong a probability that plaintiff will prevail on the claims based on the protected activity that are asserted against the defendant. (Code Civ. Proc., § 425.16, subd. (b).) This second step is a summary-judgment-like procedure. (*Citizens of Humanity, LLC v. Hass* (2020) 46 Cal.App.4th 589, 598.)

A plaintiff establishes a probability of prevailing by showing, through its pleadings and evidentiary submissions, that the complaint is legally sufficient and supported by a *prima facie* showing of facts that, if proved at trial, would support a judgment in the plaintiff's favor. (*Taus v. Loftus* (2007) 40 Cal.4th 683, 713-714.) The court cannot weigh the evidence, but must determine as a matter of law whether the evidence is sufficient to support a judgment in the plaintiff's favor. (*Id.*) The court must consider not only facts supported by direct evidence, but also facts that can reasonably be inferred from the evidence. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 822 (*Oasis*).) "[T]he plaintiff's burden of establishing a probability of prevailing is not high: [the court does] not weigh credibility, nor [does it] evaluate the weight of the evidence. Instead, [the court accepts] as true all evidence favorable to the plaintiff and assess[es] the defendant's evidence only to determine if it defeats the plaintiff's submission as a matter of law. [Citation.] Only a cause of action that lacks 'even minimal merit' constitutes a SLAPP. [Citation.]' [Citation.] (*Greene v. Bank of America* (2013) 216 Cal.App.4th 454, 457-458.) Because the anti-SLAPP motion is filed before discovery, and summary judgment motions are generally filed after discovery, courts "must accept all evidence favorable to the plaintiff as true and indulge every legitimate favorable inference that may be drawn from it. Only when no evidence of sufficient substantiality exists to support a judgment for the plaintiff may the defendant's motion be granted. [Citation.]" (*Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 828 (*Wilcox*), disapproved of on other grounds by *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, fn. 5.)

Here, Plaintiff must establish a probability of prevailing on its argument that Roundtable has violated the earmarking provisions of the Political Reform Act. The applicable provision of the Act provides as follows:

"(a) A person shall not make any contribution to a committee or candidate that is earmarked for a contribution to any other particular committee, ballot measure, or candidate unless the contribution is fully disclosed pursuant to Section 84302.
"(b) For purposes of subdivision (a), a contribution is earmarked if the contribution is made under any of the following circumstances:
"(1) The committee or candidate receiving the contribution solicited the contribution for the purpose of

making a contribution to another specifically identified committee, ballot measure, or candidate, requested the contributor to expressly consent to such use, and the contributor consents to such use.
"(2) The contribution was made subject to a condition or agreement with the contributor that all or a portion of the contribution would be used to make a contribution to another specifically identified committee, ballot measure, or candidate.
"(3) After the contribution was made, the contributor and the committee or candidate receiving the contribution reached a subsequent agreement that all or a portion of the contribution would be used to make a contribution to another specifically identified committee, ballot measure, or candidate.
"(c) Notwithstanding subdivisions (a) and (b), dues, assessments, fees, and similar payments made to a membership organization or its sponsored committee in an amount less than five hundred dollars ($500) per calendar year from a single source for the purpose of making contributions or expenditures shall not be considered earmarked.
"(d) The committee making the earmarked contribution shall provide the committee receiving the earmarked contribution with the name, address, occupation, and employer, if any, or principal place of business, if self-employed, of the contributor or contributors who earmarked their funds and the amount of the earmarked contribution from each contributor at the time it makes the contribution. If the committee making the contribution received earmarked contributions that exceed the amount contributed, or received contributions that were not earmarked, the committee making the contribution shall use a reasonable accounting method to determine which contributors to identify pursuant to this subdivision, but in no case shall the same contribution be disclosed more than one time to avoid disclosure of additional contributors who earmarked their funds." (Gov. Code, § 85704 (emphasis added) ("section 85704").)

Plaintiff argues it can establish a probability of establishing that Roundtable received earmarked contributions as described in 85704, subdivision (b), paragraphs (1) and (2) (hereafter paragraph (1) and paragraph (2), respectively). With respect to paragraph (1), Plaintiff cites to a letter Roundtable sent to Blackstone on February 4, 2020 regarding the 2020 election season ("Blackstone Letter"). (Palmer Decl., Exh. 3.) The Blackstone Letter describes threats to the statewide business community, including split roll, rent control, and a possible business service tax proposal. (*Id*., p. 1.) The letter asks "members and concerned businesses to contribute 10% of the additional costs in taxes and operations that split roll and/or these other measures pose to [their] ability to do business in California." (*Id*., p. 2.) The letter also states as follows: "Please note that the California Business Roundtable Issues PAC is a general-purpose committee engaged in multiple political activities, as described above. The Issues PAC is unable to accept any funds that are earmarked for a specific ballot measure or ballot measure committee. However, the California Business Roundtable Issues PAC has established clear priorities that any funds raised will be spent to 1) defeat split roll; 2) defeat rent control; 3) defeat other measures as required." (*Ibid*.) Plaintiff argues this letter serves as evidence that contributions to Roundtable violated the earmarking statute because "one can infer consent to use those contributions for the 'specifically identified' ballot measures listed in the solicitation." (Oppo., p. 17: 10-12.) However, paragraph (1) includes three elements - (1) the committee must solicit the contribution for the purpose of making a contribution to another specifically identified ballot measure, (2) the committee must request the contributor to *expressly* consent to such use, and (3) *the contributor must consent to such use*. Plaintiff offers no evidence to show that the committee requested the contributor to expressly consent to earmarked use; instead, Plaintiff asks the Court to rely on an *inference* that such consent was given. The Court evaluates whether it can make that inference in more detail below.

Plaintiff also cites to the Blackstone Letter as proof of a prima facie case of earmarking under paragraph (2). Paragraph (2) specifies a contribution is earmarked if it was made "subject to a condition or agreement with the contributor that all or a portion of the contribution would be used to make a contribution to another specifically identified committee, ballot measure, or candidate." Plaintiff argues that the letter cited above (and sent in February 2020) provides proof that Blackstone's response to the letter (in June 2020) with a monetary contribution constitutes an "agreement that those funds would be

used to defeat two specifically identified ballot measures." (Oppo., p. 17: 17-19.) However, the Court is not persuaded Plaintiff's evidence is sufficient. First, to the extent Plaintiff argues the timing of the letter and contribution provide evidence of an agreement, Government section 85704 provides that a violation of its provision "shall not be based solely on the timing of the contributions made or received." Second, with respect to the content of the Blackstone Letter, the Court finds advice letters from the Fair Political Practices Commission ("Commission") persuasive on this topic. (*People v. Thrasher* (2009) 176 Cal.App.4th 1302, 1309 [concluding a court may consider the advice letters of the Commission, although they receive less weight than codified regulations or FPPC formal opinions].) With respect to former section 85704, as it read in 2016, which is similar to paragraph (2) except for former section 84704's limitation to candidates, the Commission has stated that the original contributor must "knowingly and unambiguously" earmark the contribution for deposit with the second person. (Gray Advice Letter, No. A-03-068, 2003 Cal. Fair-Pract. LEXIS 60.) Also, in 2002, the Commission considered a request from a committee "that solicits contributions by identifying to potential contributors those candidates who will be the targets of independent expenditures made by the committee. Contributions will be made to the committee with the knowledge of which candidates are targeted, but without specific knowledge of the date, type and value of the independent expenditures." (Bauer Advice Letter, No. A-02-259, 2002 Cal. Fair-Pract. LEXIS 229.) The Commission concluded that the Act's earmarking statute did not apply to this situation. (*Ibid*.) The Blackstone Letter expressly states the earmarking prohibition and states the funds raised will be used for a variety of purposes, including defeating other measures.

Plaintiff also cites to Roundtable's year-end reports filed every year since 2004 as proof that Roundtable accepted earmarked contributions in 2020. In particular, Plaintiff argues that Roundtable raised less than $100,000 in most years between 2004, and 2019. (Palmer Decl., ¶ 12.) Through 2019, its highest annual contributions were in 2018, when it raised $1,210,500. (*Ibid*.) But in 2020, Roundtable raised over $46 million. (*Id*., Exh. 5, p. 17.) Plaintiff then refers the Court to records of the contributions of Blackstone, Geoffrey Palmer, and Hayde in 2018 and 2020. According to Plaintiff, those dates are significant because rent control was on the ballot in the form of Proposition 10 in 2018, which is similar to Proposition 21. Also, Plaintiff states these donors made the following contributions in 2018 versus 2020:

1) In 2018, Blackstone contributed $145,000 to Roundtable, but gave over $5 million to No. on Prop. 10. (*Id.*, Exh. 6, pp. 2 & 12.) In 2020, Blackstone did not contribute to Affordable Housing or any primarily formed committee, but gave exclusively to Roundtable in the amount of $7 million. (*Id*., Exh. 10.)

2) In 2018, Geoffrey Palmer contributed 195,000 to Roundtable but gave $2 million to No. on Prop. 10. (Oppo., p. 18: 7-8.) In 2020, Geoffrey Palmer donated $2 million to Roundtable. (*Id*., p. 18: 17.)

3) In 2018, Hayde contributed $155,000 to Roundtable and $5 million to No. on 10. (Palmer Decl., Exh. 7, p. 6.) In 2020, Hayde contributed a total of $4.3 million to Roundtable in three contributions. (*Id*., Exh. 11, pp. 5 & 7; Exh. 12, p. 4.)

Plaintiff argues that this "dramatic switch in contribution patterns, coupled with the solicitation letter to Blackstone . . . substantiates a prima facie case of undisclosed earmarking." (Oppo., p. 19: 19-21.) In order to prevail on its cause of action, Plaintiff would need to show that Roundtable and donors like Blackstone entered into an express or implied agreement that Roundtable would use the donors' contributions to contribute to a specifically identified ballot measure. By relying on the letter described above combined with evidence of contribution patterns by donors, Plaintiff is arguing an implied contract was in place. The basic difference between an implied contract and an express contract lies in the manner of proof of the contract's existence and terms. (*Friedman v. Friedman* (1993) 20 Cal.App.4th 876, 887.) An implied contract is an actual agreement between the parties, the existence and terms of which are manifested by conduct. (*Ibid*.) An implied contract may be found based on a course of conduct. (*Varni Bros. Corp. v. Wine World, Inc. (*1995) 35 Cal.App.4th 880, 889.) "Conduct will create a contract if the conduct of both parties is intentional and each knows, or has reason to know, that the

other party will interpret the conduct as an agreement to enter into a contract." (CACI No. 305.) The Court finds the Blackstone Letter combined with Plaintiff's contribution exhibits are insufficient to establish a probability of showing that an implied earmarking agreement was in place. At best, the Blackstone Letter followed by Blackstone's contribution shows an implied agreement between Blackstone and Roundtable that Roundtable would use Blackstone's contribution for a variety of purposes, including *possibly* contributing to the defeat of Prop. 21, among other possible uses; however, the evidence offered does not show an understanding between the parties that any of Blackstone's contributions would specifically be used to contribute to a particular committee or ballot measure.

In evaluating a probability of success, the court should draw "any non-speculative inference favorable to the plaintiff." (*Monster Energy Co. v. Schechter* (2019) 7 Cal.4th 781, 769.) However, speculative inferences cannot be used to defeat anti-SLAPP motions. (See *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 931-933 [plaintiff failed to demonstrate probability of prevailing on his defamation cause of action because he relied on a series of speculative inferences from evidence purporting to show actual malice].) "A reasonable inference may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture or guess work. . . It must logically flow from other facts established in the action." (*Wilcox, supra,* 27 Cal.App.4th at p. 828.) Plaintiff's motion asks the Court to make such a speculative inference here.

The Court offers the following examples to illustrate the difference between a reasonable inference and a speculative inference for purposes of the second prong of an anti-slapp motion. In *Oasis, supra*, 51 Cal.4th 811, the defendant was an attorney who represented the plaintiff in gaining approval from the city council for a redevelopment project. After he stopped representing the plaintiff, the defendant became involved in efforts to "thwart the same redevelopment project by soliciting signatures on a referendum petition to overturn the . . . [c]ity [c]ouncil's approval of the project." (*Id*. at p. 815.) The plaintiff's complaint alleged causes of action for breach of fiduciary duty, professional negligence, and breach of contract against the defendant. (*Ibid*.) The appellate court determined plaintiff's claims arose from protected activity and the plaintiff failed to demonstrate a probability of prevailing on those claims. (*Ibid*.) The Supreme Court disagreed and concluded the plaintiff had "stated and substantiated the sufficiency of its legal claims." (*Id*. at p. 816..) For example, the plaintiff had alleged that the defendant breached his fiduciary duty because he acquired confidential information relating to the redevelopment project "particularly during team meetings that discussed matters of strategy with respect to the city council, other city officials, and civil organizations, and that [defendant] then used this information when he actively opposed the precise project he had been retained to promote." (*Id*. at pp. 821-822.) Although the plaintiff did not offer direct evidence that the defendant relied on confidential information in formulating his opposition to the project, the Supreme Court stated that the "proper inquiry in the context of an anti-SLAPP motion is 'whether the plaintiff proffers sufficient evidence for such an inference.' [Citations.]" (*Id*. at p. 822.) Because it was undisputed the defendant (1) agreed to represent the plaintiff in securing the city council's approval for the project, (2) acquired confidential information during his representation of the plaintiff, and (3) then publicly opposed the same redevelopment project, the court found it "reasonable to infer that he did" misuse confidential information. (*Ibid*.)

By contrast, in *Dwight R. v. Christy B.* (2013) 212 Cal.App.4th 697, the plaintiff alleged that the defendant, a licensed marriage and family therapist, violated the plaintiff's civil rights by conspiring with state actors and others to falsely accuse him of sexually abusing his daughter. The court concluded that the complaint was based on protected free speech or petition activities under the anti-SLAPP law. (*Id*. at p. 710-713.) However, with respect to the second prong of the anti-SLAPP analysis, the court concluded that none of the evidence adduced supported a reasonable inference that the defendant engaged in a conspiracy or joint action. (*Id*. at p. 715.) Instead, the court determined that the plaintiff merely speculated that such a conspiracy or joint action occurred. (*Ibid*.) For example, the plaintiff merely speculated that the defendant and others "were in cahoots" because they all worked with abused children and the daughter's initial therapy session with the defendant took place on the day she was to

have her first overnight visit with the plaintiff. (*Ibid*.) The court determined these circumstances did not support a reasonable inference that the defendant was engaged in a conspiracy or joint action. (*Ibid*.)

The Court finds Plaintiff's pleadings and evidence offered in opposition to this motion rely on the *suspicion* that based on the historical pattern of contributions to Roundtable and Roundtable's letter written to Blackstone in early 2020, the contributions of entities like Blackstone made to Roundtable in 2020 were made subject to a condition or agreement that all or a portion of the contribution would be used to make a contribution to another specifically identified committee or ballot measure. Because the Court concludes Plaintiff has not met its burden with respect to the second prong, it need not consider Defendants' evidence offered with respect to this prong or Plaintiff's objections to that evidence.

Conclusion
Defendants' motion to strike the first cause of action from Plaintiff's Complaint pursuant to the anti-SLAPP statute is GRANTED. Defendants may seek their attorney's fees as the prevailing party on this motion by separate motion pursuant to Code of Civil Procedure section 425.16, subdivision (c).

Plaintiff is directed to file and serve an Amended Complaint omitting the first cause of action on or before March 10, 2022.

The minute order is effective immediately. No formal order pursuant to CRC Rule 3.1312 or further notice is required.

COURT RULING

The matter was argued and submitted.

The matter was taken under submission.