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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

MARC BORACCHIA et al., Plaintiffs and Respondents, v. RYAN FISTER et al., Defendants and Appellants.	A156321 (San Francisco County Super. Ct. No. CGC-17-561848)

Defendants Ryan and Sunshine Fister appeal from the order denying their anti-SLAPP motion[1] which sought to strike plaintiffs Marc Boracchia's and Lea Wivoitt-Boracchia's complaint for defamation and false light invasion of privacy. Assuming for purposes of its ruling that defendants' allegedly defamatory statements were protected activity, the trial court found that plaintiffs met their burden of demonstrating their claims had minimal merit. We conclude the conduct complained of is not protected speech or petitioning activity. Accordingly, we affirm.

[1] "SLAPP" is an acronym for "strategic lawsuit against public participation," and refers to a lawsuit that both arises out of defendants' constitutionally protected expressive or petitioning activity and lacks a probability of success on the merits. (Code Civ. Proc., § 425.16; *S.B. Beach Properties v. Berti* (2006) 39 Cal.4th 374, 377.) All further unspecified statutory references are to the Code of Civil Procedure.

FACTUAL AND PROCEDURAL BACKGROUND

In October 2017, plaintiffs filed a complaint against defendants alleging claims for defamation and false light invasion of privacy. The complaint states that plaintiffs were financial advisors at Northwestern Mutual San Francisco (Northwestern Mutual). Defendants were plaintiffs' clients. Defendants are college-educated professionals and sophisticated investors with a diversified asset portfolio. Defendants told plaintiffs they desired a long-term, low-risk investment to balance their retirement portfolio. Plaintiffs recommended they invest in a cash value life insurance plan.

According to the complaint, plaintiffs "diligently disclosed all relevant facts pertaining to what a cash value life insurance plan was and how it operated." Defendants applied for a policy and were provided a complete liquidity disclosure schedule that showed their investment would be illiquid for several years. Prior to submitting the application to underwriting, the parties held multiple telephone conferences to address defendants' questions and concerns. Defendants acknowledged that they fully understood all aspects of the plan. Their application was approved and a policy was issued in April 2016 (Policy).[2]

In October 2016, defendants allegedly had a change of heart and sought to get out of the Policy by falsely representing to Northwestern Mutual that plaintiffs had deliberately withheld information about certain aspects of the Policy, including that it could not be fully liquidated after the first year and that plaintiffs' commission on the sale of the Policy was paid out of defendants' contributions. According to plaintiffs, defendants made this false complaint because they suffered buyer's remorse and wanted a full refund.

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[2] It appears two policies were issued, one for Ryan Fister and one for Sunshine Fister.

The complaint further alleged that defendants committed defamation per se and placed plaintiffs in a false light because defendants' false statements injured plaintiffs in their occupation by attacking their veracity, integrity, and ethics as financial professionals. Plaintiffs sought $1 million in general damages, as well as special and punitive damages.

Defendants filed a special motion to strike the complaint under section 425.16. They asserted that plaintiffs' causes of action arose from acts in furtherance of their right of petition or free speech in connection with a public issue, and that plaintiffs could not establish a probability of prevailing on their claims. Defendants argued that the complaint was not actionable because their alleged statements to Northwestern Mutual were truthful and were made "in connection with an issue under consideration in an official proceeding authorized by law," entitling them to absolute immunity under the litigation privilege and qualified immunity based on the common interest privilege.

In an accompanying declaration, defendants indicated that as a result of their complaint, Northwestern Mutual agreed " 'there were miscommunications and misunderstandings with regard to the purchase and sale of [the Policy].' " Northwestern Mutual rescinded the Policy and returned their premiums. Northwestern Mutual then terminated plaintiffs' employment and notified the Financial Industry Regulatory Authority (FINRA) of their terminations.

In their opposition to the motion to strike, plaintiffs argued that the complaint did not arise from acts in furtherance of defendants' right to free speech on a public issue because the statements were not made before any kind of official proceeding, nor were they made in connection with an issue of public interest. They also asserted they had established a probability of

prevailing on their claims under the lenient standard of proof applicable to anti-SLAPP motions. Both parties submitted objections to the evidence submitted by the other party.

The trial court denied defendants' motion to strike the complaint. Assuming without deciding that the first prong of the anti-SLAPP inquiry had been satisfied, the court found that plaintiffs had satisfied their burden of showing that there is minimal merit to each of their claims. Specifically, there was sufficient evidence that one or more of the statements made by defendants was provably false and that the statements were made with malice, defeating the common interest privilege. The court further found that the litigation privilege did not apply because the allegedly false statements were not made preliminary to or during a judicial or quasi-judicial proceeding. This appeal followed.

DISCUSSION

I. Applicable Law and Standard of Review

The California Legislature enacted the anti-SLAPP statute to counteract "a disturbing increase in 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).) A court may order a cause of action "arising from any act" "in furtherance" of the "right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue" to be stricken by means of this special motion. (§ 425.16, subd. (b)(1).) We review the order granting or denying an anti-SLAPP motion de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.)

"Resolution of an anti-SLAPP motion involves two steps. First, the defendant must establish that the challenged claim arises from activity protected by section 425.16. [Citation.] 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." (*Baral v. Schnitt* (2016) 1 Cal.5th 376, 384.)

II. Official Proceeding (§ 425.16, subd. (e)(1))

Defendants base their protected activity argument on two kinds of protected statements or conduct: those made in an official proceeding (§ 425.16, subd. (e)(1)), and conduct connected with a public issue. (§ 425.16, subd. (e)(4).) Section 425.16, subdivision (e)(1) defines protected activity as "any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law." Because FINRA "is an official body for purposes of section 425.16, subdivision (e)(1)," defendants contend that their statements about plaintiffs were made before an "official proceeding." (*Fontani v. Wells Fargo Investments, LLC* (2005) 129 Cal.App.4th 719, 728 (*Fontani*), disapproved on another point in *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 203, fn. 5.)

As background, "FINRA is a 'self-regulatory organization' under the Securities Exchange Act and is overseen by the Securities and Exchange Commission [(SEC)]. FINRA exercises comprehensive oversight and regulation over all securities firms." (*Adjian v. JPMorgan Chase Bank, N.A.* (9th Cir. Aug. 31, 2017) 697 Fed.Appx. 528, 529–530; *Fontani, supra,* 129 Cal.App.4th at p. 728.) FINRA "is the successor to the National Association of Securities Dealers, Inc. [NASD]." (*Adjian*, at p. 530.) As noted above, in *Fontani,* the Court of Appeal concluded the NASD qualified as an official body under the anti-SLAPP statute. (*Fontani,* at p. 728.)

Plaintiffs are investment adviser representatives subject to FINRA's jurisdiction. Northwestern Mutual is "a member of the [FINRA] and, as such, must abide by that body's rules relating to the registration of employees. Article V, section 3 of the [FINRA] by-laws requires members to

notify it 'on a form designated by the [FINRA]' when the association of a registered person with that member is terminated." (*Fontani, supra,* 129 Cal.App.4th at pp. 725–726.) The designated form is the Uniform Termination Notice for Securities Industry Registration, also known as a Form U-5. (*Fontani*, at p. 726.) Federal law requires "that FINRA publish information about its members' 'disciplinary actions, regulatory . . . proceedings, and other information required by . . . exchange or association rule, and the source and status of such information.' (15 U.S.C. § 78*o*-3(i)(5).) FINRA does this through BrokerCheck . . ., which allows members of the public to search for and review the professional history of individual brokers." (*Flowers v. Financial Industry Regulatory Authority, Inc.* (2017) 16 Cal.App.5th 946, 950, italics omitted.)

Defendants rely on *Fontani* to argue that their communications with Northwestern Mutual were protected petitioning activity because it resulted in plaintiffs' termination and the filing of a form U-5 with FINRA. In *Fontani,* an employee sued his former employer, Wells Fargo Investments, Inc., following his termination. (*Fontani, supra,* 129 Cal.App.4th at p. 725.) Among his allegations, the employee claimed Wells Fargo defamed him and interfered with his prospective business advantage when it submitted a Form U-5 to the NASD describing the reasons for his termination. Wells Fargo moved to strike these claims under the anti-SLAPP law. (*Ibid.*) Reversing the trial court's denial of the motion to strike, the appellate court noted that communications to an official administrative agency designed to prompt agency action are protected regardless of whether the agency undertakes any investigation. (*Id.* at p. 731.) The court held that Wells Fargo's conduct was protected by section 416.25, subdivision (e)(1) because "the Form U-5 was a

communication made 'in anticipation of the bringing of an action or other official proceeding.' " (*Id.* at p. 732.)

Defendants' reliance on *Fontani* is misplaced. Here, defendants did not file a Form U-5, nor did they urge Northwestern Mutual to do so. Defendants acknowledge that their complaint about plaintiffs, which was submitted to Northwestern Mutual's client relations director, "made no reference to FINRA or disciplinary proceedings against the [plaintiffs]." Instead, defendants contend that they "filed a complaint in connection with an official [FINRA] proceeding" because their complaint caused Northwestern Mutual to institute disciplinary actions that were later "reported by FINRA in Investment Advisor Representative Public Disclosure Reports." We conclude defendant's complaint to Northwestern Mutual was not made in anticipation of any official proceeding and deserves no protection under the anti-SLAPP statute.

It is true that protected communications under section 425.16, subdivision (e)(1) are not limited to communications made during an actual official proceeding. However, the communications must be designed to prompt some type of official action. A " ' "communication to an official administrative agency . . . *designed to prompt action by that agency*" ' is ' "as much a part of the 'official proceeding' as a communication made after the proceedings had commenced." ' " (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1009, italics added (*ComputerXpress*) [complaint to SEC protected "official proceeding" communication]; see *Comstock v. Aber* (2012) 212 Cal.App.4th 931, 941–942 [filing police report protected activity]; *Fontani, supra,* 129 Cal.App.4th 719 [complaint to NASD protected "official proceeding" activity as NASD has authority to regulate broker conduct].)

For example, in *ComputerXpress,* the plaintiffs alleged the defendants had sent the SEC a letter making false accusations with the intent of inciting

an investigation. (*ComputerXpress*, *supra*, 93 Cal.App.4th at p. 1008) The appellate court had "little difficulty" in concluding that such a communication was a statement before an official proceeding because the purpose of the complaint was to prompt action by the SEC. (*Id.* at p. 1009.) Similarly, in *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777 (*Dove Audio*) the defendant solicited the endorsement of various celebrities in asking the Attorney General to open an investigation into whether the plaintiff had failed to make certain royalty payments to charities. The plaintiff sued for defamation. (*Id.* at p. 780.) The appellate court held the communications were petitioning activity: "The communication was made in connection with an official proceeding authorized by law, a proposed complaint to the Attorney General seeking an investigation. 'The constitutional right to petition . . . includes the basic act of filing litigation or otherwise seeking administrative action.' [Citation.] Just as communications preparatory to or in anticipation of the bringing of an action or other official proceeding are within the protection of the litigation privilege of Civil Code section 47, subdivision (b) [citation], we hold that such statements are equally entitled to the benefits of" the anti-SLAPP statute. (*Id.* at p. 784.)

In contrast to these authorities, there is no evidence that defendants' communications with Northwestern Mutual were designed to prompt some type of official action or investigation. Defendants' only demand of Northwestern Mutual was for a full refund of their contributions and cancellation of their Policy. Defendants made no mention of FINRA or even suggested that plaintiffs be disciplined. That Northwestern Mutual opted to terminate its relationship with plaintiffs and thereafter filed its disclosure report with FINRA is a happenstance neither requested nor anticipated by defendants.

Defendants note that the FINRA disclosure reports contain " 'information the states require Investment Adviser Representatives and firms to submit as part of the registration and licensing process, and information that state regulators report regarding disciplinary actions or allegations against Investment Adviser Representatives.' " Because Northwestern Mutual's duty to report such allegations is "automatic," defendants assert investors "do not need to submit a complaint directly to FINRA in order to trigger disciplinary action."

Defendants ignore that their complaint to Northwestern Mutual was not designed to prompt an agency investigation or official action, and that the U-5 notice was filed with FINRA only because of Northwestern Mutual's own decision to terminate plaintiffs' employment. The purpose of section 425.16, subdivision (e)(1) is "essentially to protect the activity of petitioning the government for redress of grievances and petition-related statements and writings." (*Du Charme v. International Brotherhood of Electrical Workers* (2003) 110 Cal.App.4th 107, 114 (*Du Charme*), citing *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1120–1121.) We see no basis for extending the law's protection to private communications that are not intended to initiate a government proceeding.

Defendants point out that plaintiffs' own declaration acknowledged that " '[w]ith both Defendants having worked in a corporate environments [*sic*], and both being college educated, Defendants are well aware that when a client falsely alleges that a broker misrepresented to them facts in order to induce them into entering to an investment, the outcome will always lead to some form of injury *or disciplinary action* against that person." (Italics added.) However, even if defendants knew their complaint could possibly lead to some form of disciplinary action against plaintiffs, their allegations

were not preparatory to or in anticipation of any official proceeding. Defendants' sole objective was to have Northwestern Mutual cancel the Policy and refund their contributions.

Defendants also argue that the fact they did not directly make a formal complaint to FINRA is irrelevant in analyzing whether their statements were made in connection with an official proceeding, relying on the *Fontani* court's conclusion that an official proceeding "is at least one potential consequence of a . . . filing that contains allegations of improper conduct by a broker-dealer." (*Fontani*, *supra*, 129 Cal.App.4th at p. 731.) Their quotation of this passage contains a notable omission. The relevant portion of that opinion states: "The record is silent on whether the NASD actually investigated Fontani based on the Form U-5 allegations or otherwise. However, an NASD investigation is at least one potential consequence of a *Form U-5 filing* that contains allegations of improper conduct by a broker-dealer. [Citation.] Therefore, *the Form U-5* was a communication made 'in anticipation of the bringing of an action or other official proceeding.' " (*Fontani,* at pp. 731–732, italics added.) Defendants did not file a Form U-5 with FINRA; Northwestern Mutual did.

In short, submitting a private complaint to an investment firm seeking a refund of insurance premiums based on a broker's misrepresentations is not equivalent to filing a report with an official agency to prompt an official investigation into that broker's misconduct. Indeed, if plaintiffs were concerned that defendants had violated any applicable regulations and sought redress from the government, they could have contacted FINRA or another regulator directly. We conclude that their communications with Northwestern Mutual were not protected speech or petitioning activity under the official proceeding portion of the anti-SLAPP statute.

III. Matter of Public Interest (§ 425.16, subd. (e)(4))

Defendants also argue that their communications concerned a matter of public interest. Section 425.16, subdivision (e)(4) states that protected activity includes "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."

Courts have struggled to define "public issue" and "issue of public interest" as those terms are used in section 425.16, subdivision (e)(4). After surveying the applicable cases, the court in *Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO* (2003) 105 Cal.App.4th 913 (*Rivero*) concluded that a public issue (a) "concerned a person or entity in the public eye," (b) involved "conduct that could directly affect a large number of people beyond the direct participants," or (c) concerned "a topic of widespread, public interest." (*Id.* at p. 924.) The court in *Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, added a few more observations. An issue of public interest "should be something of concern to a substantial number of people," not to a "relatively small, specific audience." There must be "some degree of closeness between the challenged statements and the asserted public interest," and "the assertion of a broad and amorphous public interest is not sufficient." (*Id.* at p. 1132.)

In determining whether section 425.16, subdivision (e)(4), applies to allegations of a complaint, a court's basic task is to draw the boundaries of the issue. What is this complaint really about? If the boundaries are drawn too expansively, any issue will become a "public issue" or an "issue of public interest." As the court observed in *Rivero,* any workplace dispute would become a public issue if the dispute is characterized as being about workplace fairness or employment in general. (*Rivero, supra,* 105 Cal.App.4th at

p. 924.) A garden-variety contract case could be about business ethics or the entrepreneurial system. (See *World Financial Group, Inc. v. HBW Ins. & Financial Services, Inc.* (2009) 172 Cal.App.4th 1561, 1569 ["[D]efendants erroneously identify generalities that might be derived from their speech rather than the specific nature of what they actually said and did."].)

The evidence presented in connection with this anti-SLAPP motion demonstrated that defendants' conduct was really about an isolated dispute between two customers and two brokers over the sale of a specific insurance policy. Defendants specifically accused plaintiffs of fraudulent concealment. They did not suggest that such misconduct was widespread in the San Francisco branch of Northwestern Mutual, let alone throughout the company as a whole. (See *Du Charme*, *supra*, 110 Cal.App.4th at p. 119 [statements of interest to only a limited number of people must be part of an ongoing controversy, dispute, or discussion to be protected].)

Defendants again rely on *Fontani* in support of the argument that their demand for a refund of their premiums concerned an issue of public interest. Again, that case is distinguishable. In *Fontani,* the Court of Appeal found that Wells Fargo's Form U-5 allegation that the plaintiff had misrepresented variable annuities to many of the bank's clients, among other misdeeds, constituted a matter of public interest as "mistruths about an annuity may artificially inflate the purchase price and thereafter affect the market." (*Fontani*, *supra*, 129 Cal.App.4th at p. 733.)

Here, the clients (defendants) and the brokers (plaintiffs) had an individualized dispute about what disclosures plaintiffs made to them in connection with a particular investment vehicle. Even if plaintiffs had misled defendants into purchasing the Policy, there is no public issue or issue of public interest because the transaction and its aftermath did not affect

anyone except the direct participants. Plaintiffs were two brokers working for a firm that reportedly has over 4 million clients in the US. (See *Baughn v. Department of Forestry & Fire Protection* (2016) 246 Cal.App.4th 328, 338–339 [disclosure of a single workplace dispute did not concern a public issue]; *Olaes v. Nationwide Mutual Ins. Co.* (2006) 135 Cal.App.4th 1501, 1511 ["[A]n investigation by a private employer concerning a small group of people does not rise to a public interest. . . . [A] dispute among a small number of people in a workplace does not implicate a broader public interest subject to a motion to strike . . . ."].) No evidence has been presented that plaintiffs committed any other acts of questionable conduct with any other clients. That the information concerning plaintiffs' termination from Northwestern Mutual is accessible to plaintiffs' potential future clients does not convert this isolated dispute into a public issue or a matter of public interest.

Because we conclude that defendants have not established that the challenged claims arise from protected speech or petitioning activity under the first prong of the anti-SLAPP analysis, we need not reach the issue of whether plaintiffs established a probability of prevailing on the merits of their claims. (See *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 80–81.)

DISPOSITION

The order is affirmed.

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Sanchez, J.

WE CONCUR:

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Humes, P.J.

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Banke, J.