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A151067

IN THE COURT OF APPEALS OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION 5

DONGXAIO YUE,
Plaintiff-Respondent

v.

TRIGMAX SOLUTIONS, LLC, et al.,
Defendants-Appellants

Appeal from the Superior Court for the County of Contra Costa

Case No. CIVMSC16-01118

Honorable Steve K. Austin, Judge

RESPONDENT'S BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rule of Court 8.208(d)(1), respondent Dongxiao Yue, self-represented, certifies that:

Netbula, LLC, a Delaware Limited Liability Company with its principal office in California, owned and operated by respondent, has an interest in the outcome of this case.

Dated: December 15, 2017

By: /s/ D. Yue

DONGXIAO YUE

Plaintiff-Respondent *Pro Se*

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INTRODUCTION

This is a case of unfair competition and defamation arises from Defendants' unfair competition schemes and defamatory internet postings against Plaintiff over the years. In a thorough opinion, the trial court denied Defendants' motion to strike under the anti-SLAPP statute as to most of the statements they posted online. On appeal, Defendants claim "an absolute right" under the statute. They assert that the trial court "confuses" legal concepts, "fundamentally misunderstands" case law, "seeks to squash public comments" and makes many other legal errors. As Plaintiff-Respondent will show, Defendants fail to provide adequate record on appeal, they make many false and misleading statements of fact, they fail to demonstrate any error in the trial court's ruling, and they fail to meet the burden under the first prong of the anti-SLAPP analysis on evidence and law. Moreover, Plaintiff has shown probability of success on the merits. The trial court ruling should be affirmed.

STATEMENT OF FACTS

I. Unfair Competition and Defamation Facts

Plaintiff is in the business of developing computer software and web services. In 2010, Plaintiff won a copyright jury trial in federal court. (Record on Appeal ("ROA") p.87)

In June 2012, Plaintiff established a Chinese language social media website called Zhen Zhu Bay ("ZZB") at the web address zhenzhubay.com. Members of ZZB enjoyed topics such as literature, performing arts, history, photography, tourism and science. *Ibid.*

Trigmax Solutions, LLC ("Trigmax") and Muye Liu ("Liu") owned, operated and administered a competing Chinese language website at Yeyetown.com ("YEYETOWN"), which was later changed to YEYECLUB.COM. *Ibid.*

Soon after the inception of ZZB, Trigmax and Liu employed unfair and fraudulent schemes to coerce and induce ZZB members to leave ZZB and join Yeyetown/Yeyeclub. In November 2012, using the ID of "wuseban" on Sinovision.net, Defendants published numerous false and scandalous blog articles about key ZZB bloggers, including Plaintiff and several female bloggers of ZZB. At the same time, using the ID "GUOBA" on ZZB, Defendants enticed these ZZB bloggers to join their site, promising special treatment by Liu, such as providing direct FTP server access to YEYETOWN server. Once these ZZB bloggers joined Defendants' site, the attacks against them on Sinovision.net stopped, and the blog articles against them were removed. (ROA.22-23, 87-88.) Plaintiff did not discover Defendants' connection to the above activities until 2016, after Liu's strange behavior triggered Plaintiff's suspicion. (ROA. 24, 88.)

On June 10, 2015, Plaintiff filed a defamation lawsuit in the Superior Court for the County of Alameda against Wenbin Yang, for posting defamatory statements about Plaintiff on Yeyeclub and elsewhere (the "Alameda Action"). (ROA.24.)

Plaintiff then sent a private email to Yeyeclub, requesting it to preserve the records of those who published the libel there. Unexpectedly, Liu, acting on behalf of Yeyeclub, reacted with vicious attacks on Plaintiff on the internet. (ROA.24-25, 88.)

Despite Plaintiff's effort to dissuade Liu from further attacks, Liu deliberately disabled the IP logging on Yeyeclub and started a defamation campaign on Plaintiff. (ROA.26, 88)

On October 30, 2015, Plaintiff filed a First Amended Complaint ("FAC") in the Alameda action, **adding** YEYECLUB and Liu as defendants, alleging additional defamation based on newly published defamatory statements on YEYECLUB. (ROA.88)

On November 30, 2015, Muye Liu filed an anti-SLAPP motion to strike in the Alameda action. (ROA.88.)

On February 11, 2016, the Alameda court denied Liu's anti-SLAPP motion, holding that Liu "did not present any competent evidence in support of his motion." (*Ibid*.)

The Alameda court also struck the FAC because it included events occurred after filing of the action. (*Ibid*.)

II. Procedural History and the Opinion Below

In 2016, Plaintiff discovered the connection between Defendant Liu, wuseban and GUOBA, upon a careful analysis of the ZZB records. After studying the law on supplemental pleadings (see, e.g., *Flood v. Simpson* (1975) 45 CA3d 644, 647[119 CR 675, 677].), Plaintiff filed the instant action on June 13, 2016, alleging unfair competition by Trigmax, Liu and Yeyeclub, and defamation by Liu and Yeyeclub. (ROA.88-89.)

On September 19, 2016, Liu, Trigmax and Yeyeclub were served process. (ROA.2.)

On November 14, 2016, the clerk entered Defendants' default.

On January 26, 2017, the trial court vacated Defendants' default on their motion.

On January 30, 2017, Defendants filed their anti-SLAPP motion.

On March 9, 2017, Plaintiff filed his opposition to the anti-SLAPP motion, and a declaration in opposition to the anti-SLAPP motion.

On March 22, the trial court issued a tentative ruling ("TR") on the anti-SLAPP motion. (ROA.97.) Defendants did not contest the TR, and it became the court order next day. (ROA.9).

ARGUMENT

I. The Anti-SLAPP Statute and Standard of Review

Under the anti-SLAPP statute, the court makes a two-step determination: "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. (§ 425.16, subd. (b)(1).) `A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e)' [citation]. If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim. (§ 425.16, subd. (b)(1))" (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88 (*Navellier*).) To establish the probability of prevailing, the plaintiff need only have "`stated and substantiated a legally

sufficient claim.'" (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123, 81 Cal.Rptr.2d 471, 969 P.2d 564 (*Briggs*)). "Only a cause of action that satisfies both prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning and lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." (*Navellier*, supra, at 89.)

"Review of an order granting or denying a motion to strike under section 425.16 is de novo.". (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325-326 (citations omitted)). The Court of Appeal considers "the pleadings, and supporting and opposing affidavits upon which the liability or defense is based." In so doing, the Court of Appeal neither weighs the credibility nor compares the weight of evidence, but "accept[s] as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law." *Ibid*.

II. Defendants Cannot Overcome the Presumptive Correctness of the Trial Court Ruling due to Their Deliberate Failure to Provide Adequate Record on Appeal

It is a fundamental tenet of appellate law that the lower court's judgment is presumed to be correct. "`A judgment or order of the lower court is presumed correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.`" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132.) "[T]o be successful on appeal, an appellant must be able to affirmatively demonstrate error on the record before the court. "(*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 822 [79 Cal.Rptr.3d 588].) (See also, *Vo v. Las Virgenes*

Municipal Water Dist. (2000) 79 Cal.App.4th 440, 447-448; *Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 630-631.)

"It is the burden of appellant to provide an accurate record on appeal to demonstrate error. Failure to do so precludes an adequate review and results in affirmance of the trial court's determination." (*Estrada v. Ramirez* (1999) 71 Cal.App.4th 618, 620, fn. 1; *Mountain Lion Coalition v. Fish & Game Com.* (1989) 214 Cal.App.3d 1043, 1051, fn. 9. "`A necessary corollary to this rule is that if the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed.' [Citations.]" (*Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416.)

Here, Defendants-Appellants bear the burden of providing adequate record on appeal and to demonstrate error by the trial court, who considered the parties' motion briefs and declarations.

In opposing Defendants' anti-SLAPP motion below, Plaintiff submitted a sworn declaration of 91 paragraphs with seven exhibits (hereafter, "Yue Decl."). Yet, Defendants fail to include Plaintiff's declaration and exhibits in the record on appeal.

For the first time on appeal, Defendants argue that Plaintiff's "improper litigation hold letter" to defendant YEYECLUB "gave license for YEYECLUB and its members" to make the alleged defamatory statements (Appellants' Opening Brief ("AOB") at p.19). A review of Plaintiff's letters would show that they were professional and proper. Plaintiff's letters to YEYECLUB were attached as exhibits to his declaration in opposition. Defendants referenced these exhibits in their reply brief below (ROA. 71). On

appeal, Defendants quoted in length from exhibit 6 to Plaintiff's declaration - a letter written by Defendant Liu's former attorney (See, AOB.8-9). Defendants' version of the events differs greatly from Plaintiff's. As Plaintiff will show in greater detail, Plaintiff's declaration would have shown that Defendants' statements of facts on appeal are largely false or misleading. Defendants' choice of not including Plaintiff's declaration in the record is thus a calculated decision for their legal advantage.

Defendants' deliberate failure to provide key documents in the record precludes a fair and meaningful review. Without the relevant record, Defendants cannot "sustain[] their burden as appellants to demonstrate error" and the trial court should be affirmed on this ground alone. (*Gee*, *supra*, 99 Cal.App.4th at 1416.)

III. Defendants' Many Factual Statements Are False or Misleading

A. Defendants-Appellants routinely fail to support their factual assertions with citations to the record on appeal, in non-compliance with Cal. Rule of Court 8.204(a)(1)(C), and they regularly make false or misleading factual statements.

In the following, Plaintiff quotes some of the factual contentions in appellants' opening brief ("AOB") and contrasts them with the true facts.

> "*Only after he filed litigation against Defendant Yang, who in over two years has not been served, did he notice YEYECLUB. ROA.1* " (AOB.7)

There was nothing in the record shows that Plaintiff only noticed YEYECLUB after filing the case against Yang in 2015. (See, ROA.23.)

> "*Yue and Yang engaged in some form of 'flame war' exchanging attacks. See ROA.23 - 24. Yang is the root of both this action…*" (AOB. 7)

ROA.23-24 does not support Defendants' factual assertions. The complaint shows that Defendants Trigmax and Liu engaged in unfair and fraudulent schemes against Plaintiff since 2012. Yang was a later episode in Defendants' injurious acts.

> "*Shocked by a vague, unfinanced litigation hold letter against what Yue believed was a competitor, Liu responded, with full awareness of Yue's blog, that Yue was 'using improper methods to promote the influence of his website" and 'oppressing others or profiteering by defamation suit.' ROA.24.*" (AOB.8)

The record does not show that Defendant Muye Liu was shocked by Plaintiff's private email to YEYECLUB, nor does it show Plaintiff's email was vague, nor does it show that Liu was aware of Plaintiff's specific writings at the time when Liu posted the statements on the web. The record shows that Defendants made the alleged defamatory statements **before** and **after** Plaintiff sent an email to YEYECLUB. (ROA.24-25.) Liu's reaction can be explained by the intent to intimidate Plaintiff into foregoing the right to discovery, as Liu was the real person behind Doe 2. That also explains why Liu quickly deleted all the information and postings by Doe 2 after receiving a subpoena for the Doe 2's data (ROA.28.)

> "*Frustrated by the lack of cooperation from an attorney representing YEYECLUB, Yue then turns his anger on Muye Liu. ROA.25, 26.*" (AOB.9)

The record does not support Defendants' factual contention. The record instead shows that before Liu's former attorney refused the preservation request, Plaintiff already linked Liu to WUSEBAN and advised Liu of the potential defamation claims against him. "Plaintiff was perplexed and troubled by YEYECLUB's reactions" and emailed Liu

stating that there was strong evidence that Liu was "WUSEBAN" and suggested YEYECLUB to "refrain from making further unfounded accusations" on August 17, 2015 (ROA.25.) On the same day, Plaintiff sent a letter to YEYECLUB and Liu's attorney, "requesting for their preservation of records and advising them of the potential defamation claims against Liu." Two days later, Liu's attorney responded that YEYECLUB would not comply with Plaintiff's request for preservation of records. (ROA.25, at 3-24.) Defendants' story was false.

Defendants' falsehood can be easily verified had they included Plaintiff's declaration in the ROA. Exhibit 5 to that declaration was Plaintiff's letter to Liu's former attorney dating August 17, 2015, in which Plaintiff sought to confirm Ms. Zhong indeed represented YEYECLUB and advised her of potential legal action against Liu.

> "*Appellee then issues a subpoena against YEYECLUB, which was served at Appellant Liu's home. ROA.25. While Appellee Yue asserts that he 'identified Liu as the Agent for Trigmax Solutions LLC from the California Secretary of State Website,' ROA.95, L Liu was not served at the address listed on the Secretary of State's website, but rather at his home, in a gated community with restricted access. This was discussed in the Motion to Set Aside Default heard on January 26, 2017. Having had his privacy violated, Liu appropriately responded by responding in a similar forum to that which he had seen Yue use.*" (AOB.9)

Nothing in the record shows that Liu was served the subpoena at his home. The facts were (1) the Plaintiff emailed the subpoena to YEYECLUB (Yue Decl. ¶32); (2) Trigmax Solutions, LLC's address of registered agent with the California Secretary of State was Liu's home address. (Yue Decl. ¶27.) A search of "Trigmax Solutions, LLC" at https://businesssearch.sos.ca.gov/ on December 15, 2017 shows its agent for service of

process to be “Mason Liu 1064 COLUMBIA CIR EL DORADO HILLS CA 95762”, which appears to be Liu’s home address. Defendants’ failure to include Plaintiff’s declaration in the ROA precludes a quick verification of the falsehood in their factual assertions.

> “*after the strange and unusual attacks on YEYECLUB, a user “freespeech” [Doe 3], an allegedly shared account, referenced ...*” (AOB. 11-12)

Nothing in the records shows that there were “attacks on YEYECLUB”. The record shows that defendant Muye Liu posted various attacks against Plaintiff and was also the real person behind user “freespeech”. (ROA.91, 93.)

> *“[Yue] openly admits that the statements made are in regard to a protected activity of his pending litigation against Defendant Yang. ROA.52.*” (AOB.13)

Nothing in the record shows that Plaintiff made such open admission. ROA.52 was a page from Defense counsel’s motion brief without any supporting evidence. "It is axiomatic that the unsworn statements of counsel are not evidence." (*In re Zeth S.* (2003) 31 Cal.4th 396, 414, fn. 11.)

> “*Yue began issuing third-party litigation holds to what he believed was a competing business, demanding not only that they ‘preserve records,’ but also attempting to dictate how they run their business and collect data.*” (AOB.15)

Defendants cite no record to support their factual contention that Plaintiff attempted to dictate how Defendants run their business and collect data. Plaintiff paid little attention to Defendants as long as they do not unlawfully injure Plaintiff. The record

shows that Plaintiff only attempted to dissuade Defendants from making defamatory attacks. (ROA.25, 88.)

> "*Appellee Yue made demands related to how that business, that Appellee Yue believed was a competitor, operated in the future.*" (AOB. 16)

Defendants cite no record to support their factual contention. See above.

> "*Appellee Yue states that he 'paid next to zero attention to the owner of YEYECLUB.' ROA.25. Needless to say, that feeling was mutual*." (AOB. 20)

Nothing in the record supports the factual contention that "that feeling was mutual." The records show that Liu had engaged in fraudulent and unfair business practices against Plaintiff since 2012. (ROA. 21-24.) Liu's declaration shows he paid great attention to Plaintiff, though in a disturbing way. (ROA.58-60.)

> "*He[Plaintiff] was seeking vague information to expose all anonymous speakers on YEYECLUB*" (AOB.20-21.)

Nothing in the record supports Defendants' factual contention that Plaintiff sought to expose all anonymous speakers on YEYECLUB. On the contrary, Plaintiff sought to discover very specific information, include that of Doe 2 ("LAO CAITOU") (ROA. 25). After receiving the court issued subpoena for Doe 2's information, YEYECLUB deleted the data. (ROA. 28.)

> "*Appellee Yue issued a broad, vague third-party litigation hold letter against YEYECLUB, for which he did not agree to cover costs. ROA.24*" (AOB.26)

Nothing in the record supports the contention that Plaintiff did not agree to cover costs. Instead, the record shows that YEYECLUB and Liu categorically refused to comply with the preservation request. (ROA.25-26.)

> "*Appellants had paid 'next to zero' attention to Yue until Yue started making demands…*" (AOB.31)

Nothing in the record supports the factual contention that Defendants-Appellants had paid next to zero attention to Plaintiff until Plaintiff started making demands on them. The records show the contrary. Liu had engaged in fraudulent and unfair acts against Plaintiff since 2012. (ROA. 21-24.) Liu's declaration shows that he paid great personal attention to Plaintiff while harboring inexplicable ill-will. (ROA.58-60.)

B. Defendants mischaracterized this case as a derivative of another case.

Repeatedly, Defendants attempted to cast this case as a derivative of the case against Wenbin Yang. A review of the Complaint shows this to be untrue. Defendants Liu and Trigmax's unlawful behavior started in 2012, long before Yang entered the scene. (ROA.22-23, 87-88.) In fact, the defamation claim against Yang is a subset of the case against Defendants Liu and Trigmax, who had used Yang to further their defamation campaign against Plaintiff for their business advantage. Although Plaintiff paid little attention to Defendants previously, Defendant Liu's strange behavior after receiving Plaintiff's email triggered Plaintiff's suspicion. Only then, Plaintiff discovered the connection between the previous attacks on Plaintiff to Liu and Trigmax. Only then, Plaintiff started to suspect that Liu was actually Doe 2. In the litigation below, Liu did not and does not deny that he was also DOE 2 and DOE 3 in this case, and Plaintiff presented evidence that Liu was behind the two other pseudo-names who engaged unlawful acts against Plaintiff and his ZZB website. (ROA. 21-23, 87-88, 91, 93.)

C. Defendants fail to provide competent evidence in support of their anti-SLAPP motion.

"Anti-SLAPP motions must be supported (and opposed) by declarations stating facts upon which the liability or defense is based. (§ 425.16, subd. (b).)" (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 12 Cal. Rptr. 3d 786, 791.) The facts must be admissible evidence if presented at trial. *Ibid*.

In this case, Defendants presented no competent evidence by themselves. Muye Liu's declaration in support of their anti-SLAPP motion was largely a rehash of his defamatory and false accusations. (ROA. 58-61.) Plaintiff specifically refuted Liu's falsehood in the case below. (ROA. 89.) In Liu's declaration, Defendants attempt to assign nefarious intentions to Plaintiff's actions without any basis. Such is only evidence of Liu's own mental process. Similarly, Defendants' *ad hominem* attacks against Plaintiff in their briefs serve only to demonstrate their lack of reason. Defendants' baseless insinuations cannot be admitted as competent evidence under the anti-SLAPP statute.

IV. Defendants-Appellants Wrongly Assign Legal Errors to the Trial Court's Analysis under Code Civ. Proc., § 425.16(e)(2)

The trial court's analysis under subdivision (e)(2) of the anti-SLAPP statute recognizes that protected activity includes "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… ." (ROA. 98.) It then noted that Defendants had only identified paragraph 22 of the Complaint as the

statements made in connection with a judicial proceeding. *Ibid*. ("Defendants have not argued that any other alleged statements were made in connection with a litigation.")

Citing *Neville v. Chudacoff* (2008) 160 Cal.App.4th 1255 (*Neville*), the trial court held that a statement is "**in connection with**" a pending litigation within the meaning of § 425.16(e)(2) only if it (1) relates to the substantive issues in the litigation and (2) is directed to persons having some interest in the litigation. *Id*. at 1266. Since there is no evidence that Defendants' statements on the world-wide-web were directed to individuals with some interest in that lawsuit, they fail to satisfy requirement (2) to be "in connection with" the litigation. *Ibid*.

Notably, the trial court did not make any "public issue" requirement in the analysis. The *Neville* is a progeny of *Briggs v. Eden Council For Hope and Opportunity* (1999) 19. Cal. 4th 1106 (*Briggs*), which held that subdivisions (e)(1) and (e)(2) of the anti-SLAPP statute do not contain an issue of public interest limitation.

The thorough analysis by the *Neville* court is instructive. Defendants do not have a license to post on the world-wide-web whatever they want simply because YEYECLUB received a private email requesting preservation of records for a pending case. Muye Liu's strange and extreme reaction to the private email to YEYECLUB was most likely due to the fact that Liu was the person behind Doe 2 and discovery would expose his unlawful conduct under a notorious web identity. But Liu's personal concerns do not justify protection under the anti-SLAPP statute for his statements not "in connection with" the pending litigation. The *Neville* court has set the proper bounds for protected activities under subdivision (e)(2).

Defendants do not dispute the trial court's finding that they fail to show that their statements posted on the web were directed to individuals with some interest in the lawsuit against Yang. In fact, Defendants concede that "they have no interest in" that lawsuit (AOB.20). Other than their bald assertion of an "absolute right" under the anti-SLAPP statute, Defendants cite no contrary authority to *Neville* and make no colorable legal argument against the trial court's legal reasoning. (AOB. 18.) Yet, Defendants assert that the trial court was "confused" and "erroneously" inserted "an overall 'public issue' limitation" into subdivision (e) (2) of anti-SLAPP statute. (AOB. 16, 23, 25, 34.)

Defendants themselves are confused. They have failed to demonstrate error in the trial court's ruling that they failed to meet their burden under CCP § 425.16(e) (2).

V. Defendants Confound Trial Court's Analysis under Subdivision (e) (3) with Subdivision (e) (2)

There are 11 alleged defamatory statements in the Complaint. (ROA. 31-32.) The trial court next analyzed Defendants' remaining statements under Code Civ. Proc., § 425.16(e) (3). The trial court noted that Defendants' main argument is that Plaintiff is a public figure, but concluded that Defendants had failed to present facts to make such showing. On whether the statements involve a topic of widespread, public interest, the trial court identified only Paragraphs 35 and 54(11) of the Complaint and proceed to the second prong of the anti-SLAPP analysis. (ROA. 98-99.) Defendants' motion is denied as to all other statements. (ROA. 101.)

On appeal, Defendants do not challenge the trial court's finding that Defendants fail to show that Plaintiff is a public figure in the subdivision (e) (3) analysis. Instead,

Defendants assert that "[t]he trial court confuses 'an issue of public interest' and a 'public issue'" (AOB. 34) and that "the trial court fundamentally misunderstands" case law (AOB. 35.) Defendants repeatedly cite *Briggs* to attack trial court's analysis under subdivision (e)(3).

Defendants confound subdivisions (e)(2) and (e)(3) of the anti-SLAPP statute and misunderstand the trial court's analysis. The *Briggs* decision held that subdivisions (e)(1) and (e)(2) do not contain an issue of public interest limitation. (*Brigg, supra,* at 1115). However, subdivision (e)(3) expressly has the "issue of public interest" limitation. It affords protection only to "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**". (Code Civ. Proc., § 425.16(e)(3) (boldface added).)

Defendants seem to suggest any pending court case constitute "an issue of public interest", and their online postings make it more of public interest. "[T]hose charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." (*Weinberg v. Feisel* (2003) 110 Cal. App. 4th 1122, 1133; citing *Hutchinson v. Proxmire*, 443 U.S. 111, 135 (1979)). "A person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people." *Ibid.* "If the mere publication of information in a union newsletter distributed to its numerous members were sufficient to make that information a matter of public interest, the public-issue limitation would be substantially eroded, thus seriously undercutting the obvious goal of the Legislature that the public-issue requirement have a limiting effect." (*Rivero v. Am. Fed'n of State, Cnty., and Mun.*

Employees, AFL–CIO (2003) 105 Cal. App. 4th 913, 926.) Defendants cannot publish Plaintiff's private email to YEYECLUB on the web and turn an ordinary lawsuit into an issue of public interest.

Under subdivision (e)(3), the trial court analyzed multiple ways in which Defendants' enumerated statements could satisfy the "in connection with an issue public interest" requirement. By confounding subdivisions (e)(2) and (e)(3), Defendant wrongly assigned error to the (e)(3) analysis of the trial court and have thus failed to demonstrate error before the Court of Appeal.

VI. Defendants-Appellants' Other Arguments Fail to Show That The Challenged Claims Arise from Protected Activities Under Section 425.16

A. Defendants do not enjoy an "absolute right" and "license" under the anti-SLAPP statue.

Without citing any authority, Trigmax and Liu make the unqualified assertion that "[t]he California Anti-SLAPP statute absolutely protects comments made regarding a pending judicial matter." (AOB. 18.) They further assert that Plaintiff's litigation hold letter to YEYECLUB "gave license for YEYECLUB and its members" to launch the attacks on Plaintiff. (AOB.19.) Defendants claim that they "are absolutely allowed to comment, publicly, on litigation" in which Plaintiff send them a request for preserving records. (AOB. 24.)

Defendants fail to support their legal arguments with cogent analysis that applies legal authority to the facts of their case. (See Cal. Rules of Court, rule 8.204(a)(1)(B); *Guthrey*

v. State of California (1998) 63 Cal.App.4th 1108, 1115-1116 [claim on appeal may be denied if unsupported by argument applying legal principles to particular facts of case].)

As we have seen above, the trial court correctly applied subdivisions (e)(2) and (e)(3) of the statute, and Defendants have failed to demonstrate any error.

B. The Court should disregard any new arguments defendants attempt to make.

It is hard to discern and follow Defendants-Appellants' logic. Defendants accuse the trial court of "seek[ing] to squash public comments on a matter of public significance, thereby discouraging public participation in litigation."(AOB.38.) But they fail to support their legal arguments with legal authority.

Defendants attempt to justify their defamatory statements that they posted on YEYECLUB in 2015 by citing the damages Plaintiff is seeking from them in the instant lawsuit, which was filed against them in 2016. *Ibid*. A cause must precede an effect in time. Defendants are inverting cause and effect.

"It is axiomatic that arguments not asserted below are waived and will not be considered for the first time on appeal." (*Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1488 fn.3) Defendants' new arguments should not be entertained. But even if they are considered, they fail to meet their burden under the first prong of the anti-SLAPP analysis.

VII. Plaintiff-Respondent Has Shown Probability of Success on the Merits

Section 425.16 "does not protect activity that, because it is illegal, is not in furtherance of constitutionally protected speech or petition rights. [Citation.]" (*Lefebvre v.*

Lefebvre (2011) 199 Cal.App.4th 696, 704-705.) "[A] defendant whose assertedly protected speech or petitioning activity was illegal as a matter of law, and therefore unprotected by constitutional guarantees of free speech and petition, cannot use the anti-SLAPP statute to strike the plaintiff's complaint." (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.)

At the court below, supported by his 91-paragrapg declaration and accompanying exhibits, Plaintiff showed that he has adequately stated *prima facie* case of unfair competition and defamation. (ROA. 92-96.) There, Plaintiff showed that Defendants' actions were fraudulent and unfair, and each of Defendants' statements was false and defamatory.

Defendants' deliberate failure to include Plaintiff's declaration in the record precludes a fair and meaningful review. The Court of Appeal should affirm the trial court ruling so that Defendants can be brought before the court to answer for and be held liable for their injurious actions.

CONCLUSION

Defendants have no "absolute right" under the anti-SLAPP statute. Defendants have failed to provide adequate record on appeal for a fair and meaningful review. Defendants have made many false or misleading factual assertions to the Court. Defendants have failed to demonstrate any error in the trial court's ruling. They have failed to prove on evidence and law that Plaintiff's claims arise from protected activities.

Plaintiff has shown probability of success on the merits. Plaintiff-Respondent respectfully asks the Court of Appeal to affirm the trial court ruling.

Respectfully submitted,

Dated: December 15, 2017

/s/ D. Yue
_____
Dongxiao Yue
Plaintiff-Respondent *Pro Se*

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 5460 words, including footnotes, in 13-point fonts. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

Dated: December 15, 2017

/s/ D. Yue

_____

Dongxiao Yue

Plaintiff-Respondent *Pro Se*

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APP-009

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Case Name: Yue v. Trigmax Solutions, LLC, et al.

Court of Appeal Case Number: A151067

Superior Court Case Number: CIVMISC16-01118

1. At the time of service I was at least 18 years of age and **not a party to this legal action.**
2. My ☐ residence ☑ business address is *(specify)*: PO Box 277089 Sacramento CA 95827
3. I mailed or personally delivered a copy of the following document as indicated below *(fill in the name of the document you mailed or delivered and complete either a or b)*:
   RESPONDENT'S BRIEF

   a. ☒ **Mail.** I mailed a copy of the document identified above as follows:

      (1) I enclosed a copy of the document identified above in an envelope or envelopes **and**

         (a) ☑ **deposited** the sealed envelope(s) with the U.S. Postal Service, with the postage fully prepaid.

         (b) ☐ **placed** the envelope(s) for collection and mailing on the date and at the place shown in items below, following our ordinary business practices. I am readily familiar with this business's practice of collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in a sealed envelope(s) with postage fully prepaid.

      (2) Date mailed: 12/15/17

      (3) The envelope was or envelopes were addressed as follows:

         (a) Person served:
            (i) Name: Appellate Clerk for Delivery to Judge Steve K. Austin
            (ii) Address:
            725 COURT STREET
            MARTINEZ, CA 94553

         (b) Person served:
            (i) Name:
            (ii) Address:

         (c) Person served:
            (i) Name:
            (ii) Address:

         ☐ Additional persons served are listed on the attached page *(write "APP-009, Item 3a" at the top of the page)*.

      (4) I am a resident of or employed in the county where the mailing occurred. The document was mailed from (city and state):

Case Name:	Court of Appeal Case Number:
	Superior Court Case Number:

3. b. ☐ **Personal delivery.** I personally delivered a copy of the document identified above as follows:

(1) Person served:
(a) Name:
(b) Address where delivered:

(c) Date delivered:
(d) Time delivered:

(2) Person served:
(a) Name:
(b) Address where delivered:

(c) Date delivered:
(d) Time delivered:

(3) Person served:
(a) Name:
(b) Address where delivered:

(c) Date delivered:
(d) Time delivered:

☐ Names and addresses of additional persons served and delivery dates and times are listed on the attached page *(write "APP-009, Item 3b" at the top of the page)*.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: 12/15/17

Maurice Robinson
(TYPE OR PRINT NAME OF PERSON COMPLETING THIS FORM)

(SIGNATURE OF PERSON COMPLETING THIS FORM)

CA 1st District Court of Appeal	PROOF OF SERVICE
A151067	

1. At the time of service I was at least 18 years of age.

2. My email address used to e-serve: **ydx@netbula.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF - RESPONDENTâ€™S BRIEF (WITH ONE TIME RESPONSIVE FEE)	RESPONDENTS BRIEF
PROOF OF SERVICE - PROOF OF SERVICE	PROOF OF SVC OF RESPONDENT BRIEF ON JUDGE BELOW

PERSON SERVED	EMAIL ADDRESS	Type	DATE / TIME
William Pohl The Law Office of William Pohl 302367	buddy@lawyerbuddy.org	e-Service	12-18-2017 03:43:34 AM
William Pohl The Law Office of William Pohl 302367	buddy@lawyerbuddy.org	e-Service	12-18-2017 03:43:34 AM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury that the foregoing is true and correct.

12-18-2017
Date

/s/DONGXIAO YUE
Signature

Received by First District Court of Appeal

YUE, DONGXIAO (Pro Per)

Last Name, First Name (PNum)

DONGXIAO YUE

Law Firm