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April 7, 2014

Honorable Chief Justice Tani Cantil-Sakauye
Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: ***OPPOSITION TO DEPUBLICATION REQUEST***
Moriarty v. Laramar Management Corporation.
Appeal No. A137608 (District One, Division Two)
Supreme Court No. S217055

To the Chief Justice and Associate Justices:

Pursuant to Rule 8.1125(b) of the California Rules of Court, this letter is submitted by the Plaintiff/ Respondent in **opposition** to the Request for Depublication of *Moriarty v. Laramar Management Corporation* (2014) 224 Cal.App.4th 125 (Supreme Court Case No. S217055, First Appellate District Case No. A137608, hereafter "*Moriarty*" or the "Opinion"). The depublication request was filed by Defendant Laramar Management Corporation (hereafter "Defendant") and its counsel, Michael K. Johnson, of Lewis, Brisbois, Brigaard & Smith, LLP. Dowling & Marquez, LLP, Laramar's attorneys who lost the initial anti-SLAPP motion in Superior Court, also submitted a letter on behalf of the San Francisco Apartment Association, joining in Defendant and Mr. Johnson's request. We respectfully urge this Court to deny these requests for depublication. My office initially requested publication, along with several other interested parties, and the Court of Appeal graciously granted our request.

The Law Offices of Eric L. Lifschitz represents Plaintiff John Moriarty in his suit against his previous landlord, Laramar Management Corporation. Mr. Moriarty has waited over a year and a half for the case to move beyond the pleading stage. Mr. Moriarty's claims are based solely on allegations that his apartment was uninhabitable and those uninhabitable conditions forced him to move out. Both the Superior Court and the Court of Appeal stated this clearly and told Defendant that Plaintiff's complaint was by no means based on allegations of protected conduct. Nevertheless, Defendant insists that the Court should look beyond the four corners of Plaintiff's complaint and infer facts favorable to Defendant's position and find that there was a "mixed cause of action."[1] As the Court of Appeal

[1] Defendant and its supporters also claim that the Opinion encourages broad, vague pleading. This is nonsense. The Opinion goes through each of the complaint's purportedly SLAPPable sentences, articulates Defendant's arguments verbatim, and then soundly disagrees with Defendant's premise that those sentences refer to

observed, " Simply saying something does not make it so. Laramar's strained reading of Moriarty's complaint is, simply, inaccurate." *Moriarty*, 224 Cal.App.4th at 139. The analysis that Plaintiff's complaint contains no reference to protected activity consumes the majority of the Opinion.

Notwithstanding, Defendant argues that *Moriarty* misstates the "test" for mixed causes of action because after going to great lengths to describe how the complaint alleges no protected conduct whatsoever, the Court of Appeal observes that even if the Court agreed with Defendant's absurd interpretation of Plaintiff's complaint, the protected conduct Defendant infers was "incidental to the thrust of the complaint." *Moriarty*, 224 Cal.App.4th at 139-140. The Court of Appeal then illustrates precisely what it means by that phrase with a review of four published cases. *Moriarty*, 224 Cal.App.4th at140. Such an observation is consistent with the theme of the Opinion, namely that a powerful Defendant, backed by a large firm, should not ignore case after case after case to advance a meritless theory through appeal (and now beyond!) to delay a dispossessed tenant's lawsuit.

There is no lack of clarity or creation of confusion by this phrase, as Defendant contends. It is not even clear that there actually is a "split" between divisions in how to analyze a mixed cause of action, or any different result that would occur had Moriarty's complaint been analyzed under a different standard. It seems that if Defendant had been damaged by the outcome, it would have been able to explain that it would have benefitted from one analysis or one standard over another, which of course it does not do. Defendant's failure to articulate this important principle adds to the evidence that this issue is manufactured for the purpose of delay. Defendant strains even to identify a purported split of authorities and infer it into the Opinion but can go no further. In any event, the Opinion makes resoundingly clear that Plaintiff's complaint does not present a mixed cause of action in the first place.

Defendant Laramar argues that this phrase will create monumental confusion over a principle that the Court of Appeal states is not even involved in the fact pattern of the case. It is stated only for the purpose to mention that Defendant has flagrantly ignored relevant case law on the subject matter. *Moriarty* is an opinion about how far a large corporate Defendant will go to push a meritless anti-SLAPP motion and delay a tenant's case. The Court of Appeal's decision to publish *Moriarty* was correct as it will greatly assist landlord and tenant attorneys in distinguishing actions that are beyond the bounds of arising from protected activity from those with actual merit. Here, Defendant still seems to struggle with this principle despite the firm guidance of the Court of Appeal. Furthermore, the publication of *Moriarty* greatly aids the Legislature as it clearly illustrates the unintended negative impact of California's anti-SLAPP statute on its constituents.

Defendant incorrectly claims that *Moriarty* does not meet the publication criteria. California Rules of Court 8.1105 sets forth the standards for certification of an opinion and the Court of Appeal has already decided that *Moriarty* meets these standards. *Moriarty* meets CRC 8.1105(c)(4), which requires that the Opinion advance a new interpretation, clarification, criticism or construction of a provision of a constitution, statute, ordinance or court rule. In the instant case, the Court of Appeal

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protected activity. The Opinion neither encourages nor discourages broad, vague, pleading. It does encourage Defendants to look at existing case law, make a fair and honest assessment of the pleadings, and refrain from appealing such obviously meritless motions to strike.

criticized Defendant for its abuse of the anti-SLAPP statute in an attempt to delay the judicial process. The Opinion clarifies the effect of the anti-SLAPP statute as well as criticizes what it has evolved into. The Opinion also reviews the significant body of case law and warns against bringing questionable appeals for the purpose of delay. The Court of Appeal states in the first paragraph of the Opinion:

"Another appeal in an anti-SLAPP case. Another appeal by a defendant whose anti-SLAPP motion failed below. Another appeal that assuming it has no merit will result in an inordinate delay of the plaintiff's case and cause him to incur more unnecessary attorney fees."

It is necessary to publish the Opinion to both further interpret California's anti-SLAPP statute and aid in possible reform of the statute by emphasizing the Court's recognition of the abuse of process that is frequently occurring in the area of landlord-tenant litigation as an unintended consequence of this law.

The Opinion also meets the requirements of CRC 8.1105(c)(6) which requires that the decision involve legal issues of continuing public interest. The number of published decisions in the past decade which concern the application of the litigation privilege to actions based upon local rent and eviction control laws by way of anti-SLAPP motions demonstrates a continuing public interest in the legal issues addressed in this case. This case adds needed clarification regarding the limits of Civil Code of Procedure section 425.16 motions. Defendant wants to infer protected conduct into the complaint even though plaintiff does not mention it or uses it as an ultimate fact for any of his causes of action. The *Moriarty* court has said, "Enough! You cannot do this!" The Legislature, in enacting the anti-SLAPP statute, acknowledged that a continuing public interest is "to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process." (Code of Civil Procedure section 426.16(a).) In the instant case, the public interest is exactly what the Legislature acknowledged – to encourage matters of public significance, such as vindicating a tenant's right to sue for his landlord's continued failure to repair uninhabitable living conditions.

Moriarty also significantly contributes to legal literature by reviewing the judicial history of the anti-SLAPP and litigation privilege statutes, thereby meeting the requirements of CRC 8.1105(c)(7). The Opinion provides a detailed review of recent cases delineating the boundaries of Civil Code of Procedure 425.16. Moriarty discusses the growing body of cases which analyze the difference between activity arising out of protected activity, and those in which the gravamen of the cause of action does not arise from such activity. This review will assist practitioners in determining when protected activity is insufficient to support an anti-SLAPP action.

Laramar requests that this Court depublish the Opinion should their frivolous Petition for Review fail. However, the depublication process should not be used as a forum to re-try the case. "De-publication is only ordered because the majority of the justices consider the opinion to be wrong in some significant way, such that it would mislead the bench and bar if it remained citable as precedent.[2]

[2] See Joseph R. Grodin, The Depublication Practice of the California Supreme Court, 72 Cal. L. Rev. 514, 515 n.7 (1984).

As the Court of Appeal correctly recognized in this case, Plaintiff's lawsuit does not arise from protected activity. Defendant's claims that the Opinion misstates the test for analyzing mixed causes of action ignores that this case does not involve a mixed cause of action. The Opinion makes it very clear that where there is no protected activity, there is no mixed cause of action. Defendant and its counsel are essentially fabricating an argument about mixed causes of action in order to try and get the Opinion depublished. This is type of conduct should not be encouraged or rewarded. The Opinion in no way created a split of authority as to whether an unlawful detainer action is merely incidental to the thrust of the complaint. Furthermore, during oral augments, defense counsel was specifically admonished for referring to Plaintiff's complaint as a mixed cause of action. Justice Richman stated, "I think you should be careful to call it a mixed cause of action….You never, in your brief, say what this case is based on. You assume that it's an unlawful detainer premise case. And there are so many cases that hold against you, it is mind boggling to me that you've ignored most of them." [3] Apparently, the Court of Appeal actually listed at least four cases it felt should have been considered by Laramar to understand that its theory was at best unsound. *Moriarty*, 224 Cal.App.4th at 140.

Most significantly, Laramar's statements made in the depublication request directly contradict the arguments contained in their Petition for Review. Defendant states in both the instant request for depublication and it previous opposition to publication that "...this Opinion does not survey or discuss the development of any legal rule or line of decisions. **Nor does the decision discuss or try to resolve any split of authority between districts or between divisions within districts.**" However, Defendant argued in its Petition for Review, and now repeats the same argument in the request for depublication, that the Opinion contains a discussion of a split in authorities concerning "mixed causes of action" sufficient to merit review by the Supreme Court. These arguments are contradictory and provide direct evidence that Defendant is willing to say anything that suits its needs at the time.

Mr. Dowling's request for depublication by the powerful landlord group the San Francisco Apartment Association is more obtuse still. Mr. Dowling discusses another Superior Court anti-SLAPP motion he lost to my firm but wisely did not follow through with on appeal. His misguided discourse still cannot overcome the fact that the Opinion clearly states that there were no allegations of protected conduct anywhere in Plaintiff's complaint. The concern over misstatement of the standard for "mixed causes of action" is frankly puzzling since none was present in the *Moriarty* allegations. Even though there was no protected activity alleged to make Plaintiff's complaint "mixed," it has not prevented Mr. Dowling or Mr. Johnson from complaining that *Moriarty* misapplies a standard to facts that do not exist in an analysis that was not given.

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[3] See Transcript of Moriarty Appellate Argument attached as Exhibit A to Darsky Decl. iso Motion for Sanctions, filed with the Supreme Court in this matter.

In summary, the numerous requests for publication were properly considered and this case was properly certified for publication. The arguments proffered supporting the request for depublication are meritless and the request overall is a waste of this Court's precious time and resources. Plaintiff John Moriarty respectfully requests that this Court deny the request for depublication.

Very truly yours,

Aaron H. Darsky
Law Offices of Eric L. Lifschitz
Attorneys for Plaintiff/Respondent John Moriarty

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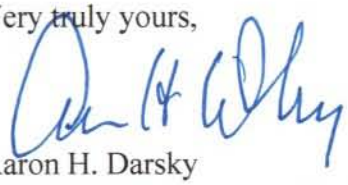


Aaron H. Darsky
Law Offices of Eric L. Lifschitz
Attorneys for Plaintiff/Respondent John Moriarty

CERTIFICATE OF SERVICE

Moriarty v. Laramar Management Corporation, et al.

Supreme Court Number: S217055

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action. My business address is 345 Franklin Street, San Francisco, CA 94102.

On April 7, 2014, I served the following document:

OPPOSITION TO DEPUBLICATION REQUEST

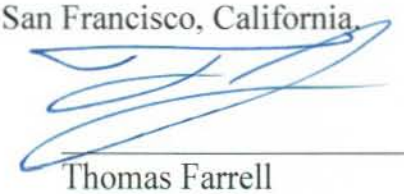
On all interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

Curtis F. Dowling Dowling & Marquez, LLP 703 Market Street, Suite 1610 San Francisco, CA 94103 ***Counsel for Laramar Management Corporation, 2363 Van Ness Ave, LLC , and San Francisco Apartment Association***	Michael K. Johnson William F. Horsey Lewis Brisbois Bisgaard and Smith 333 Bush Street, Suite 1100 San Francisco, CA 94104 ***Attorneys for Laramar Management Corporation and 2363 Van Ness Ave, LLC***
Jeffrey A. Miller Britany H. Bartold Lewis Brisbois Bisgaard and Smith 701 B Street, Suite 1900 San Diego, CA 02101	Hon. Ronald E. Quidachay c/o Clerk of the Court SAN FRANCISCO COUNTY SUPERIOR COURT 400 McAllister Street San Francisco, CA 94102
Hon. J. Anthony Kline Hon. Paul R. Haerle Hon. James A. Richman c/o Clerk of the Court CALIFORNIA COURT OF APPEAL FIRST APPELLATE DISTRICT, DIVISION TWO 350 McAllister Street San Francisco, CA 94102-7303 Via mail and Electronic Service	

___XX___ **MAIL (C.C.P. §§ 1013a, 2015.5)**: I caused such envelope to be deposited in the mail, with postage thereon fully prepaid, addressed to the addressee(s) designated.

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

Executed on April 7, 2014, in San Francisco, California.



Thomas Farrell