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Court of Appeal, Second District, Division 6,
California.

Ivor **BAUM**, Plaintiff, Cross-defendant and
Appellant,

v.

SMART & FINAL STORES CORPORATION,
Defendant, Cross-complainant and Appellant.

No. B154079.

(Los Angeles County Super. Ct. No. BC 252118).

Sept. 24, 2003.

Superior Court County of Los Angeles County, S.
James Otero, Judge.

Vakili & Leus, [Sa'id Vakili](#); Lascher & Lascher,
[Wendy Cole Lascher](#) for Plaintiff, Cross-defendant and
Appellant Ivor Baum.

Connon & Wood, [Nicholas P. Connon](#), Kathleen M.
Wood for Defendant, Cross-complainant and Appellant
Smart & Final Stores Corporation.

Sidley Austin Brown & Wood, Jeffrey A. Berman,
James M. Harris, [Kerry McCoy Friedrichs](#) for
Employers Group, as Amicus Curiae on behalf of
Smart & Final Stores Corporation.

[COFFEE](#), J.

*1 Plaintiff Ivor Baum sued defendants Smart & Final Stores Corporation and Raymond Swain for wrongful termination, unfair business practices and intentional infliction of emotional distress. [\[FN1\]](#) Smart & Final filed a cross-complaint against Baum for misappropriation of trade secrets, breach of contract, conversion, breach of fiduciary duties, interference with contractual relations, and interference with prospective economic relations.

[FN1](#). Other defendants named in the complaint were dismissed during the trial court proceedings.

Baum filed a special motion to strike the cross-complaint pursuant to [Code of Civil Procedure section 425.16](#), the anti-SLAPP statute. [\[FN2\]](#) The motion was denied in part and granted in part by the trial court. The trial court also denied both parties' request for attorney fees, finding there was no prevailing party. We affirm that part of the trial court's order denying the SLAPP motion with respect to causes of action for misappropriation of trade secrets, intentional interference with contractual relations and intentional interference with prospective economic relations. We reverse that part of the order granting the motion with respect to causes of action for breach of contract, conversion and breach of fiduciary duties. We remand to the trial court to determine whether the prevailing party is entitled to attorney fees.

[FN2](#). All statutory references are to the Code of Civil Procedure.

FACTS

Ivor Baum (Baum) was employed by Smart & Final

Stores Corporation (Smart & Final) from September 1999 to June 2000. As a condition of employment, Baum signed an Acknowledgement of Compliance with Smart & Final's Memorandum of Confidentiality for Key Management Personnel (confidentiality agreement). The confidentiality agreement prohibits employees from copying company documents, including "documents relating to transactions with suppliers or customers of the Company for their personal use, without the express prior consent of the Company...." Baum also agreed to comply with Smart & Final's Code of Ethics, obligating him to keep certain sensitive information confidential, and with other rules and standards adopted by Smart & Final, including a rule that employees are not to take or keep Smart & Final's property and information upon termination of employment.

Baum's duties included processing data concerning Smart & Final's vendor bidding process. Baum had access to confidential information regarding the terms and conditions of Smart & Final's contracts with various vendors as well as financial data related to sealed bids by vendors seeking to contract with Smart & Final. Baum stored financial data and information about vendor contracts and potential vendor contracts on "zip" cartridges.

Baum was assigned to Smart & Final's \$18 million edible oil contract for the year 2000. His responsibilities included calculating which bid was lowest. In December 1999, Smart & Final invited suppliers to submit sealed bids. Archer-Daniels-Midland Company (ADM), the incumbent supplier, submitted a bid as did three other prospective suppliers. The bids were received in January 2000. Two of the suppliers were eliminated before the bids were considered, leaving ADM and Ventura Foods as the remaining bidders.

*2 Baum determined that ADM's bid was the lowest. When he presented a draft award letter to his supervisor, defendant Raymond Swain, Swain told him that Ventura Foods would be given an opportunity to revise its bid. Swain asked Baum to recalculate the bids three times over the next few months. Each time, Baum concluded that Ventura Foods' bid was higher than ADM's.

In May 2000, Swain invited Baum to a meeting with Ventura Foods executives. Baum alleges that at this meeting two employees of Ventura Foods offered him

a bribe if he would award the contract to Ventura Foods.

After the meeting, Swain requested that Baum give him a copy of the disk that contained ADM's bid information for another meeting with Ventura Foods. Baum gave Swain a disk with Excel spreadsheets containing values, but not the formulas he used for the ADM bid calculations. Baum asserts that Swain became infuriated with him for not giving him all the information he requested, caused him to be humiliated at the meeting with Ventura Foods, and threatened to terminate him unless he provided the formulas. Baum then provided Swain with the complete ADM bid analysis and information.

Baum alleges that after Swain met with Ventura Foods a third time, Swain gave Baum a printout of the ADM bid along with reworked numbers for Ventura Foods' bid, and instructed Baum to prepare a letter awarding the edible oils contract to Ventura Foods. Baum refused to prepare the letter unless he received a copy of the bid from Ventura Foods. Swain accused him of insubordination and threatened him with termination if he did not comply. Baum was subsequently told by Smart & Final's vice president that, because of a personality conflict with Swain, he was to take a two-week paid vacation while Smart & Final considered where it might transfer Baum within the company.

During the two-week vacation, Baum e-mailed the vice president that he believed that Swain and Ventura Foods had engaged in "bid-rigging." On June 9, 2000, Baum was fired. Baum was given a check for his final pay and accrued vacation. Baum alleges he was offered a third check in the sum of \$6,500 in exchange for silence about the alleged bid-rigging scheme. Baum asserts he refused the check.

After Baum was terminated, Swain attempted to retrieve the zip cartridges and found that they were missing. Swain also attempted to retrieve the information from the hard drive of Baum's computer, but was unsuccessful. Because the information Baum had processed could not be located, Swain and other Smart & Final employees spent a significant amount of time and resources reconstructing the missing data in order to finalize the bidding process.

Baum filed a complaint on June 11, 2001, and a first amended complaint on July 19, 2001, alleging

wrongful termination in violation of public policy, unfair business practices, and intentional infliction of emotional distress. He attached to the complaint a copy of a proposed agreement between Smart & Final and ADM.

*3 On July 23, 2001, Smart & Final filed a cross-complaint against Baum for misappropriation of trade secrets, breach of contract, conversion, breach of fiduciary duties, intentional interference with contractual relations, and intentional interference with prospective economic advantage.

The trial court denied the SLAPP motion as to the claims for misappropriation of trade secrets, intentional interference with contractual relations and intentional interference with prospective economic relations. The trial court granted the motion as to the claims for breach of contract, conversion and breach of fiduciary duties. With respect to Smart & Final's claims for interference with contract and with prospective economic advantage, the court concluded that these "are not the types of causes of actions that the Legislature was concerned with in reference to the enactment of ... the SLAPP legislation." The trial court determined there was no prevailing party and did not award attorney fees to either party.

Baum filed a second amended complaint on October 1, 2001, narrowing his claims, dropping the non-Smart & Final defendants from the lawsuit, and eliminating the confidential proposed vendor agreement as an exhibit to his pleadings. On October 11, 2001, Smart & Final and individual defendant, Raymond Swain, filed their answers to the second amended complaint. On October 23, 2001, Baum filed a notice of appeal. On November 1, 2001, Smart & Final filed a notice of cross-appeal. An amicus curiae brief was filed on behalf of Smart & Final by the Employers Group. Proceedings in the trial court have been stayed pending the outcome of this appeal.

DISCUSSION

We review de novo a trial court order granting or denying a SLAPP motion. (*Gallimore v. State Farm Fire & Casualty Ins. Co.* (2002) 102 Cal.App.4th 1388, 1396-1397, 126 Cal.Rptr.2d 560.) Section 425.16 allows a defendant or cross-defendant to obtain dismissal of a nonmeritorious SLAPP (strategic lawsuit against public participation) suit at an early stage of the litigation. (*Bradbury v. Superior Court* (1996) 49

[Cal.App.4th 1108, 1113, 57 Cal.Rptr.2d 207.](#)) The statute provides that a special motion to strike may be filed as to any "cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue ... unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim." (§ 425.16, subd. (b)(1).)

"The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken 'in furtherance of the [defendant]'s right of petition or free speech under the United States or California Constitution in connection with a public issue,' as defined in the statute." (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67, 124 Cal.Rptr.2d 507, 52 P.3d 685.) Such acts include: "(1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or 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." (§ 425.16, subd. (e).)

*4 Baum argues that the trial court erred in partially denying his motion because (1) the cross-complaint arose out of Baum's complaint, (2) he has a first amendment right to expose bid-rigging, and (3) he has a privilege to retain evidence of public policy violations.

Smart & Final argues that the trial court erred in partially granting the SLAPP motion because (1) its cross-complaint is a compulsory cross-complaint to which the anti-SLAPP statute does not apply and (2) the conduct alleged in the cross-complaint occurred before Baum filed his complaint.

The right to petition includes the act of filing litigation. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1115, 81 Cal.Rptr.2d 471, 969 P.2d 564.) "This right is not one-way. Just as a plaintiff

invokes the right of petition by filing a lawsuit ..., a defendant, when responding to such an action, exercises the same constitutional right." (*Beach v. Harco National Ins. Co.* (2003) 110 Cal.App.4th 82, 93-94.)

In *Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 651, 49 Cal.Rptr.2d 620, overruled on other grounds in *Equilon Enterprises v. Consumer Cause, Inc.*, *supra*, 29 Cal.4th at p. 67, fn. 5, 124 Cal.Rptr.2d 507, 52 P.3d 685, the court discussed the application of [section 425.16](#) to compulsory cross-complaints. "Although a cross-complaint may be subject to a [section 425.16](#) motion, not all cross-complaints would qualify as SLAPP suits. A defendant may file a cross-complaint against the plaintiff for any existing cause of action regardless of its nature and origins. (*Code Civ. Proc.*, § 428.10, subd. (a).) Only those cross-complaints alleging a cause of action arising from the plaintiff's act of filing the complaint against the defendant and the subsequent litigation would potentially qualify as a SLAPP action. ([§ 425.16](#), subds.(b) and (d).) ... [¶] A compulsory cross-complaint on a 'related cause of action' against the plaintiff (*Code Civ. Proc.*, § 426.30, subd. (a)) would rarely, if ever, qualify as a SLAPP suit arising from petition activity. By definition, a 'related cause of action' is 'a cause of action which arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause of action which the plaintiff alleges in his complaint.' (*Code Civ. Proc.*, § 426.10, subd. (c)....) The SLAPP suit is not 'related' to the transaction or occurrence which is the subject of the plaintiff's complaint, but arises out of the litigation process itself." (Italics omitted.)

Several subsequent cases reaffirm that a cross-complaint that arises out of the same transaction or occurrence as the plaintiff's complaint is not subject to a SLAPP motion. For example, in *People ex rel. 20th Century Ins. Co. v. Building Permit Consultants, Inc.* (2000) 86 Cal.App.4th 280, 103 Cal.Rptr.2d 71, the defendants prepared earthquake damage and repair estimates as part of a fraudulent scheme to obtain insurance payments. (*Id.* at p. 282, 103 Cal.Rptr.2d 71.) They "cold called" and sent direct mail to earthquake victims to persuade them to enter into illegal contracts. (*Ibid.*) When sued for a violation of the Insurance Code, the defendants brought a motion to strike under [section 425.16](#), claiming the cold calling and direct mail solicitation of victims and preparation of fraudulent reports and estimates was in furtherance of

their free speech rights. (*20th Century Ins. Co.*, at pp. 283- 284, 103 Cal.Rptr.2d 71.) The court held that defendants failed to make a prima facie showing that the lawsuit was brought to chill their First Amendment rights because the damage reports and estimates were not created before or " 'in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law.' " (*Id.* at pp. 284-285, 103 Cal.Rptr.2d 71.) The court held there was no issue pending before or under consideration in an official proceeding when the reports and estimates were prepared. (*Id.* at p. 285, 103 Cal.Rptr.2d 71.)

*5 The court reached the same conclusion in *Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 116 Cal.Rptr.2d 187. In that case, the plaintiff sued the city for payment on a reconstruction project, and the city cross-complained for breach of contract and numerous other causes of action. The court held the anti-SLAPP statute was inapplicable to all but one of the cross-complainant's causes of action because they arose from the cross-defendant's bidding and contracting practices, which predated the filing of the complaint, and not from acts in furtherance of cross-defendant's right of petition. (*Id.* at pp. 929-930, 116 Cal.Rptr.2d 187.)

Our Supreme Court recently addressed the issue in *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 124 Cal.Rptr.2d 519, 52 P.3d 695. In that case, mobilehome park owners brought an action in federal court challenging the legality of the city's rent control ordinance. The city filed an action for declaratory relief in state court, based on the same underlying issues. The owners moved to strike the city's state court complaint as a SLAPP action. The Supreme Court held that the city's state court action did not arise from the owners' filing of the federal court action. Rather, it arose from the underlying dispute about the constitutionality of the ordinance. The Supreme Court held that "[t]he mere fact an action was filed after protected activity took place does not mean it arose from that activity.... [¶] To construe 'arising from' in [section 425.16](#), subdivision (b)(1) as meaning 'in response to' ... would in effect render all cross-actions potential SLAPP's." (*Id.* at pp. 76-77, 124 Cal.Rptr.2d 519, 52 P.3d 695.) The court added, "Just as a cross-complaint often 'arises out of the same transaction, occurrence, or series of transactions or occurrences as the cause of action which the plaintiff alleges' [citations], so may a responsive but

independent lawsuit arise from the same transaction or occurrence alleged in a preceding lawsuit, without necessarily arising from that earlier lawsuit itself." (*Id.* at pp. 77-78, 124 Cal.Rptr.2d 519, 52 P.3d 695; see also *Santa Monica Rent Control Bd. v. Pearl Street LLC* (2003) 109 Cal.App.4th 1308, 1318, 135 Cal.Rptr.2d 903, italics omitted ["[W]hile this suit may have been 'triggered by' defendants' submission of such documents to the Board, it is not true that this suit is based on the filing of such papers. Rather, the suit is based on activity that preceded the filing of the papers. This suit is based on the Board's claim that defendants are charging an illegal rent for units A and C"].)

The conduct alleged in Smart & Final's cross-complaint did not arise out of the litigation process or from Baum's exercise of his right to petition or free speech. As in *Cotati, Kajima* and *20th Century Insurance*, all of the causes of action in Smart & Final's cross-complaint relate to Baum's alleged breach of various rules and regulations adopted by Smart & Final to protect the confidentiality of certain information and Baum's alleged theft of confidential information, conduct that occurred a year before Baum filed his wrongful termination lawsuit.

*6 We are not persuaded by Baum's argument that his alleged attempts to uncover bid-rigging or to prove his claim of wrongful termination against public policy are activities protected by the SLAPP statute. As Smart & Final points out, there is no whistleblower's privilege (*Gonzalez v. Superior Court* (1995) 33 Cal.App.4th 1539, 1547-1548, 39 Cal.Rptr.2d 896), and Baum has cited no cases or other authority supporting his claim that these activities fall within the speech and conduct protected by [section 425.16](#). Therefore, the trial court erred in granting the SLAPP motion as to the causes of action for breach of contract, conversion and breach of fiduciary duties. [\[FN3\]](#)

[FN3](#). The trial court's reason for denying the SLAPP motion as to the causes of action for interference with contract and prospective economic advantage--i.e., these "are not the types of causes of actions that the Legislature was concerned with in reference to the enactment of ... the SLAPP legislation"--was erroneous. "Nothing in the statute itself categorically excludes any particular type of action from its operation." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 92, 124

[Cal.Rptr.2d 530, 52 P.3d 703.](#)) We affirm the trial court's order as to these causes of action nonetheless because we review the result in the trial court not the trial court's reasoning. (See, e.g., *Belair v. Riverside County Flood Control Dist.* (1988) 47 Cal.3d 550, 568, 253 Cal.Rptr. 693, 764 P.2d 1070 ["There is perhaps no rule of review more firmly established than the principle that a ruling or decision correct in law will not be disturbed on appeal merely because it was given for the wrong reason. If correct upon any theory of law applicable to the case, the judgment will be sustained regardless of the considerations that moved the lower court to its conclusion"].)

The trial court may award reasonable attorney fees and costs to a party who successfully defeats a SLAPP motion if the trial court finds that the motion is frivolous or is solely intended to cause unnecessary delay. ([§ 425.16](#), subd. (c).) The trial court declined to award attorney fees to either party because it found that there was no prevailing party. Our decision requires that the case be remanded so the trial court can exercise its discretion in determining whether Smart & Final is entitled to attorney fees under [section 425.16](#), subdivision (c). (See *Robertson v. Rodriguez* (1995) 36 Cal.App.4th 347, 361-362, 42 Cal.Rptr.2d 464.)

Our disposition makes it unnecessary to discuss whether the cross-complaint will succeed on the merits or Smart & Final's claim that the trial court erred by denying its motion for discovery.

We affirm that part of the trial court's order denying the SLAPP motion with respect to causes of action for misappropriation of trade secrets, intentional interference with contractual relations and intentional interference with prospective economic relations. We reverse that part of the order granting the motion with respect to causes of action for breach of contract, conversion and breach of fiduciary duties. We remand to the trial court to determine whether the prevailing party is entitled to attorney fees and the amount thereof. Smart & Final is awarded costs on appeal.

We concur: YEGAN, Acting P.J., and [PERREN](#), J.

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- [2003 WL 22386375 \(Appellate Brief\) Appellant's Answer to Brief of Amicus Curiae Employer's Group \(May. 05, 2003\)](#)
- [2003 WL 22386320 \(Appellate Brief\) Appellant's Reply and Cross Respondent's Brief \(Apr. 03, 2003\)](#)
- [2001 WL 34157163 \(Appellate Brief\) Appellant's Opening Brief \(Nov. 02, 2001\)](#)

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