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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

GOLDEN GATE LAND HOLDINGS LLC, a Delaware limited liability company; PACIFIC RACING ASSOCIATION d/b/a Golden Gate Fields, a California corporation; PACIFIC RACING ASSOCIATION II d/b/a Golden Gate Fields, a California Corporation,

Plaintiffs,

vs.

DIRECT ACTION EVERYWHERE, a California corporation; RACHEL CHRISTINA ZIEGLER, an individual, ROCKY NING FAN CHAU, an individual, OMAR ENRIQUE AICARDI, an individual, JAMES NICHOLAS CROM, an individual, and DOES 1-100, inclusive,

Defendants.

Case No. RG21091697

Assigned for all purposes to the Honorable James Reilly, Dept. 25

Defendant Direct Action Everywhere's Memorandum in Support of Their Special Motion to Strike Complaint Pursuant to Code Civ. Proc. § 425.16

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1 **Introduction**

2 The rights to speech, assembly, and petition are a cornerstone of our democratic system. This
3 country's Framers considered the "right of peaceable assembly . . . to lie at the foundation of a
4 government based upon the consent of an informed citizenry." (*Bates v. City of Little Rock* (1960) 361
5 U.S. 516, 522–523.) This right has sustained countless social and political movements throughout our
6 history. Civic activism and democratic participation in this country depend on the continued recognizing
7 a robust right to organize, assemble, and petition the government for redress.

8 The Plaintiffs here bring suit against Defendant Direct Action Everywhere for opposing
9 Plaintiffs' horse racing business, gathering signatures on a petition to the cities of Berkeley and Albany
10 to close Plaintiff's business, and allegedly organizing protests against the horse track. But Plaintiffs are
11 wrong on the facts. DAE had no involvement in the civil disobedience that unfolded at the track. The
12 only activity alleged in the Complaint that DAE was involved in is well within the protections of the
13 First Amendment: publishing information about the protest on its Facebook page and website. Plaintiffs
14 sued DAE for that publication and for its affiliation with the activists who *were* directly involved.

15 This is precisely the situation that the anti-SLAPP statute, Code of Civil Procedure section
16 425.16, is designed to thwart.

17 Because Direct Action Everywhere's speech and petitioning activity are protected, the horse
18 track must show a probability of prevailing on its claims based on admissible evidence. It cannot meet
19 this burden. The Court should grant this special motion and strike the Complaint.

20 **Facts**

21 Defendant Direct Action Everywhere is charitable nonprofit advocacy organization under section
22 501(c)(3) of the Internal Revenue Code dedicated to promoting and achieving animal rights. It is run by
23 a three-person Board of Directors. (Declaration of Jon Frohnmayer ¶ 2.)

24 DAE shares a mission with dozens of local DAE chapters and other affiliated activists
25 throughout North, Central, and South America, as well as Europe, Asia, Australia, and the Middle East.
27 (Frohnmayer Decl. ¶ 3.) DAE chapters are independent of DAE-the-501(c)(3), and the 501(c)(3) does
28 not operate any of the local chapters. (*Ibid*.) DAE publishes content produced by local chapters but has

1 no direct involvement in, or even foreknowledge of, most local protests. (*Id*. ¶ 4.) These chapters carry
2 out the grassroots activism that happens using the DAE branding but with no formal affiliation. (*Id*. ¶ 5.)
3 The chapters organize events, protests, and civil disobedience, among other things independent of DAE-
4 the-501(c)(3) and the board of DAE-the-501(c)(3). (*Ibid*.) In general, one or more of the organizers
5 within a chapter organizes a protest or other event. (*Ibid*.) DAE chapters operate as unincorporated
6 associations. (*Id*. ¶ 6.)
7 Plaintiffs are the landowners and operators of Golden Gate Fields, a horse racing track spanning
8 Albany and Berkeley. (Compl. ¶¶ 1–3.) As is fairly typical at horse racing tracks, a lot of horses die at
9 Golden Gate Fields. In 2020, as most of the country was staying home to alleviate a global pandemic,
10 Golden Gate kept racing—and at least 26 horses died there.[1] (See *2-year-old horse dies at Golden Gate*
11 *Fields*, Fox KTVU (Dec. 21, 2020), available at: https://www.ktvu.com/news/2-year-old-horse-dies-at-
12 golden-gate-fields.) The alarming death rate at the track prompted the City of Berkeley to write to the
13 Chairman of the California Horse Racing Board—the state entity that regulates horse racing—requesting
14 the Board investigate the track and the deaths, noting that the track is owned by the same conglomerate
15 that owns another California horse track where 38 horses dropped dead the prior year. (See City of
16 Berkeley, *Treatment of Horses at Golden Gate Fields* (Oct. 27, 2020), available at:
17 https://www.cityofberkeley.info/Clerk/City_Council/2020/10_Oct/Documents/2020-10-
18 27_Item_19_Treatment_of_Horses_at_Golden_Gate.aspx; *Golden Gate Fields Responds To Berkeley*
19 *City Council Request To Investigate Equine Fatalities*, Paulick Report (Nov. 19, 2020), available at:
20 https://www.paulickreport.com/news/the-biz/golden-gate-fields-responds-to-berkeley-city-council-
21 request-to-investigate-equine-fatalities/.)
22 Given its alarming death toll, it should come as no surprise that people who believe in the rights
23 of animals would object to the horse track's operation. DAE has an on-going petition seeking signatories
24 who support asking the cities of Berkeley and Albany to shut the place down, noting the large-scale
25

27 [1] And a whole lot of their workers contracted COVID-19 at the track. (See Shultz, *Emails obtained by SFGATE detail treatment of on-site workers at Bay Area's Golden Gate Fields*, S.F. Gate (May 6, 2021),
28 available at: https://www.sfgate.com/sports/article/2021-05-Emails-obtained-golden-gate-fields-16153713.php.)

1 coronavirus outbreak and horse deaths. (Frohnmayer Decl. ¶ 7, Ex. A.) It has more than 38,000
2 signatories. (*Id*. ¶ 7, Ex. A.)
3 A local chapter of DAE also opposes the steady stream of horse deaths at the track. In early
4 March, people apparently affiliated with the local DAE chapter held a protest on the public rights of way
5 outside the track. And four people—the individual defendants here—engaged in civil disobedience,
6 locking down on the track and shutting down the track for the day. DAE-the-501(c)(3) broadcasted
7 reports of the protest from participants on the ground via its Facebook page, as it does with many
8 protests organized by a variety of groups. (Frohnmayer Decl. ¶ 8; Compl. ¶ 19.)
9 Police arrested the four individual protesters who locked down on the racetrack. (Compl. ¶ 21.)
10 And the horse track seeks civil remedies against them. (Compl. ¶¶ 17, 21, 26–37.) All well and good.
11 But the horse track also sued a nonprofit advocacy organization that had no role in planning or
12 executing even the lawful protest outside the track, not to mention having no role in the civil
13 disobedience. (Frohnmayer Decl. ¶ 9.) Even Plaintiff's Complaint concedes that DAE's only connection
14 to the protests was publications on its website and Facebook page. (Compl. ¶¶ 15, 19.) The track seeks
15 to hold DAE liable because the people who locked down to the track share an ideology with the
16 organization or are members of an affiliated unincorporated local chapter. Or, more simply, the track
17 just seeks to punish a critic. Either way, these litigation tactics are prohibited by the First Amendment
18 and California's anti-SLAPP statute.
19 **Argument**
20 "A SLAPP suit is a civil lawsuit that is aimed at preventing citizens from exercising their
21 political rights or punishing those who have done so." (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49
22 Cal.4th 12, 21.) The purpose of the anti-SLAPP statute is to prevent and deter SLAPPs brought
23 primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the
24 redress of grievances. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 312.) The weapons of choice for SLAPP
25 plaintiffs include "various business torts such as interference with prospective economic advantage,
27 nuisance and intentional infliction of emotional distress." (*Wilcox v. Superior Court* (1994) 27
28

Cal.App.4th 809, 816, overruled on another ground in *Equilon Enters. v. Consumer Cause, Inc*. (2002) 29 Cal.4th 53, 68 fn. 5.)

In ruling on an anti-SLAPP motion, the Court "engages in a familiar two-step process." (*J-M Mfg. Co., Inc. v. Phillips & Cohen LLP* (2016) 247 Cal.App.4th 87, 95.) "First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88 (*Navellier*).) A defendant meets this burden simply "by demonstrating that the act underlying the plaintiffs' cause of action fits one of the categories spelled out in section 425.16, subdivision (e)." (*Ibid.*) Second, if the defendant makes this showing, the burden then shifts to the plaintiff to establish a probability of prevailing on its claim based on admissible evidence. To do so, the plaintiff must show "that the complaint is legally sufficient and supported by a prima facie showing of facts that, if proved at trial, would support a judgment in the plaintiff's favor." (*Digerati Holdings, LLC v. Young Money Entm't, LLC* (2011) 194 Cal.App.4th 873, 884.) The motion must be granted if the "plaintiff fails to produce evidence to substantiate his claim or if the defendant has shown that the plaintiff cannot prevail as a matter of law." (*Siam v. Kizilbash* (2005) 130 Cal.App.4th 1563, 1570.)

"[A]n anti-SLAPP motion may be used to attack specific allegations constituting a claim within a pleaded count." (*Newport Harbor Offices & Marina, LLC v. Morris Cerullo World Evangelism* (2018) 23 Cal.App.5th 28, 43.) Thus, when the statute applies, a Court that declines to strike the entire complaint or an entire cause of action must assess each a plaintiff's probability of prevailing on each challenged allegation.

I. The Anti-SLAPP Statutes Applies to the Horse Track's Claims Against DAE

The anti-SLAPP statute protects broad categories of acts involving free speech and petition, including "(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." (Code. Civ. Proc. § 425.16, subds. (e)(3), (e)(4).) To satisfy Step 1, DAE need only make a prima facie showing of activity in furtherance of free speech.

DAE's speech and conduct were in furtherance of free speech in a public forum and in connection with an issue of public interest.

A. DAE's Speech Was Made in a Public Forum

There cannot be any reasonable dispute that DAE's speech was made in a public forum. The Complaint's allegations about DAE are that it "maintains a website" where it promotes animals right (Compl. ¶ 15), that it organizes protests (*ibid.*), that it gathers petition signatures on its website opposing GGF (*id.* ¶ 16), and that it published footage of a civil disobedience protest on its Facebook page (*id.* ¶¶ 19–20). Such statements on publicly accessible webpages are made in a public forum. (*Ampex Corp. v. Cargle* (2005) 128 Cal.App.4th 1569, 1576 ["Web sites that are accessible free of charge to any member of the public, where members of the public may read the views and information posted, and post their own opinions, meet the definition of a public forum" for anti-SLAPP]; *Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 895 [statements published on the Internet "hardly could be more public" under step one of the anti-SLAPP]; *ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 1007 [same].)

Because DAE's speech was made on websites readily accessible to the public, it was made in a public forum under the anti-SLAPP statute.

B. DAE's Speech Was Made in Connection with an Issue of Public Interest

Plaintiffs base their claims on statements DAE made in connection with an issue of public interest.

For a statement to be made in connection with an issue of public interest, the defendant must simply have "participated in, or furthered, the [public] discourse that ma[de] [the] issue one of public interest." (*FilmOn.com Inc. v. DoubleVerify Inc.* (2019) 7 Cal.5th 133, 151 (*FilmOn*).) *FilmOn* established a two-part inquiry to determine whether a defendant's speech was made in connection with an issue of public interest. In the first step, the court determines "what 'public issue or . . . issue of public interest' the speech in question implicates—a question [courts] answer by looking to the content of the speech. [Citation.] Second, [a court] ask[s] what functional relationship exists between the speech and the public conversation about some matter of public interest." (*Id.* at pp. 149–150.) On the second inquiry, the Court stated that a statement is made in connection with an issue of public interest if it

"contributes to—that is, 'participat[es]' in or furthers—some public conversation on the issue." (*Id*. at p. 151.) And the Court made clear that this analysis must include a consideration of the context or specific circumstances in which the statement was made, "including the identity of the speaker, the audience, and the purpose of the speech." (*Id*. at pp. 140, 151–152.) In *FilmOn*, a commercial speaker making statements to "a coterie of paying clients" to sell a product did not make the required contextual showing to qualify as a statement made in connection with an issue of public interest. (*Id*. at p. 153.)

Several courts have found that public demonstrations and organizing to promote animal rights involve issues of a public interest under subdivisions (e)(3) and (e)(4), and lawsuits arising out animal rights demonstrations are therefore subject to section 425.16. (See *City of Los Angeles v. Animal Defense League* (2006) 135 Cal.App.4th 606, 620–621 ["[d]emonstrations, leafleting and publication of articles on the Internet to criticize government policy regarding the alleged mistreatment of animals at City-run animal shelters . . . constitute a classic exercise of the constitutional rights of petition and free speech in connection with a public issue or an issue of public interest within the meaning of section 425.16(e)(4)."]; *Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1246 ["[a]nimal testing is an area of wide-spread public concern and controversy, and the viewpoint of animal rights activists contributes to the public debate" under § 425.16(e)(3) & (4)]; accord *McGill v. Parker* (N.Y. App. Div. 1992) 179 A.D. 2d 98, 106–107 [statements of animal rights activists as to living and working conditions of horses were communications on a matter of public interest entitled to protection under the First Amendment].)

And the speech meets *FilmOn*'s content and context analysis, too. The content of DAE's speech is promotion of animals right—no doubt an issue of public interest. And each of the contextual factors line up. Unlike *FilmOn*'s commercial speaker, DAE is an animal rights nonprofit advocacy organization. Unlike *FilmOn*'s speech to "a coterie of paying clients," (*FilmOn*, *supra*, 7 Cal.5th at p. 153), DAE made statements on its website and Facebook page to anyone willing to listen. And unlike *FilmOn*'s commercial purpose, DAE's purpose was to advance it political agenda of promoting animal rights generally and stopping the constant stream of horse deaths at Gold Gate Fields specifically.

The statute applies.

II. The Horse Track Will Not Be Able to Show a Probability of Success on the Merits of The Claims Against DAE

Because DAE has shown that Plaintiffs' claims arise from protected speech, the burden shifts to the horse track to establish that the causes of action are both "legally sufficient" (that is, the causes of action would satisfy a demurrer (*Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1421)) and "supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056.) The motion should be granted if the horse track fails to establish either requirement. (See *Navellier*, *supra*, 29 Cal.4th at pp. 88–89. They cannot rely merely on the allegations in the complaint, but must produce competent, admissible evidence establishing each element of each cause of action. (See *Evans v. Unkow* (1985) 38 Cal.App.4th 1490, 1497–1498.)

Plaintiffs will be unable to meet their burden for at least two reasons. First, they sued an entity that had no direct involvement in the protests. Second, the First Amendment protects advocacy organizations from the type of vicarious liability that the horse track seeks to impose on DAE. The Court should strike the action against DAE under section 425.16.

A. Plaintiffs Sued the Wrong Entity

Plaintiffs will be unable to establish a probability of prevailing on their claims against DAE because they sued the wrong entity. Their Complaint accuses DAE of organizing protests against Golden Gate Fields, but the 501(c)(3) organization had no role in organizing the civil disobedience at the track. (Frohnmayer Decl. ¶ 9.) The 501(c)(3) doesn't organize protests as a general matter. (*Ibid*.) And in particular, it didn't organize any protest related to Golden Gate Fields on March 4, 2021. (*Ibid*.) Plaintiffs will be unable to provide evidence that it did (because it didn't).

To the extent that the horse track seeks to impose liability on the entity responsible for organizing protests against Golden Gate Fields, their target appears the by the local chapter of Direct Action Anywhere, not DAE-the-501(c)(3).

But regardless, even if Plaintiffs had the right entity, the First Amendment precludes the track's claims and legal theory.

1 **B. Plaintiffs' Claims Are Barred by the First Amendment**

2 Plaintiffs will also be unable to establish a probability of prevailing on their claims against DAE
3 because Plaintiffs premise their claims against DAE an unconstitutional attempt to hold DAE civilly
4 liable for its association.

5 "The First Amendment protects political association as well as political expression." (*Unger v.*
6 *Superior Court* (1984) 37 Cal.3d 612, 636.) "Effective advocacy of both public and private points of
7 view, particularly controversial ones, is undeniably enhanced by group association." (*NAACP v. Ala. ex*
8 *rel. Patterson* (1958) 357 U.S. 449, 460.) And such advocacy on public issues "has always rested on the
9 highest rung of the hierarchy of First Amendment values." (*Carey v. Brown* (1980) 447 U.S. 455, 467.)

10 Nearly four decades ago, in *NAACP v. Claiborne Hardware Co.*, the U.S. Supreme Court
11 established a constitutional rule limiting state law damages liability for the "unlawful conduct of others"
12 occurring "in the context of . . . activity" protected by the First Amendment. (*NAACP v. Claiborne*
13 *Hardware Co.* (1982) 458 U.S. 886, 916, 927 (*Claiborne Hardware*).)

14 *Claiborne Hardware* arose out of a seven-year campaign in the 1960s for equal rights of Black
15 Americans in Claiborne County, Mississippi. (*Claiborne Hardware*, *supra*, 458 U.S. at p. 898.) White
16 business owners sued the NAACP and NAACP Mississippi Field Officer Charles Evers, among others
17 associated with the NAACP, under a conspiracy theory for business losses sustained during an NAACP-
18 sponsored boycott of white-owned businesses. (*Id*. at p. 889.) The boycott had a "'chameleon-like'
19 character. . . .; it included elements of criminality and elements of majesty." (*Id*. at p. 888.)

20 Evers had publicly proclaimed that boycott violators "would be watched[,]" (C*laiborne*
21 *Hardware*, *supra*, 458 U.S. at p. 900 fn. 28), "blacks who traded with white merchants would be
22 answerable to him[,]" (*ibid*.), "boycott violators would be 'disciplined' by their own people[,]" (*id*. at p.
23 902), and "any 'uncle toms' who broke the boycott would 'have their necks broken' by their own
24 people." (*Id*. at p. 900 fn. 28.) Evers "warned that the Sheriff could not sleep with boycott violators at
25 night," and told his audience, "'If we catch any of you going in any of them racist stores, we're gonna
27 break your damn neck.'" (*Id*. at p. 902.)

28

The NAACP posted “store watchers,” including Evers himself, outside boycotted stores and identified those who violated the boycott. (*Claiborne Hardware*, *supra*, 458 U.S. at pp. 903, 929 fn. 72.) The names of boycott violators were published in the local Black Times newspaper and read aloud at Claiborne County NAACP meetings. (*Id*. at p. 903–904.)

Identified boycott violators were subject to repercussions beyond social ostracism. Supporters of the boycott fired gunshots into three separate boycott violators’ homes. (*Claiborne Hardware*, *supra*, 458 U.S. at pp. 904–905.) Supporters physically beat two other boycott violators. (*Id*. at pp. 905 & fn. 39.) They robbed another. (*Id*. at p. 905.) They threw a brick through the windshield of a boycott violator’s car. (*Id*. at p. 904 fn. 37.) They slashed another’s tires. (*Id*. at p. 906.)

The perpetrators of the violence and property destruction did not operate separate and apart from the NAACP of Claiborne County. The leader of the NAACP-organized “store watchers” was involved in several acts of violence or property destruction. (*Id*. at p. 906 fn. 40.) The Claiborne County NAACP provided legal representation for those arrested in connection with acts against boycott violators, including three individuals apprehended in one of the shootings. (*Id*. at p. 906 fn. 41.)

Still, this was not enough to hold an advocacy organization liable for the damages that resulted from the boycott. The Court held that though violence and threats of violence could be punished, the organization that organized the boycott and even cheered it along was fully protected by the First Amendment. “The rights of political association are fragile enough without adding the additional threat of destruction by lawsuit.” (*Claiborne Hardware*, *supra*, 458 U.S. at pp 931–932, quoting *NAACP v. Overstreet* (1966) 384 U.S. 118, 122 (Douglas, J., dissenting from dismissal of certiorari).).

The rule from *Claiborne Hardware* is straightforward: Whatever state law provides, damages liability for unlawful acts committed in the context of a protest requires a stringent showing of direct, culpable involvement. Specifically, an advocacy organization may only be held accountable for harms it “authorized, directed, or ratified.” (*Claiborne Hardware*, *supra*, 458 U.S. at p. 927.) Full stop.

Claiborne Hardware’s rigorous specific intent requirement was no slip of the judicial pen. It was the decision’s central, rigorously supported holding. And it rested on First Amendment limitations recognized in historic decisions addressing incitement and associational liability. (*Claiborne Hardware*,

supra, 458 U.S. at pp. 918–920, 927–928, citing, inter alia, *Brandenburg v. Ohio* (1969) 395 U.S. 444, 447 (*Brandenburg*); *Whitney v. California* (1927) 274 U.S. 357, 372 (Brandeis, J., concurring); *N.Y. Times Co. v. Sullivan* (1964) 376 U.S. 254, 270; *Scales v. United States* (1961) 367 U.S. 203, 229 (*Scales*); *Noto v. United States* (1961) 367 U.S. 290, 297–299; *Healy v. James* (1972) 408 U.S. 169 (*Healy*).) Those precedents, too, affirm that the Constitution forbids imposing liability for advocacy or association that only foreseeably leads others to commit unlawful acts. Instead, there must at a minimum be proof a defendant specifically intended the harm to occur. (See *Brandenburg*, *supra*, 395 U.S. at p. 447; *Scales*, *supra*, 367 U.S. at p. 229; *Healy*, 408 U.S. at pp. 185–186; cf. *Herndon v. Lowry* (1937) 301 U.S. 242, 262 [invalidating statute authorizing punishment if a defendant could have "forecast that, as a result of a chain of causation" his speech will lead a "group to resort to force"].)

1. The *Claiborne Hardware* Rule Advances Essential Policy for a Free Society

While being precedent of the United States Supreme Court is itself sufficient, the rule from *Claiborne Hardware* is also a necessary principle. All speech and advocacy that accuses someone of misconduct—however correctly—could yield some illegal behavior against them. Any newspaper story reporting that someone was arrested for molesting a child could lead some people to vandalize his home or physically attack him. A story reporting a person's extreme religious ideology views could yield attacks or illegal employment discrimination. Without the rule from *Claiborne Hardware*, a loose approach to civil liability would create incentives for plaintiffs to sue protest organizers for money damages resulting from violent actions that the protest organizers did not direct, incite, or authorize—acts they likely were unaware of.

Such a scheme would inevitably suppress expression by a diverse array of protesters and protest groups. Pro- life, pro-gun, environmental, and other protest groups would find themselves defendants in costly suits based on the unauthorized and unratified unlawful acts of participants. Every organizer of a significant march will face substantial and, in many cases, crippling civil liability. Organizers of the Women's March and Black Lives Matter, the annual protesters of the decision in *Roe v. Wade*, and youth organizers promoting gun control would all be at risk. It would impermissibly shift responsibility for costs and harms that protest organizers cannot control to protest organizers. (See *Forsyth Cty. v.*

Nationalist Movement (1992) 505 U.S. 123, 134–135 [protesters cannot be charged for the costs created by counter-protesters that voice their opposition, even counter-protesters whose appearance heightens the risk of violence].)

2. California Courts Fully Embrace the *Claiborne Hardware* Rule

California courts zealously guard the *Claiborne Hardware* rule, if not read the protections more expansively. (See *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal.4th 468, 491 ["Our California Constitution provides greater, not lesser, protection for this traditional form of free speech."].) This includes cases applying the anti-SLAPP statute.

Lam v. Ngo (2001) 91 Cal.App.4th 832 (*Lam*), is the essential California precedent applying *Claiborne Hardware*. *Lam* arose out of dispute involving a video store owner who hung a North Vietnamese flag and a picture of Ho Chi Minh in the store's window. (*Id*. at pp. 837.) The protestors then turned their ire on a restaurant owner, Tom Lam, who was also a member of the local city council. (*Ibid*.) The landlord of the restaurant premises, Ky Ngo, was sympathetic to the protestors and allowed them to protest in the parking lot. (*Id*. at p. 838.)

The protesters slashed patron's tires, posted banners on the restaurant, urinated on it, and intimidated customers. (*Lam*, *supra*, 91 Cal.App.4th at p. 838.) And Ngo didn't only allow protesters to use the parking lot, he helped organize the protests themselves. (*Id*. at p. 846.) Even after a judge issued a TRO imposing a protest buffer zone around the restaurant, Ngo continued to violate it. (*Ibid*.)

The protests hurt Lam's business and drove up his costs by requiring him to hire security guards. (*Lam*, *supra*, 91 Cal.App.4th at pp. 837–839.) So he sued Ngo and others for intentional infliction of emotional distress, intentional interference with economic advantage, trespass, and nuisance—and Ngo filed an anti-SLAPP motion in response. (*Id*. at p. 839.)

Applying *Claiborne Hardware*, the Court of Appeal found that the anti-SLAPP statute mandated dismissal of Lam's lawsuit. (*Lam*, *supra*, 91 Cal.App.4th at pp. 845–851.)

Because Lam's action "involve[d] possible tort liability for the collateral effects of a political protest," the Court of Appeal recognized three controlling principles from *Claiborne Hardware*:

1 (a) Peaceful picketing of a business for political reasons cannot be burdened by state tort liability, even if it has the effect of interfering with prospective economic advantage. (*NAACP v. Claiborne Hardware Co.*, *supra*, 458 U.S. at p. 918 [state may not "award compensation for the consequences of nonviolent, protected activity"].)
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4 (b) Violence and other criminal acts are bases of tort liability and not constitutionally protected, even when committed out of political motives and in the context of a political demonstration. (*NAACP v. Claiborne Hardware Co.*, *supra*, 458 U.S. at p. 916 ["No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence."].)
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8 (c) An organizer of a political protest cannot be held personally liable for acts committed by other protesters unless he or she authorized, directed or ratified specific tortious activity, incited lawless action, or gave specific instructions to carry out violent acts or threats. (See *NAACP v. Claiborne Hardware Co*., *supra*, 458 U.S. at p. 927.)
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10

11 (*Lam*, *supra*, 91 Cal.App.4th at pp. 836–837.)

12 Applying those principles, the Court of Appeal found it was not enough that Ngo participated in
13 the protests, violated a TRO, and even allowed the parking lot to be used for the protests because there
14 was no allegation or evidence that "such acts were authorized, directed or ratified by Ngo." (*Lam*, *supra*,
15 91 Cal.App.4th at p. 846.) The Court of Appeal found that "[t]here was, in fact, far more in *NAACP v.*
16 *Claiborne Hardware Co.*, to link Charles Evers, the field secretary of the state NAACP, to the sporadic
17 acts of violence in that case. Evers organized the boycott, made 'emotional and persuasive appeals for
18 unity in the joint effort,' and even made '"threats" of vilification and social ostracism.'" (*Id*. at p. 846,
19 quoting *Claiborne Hardware*, *supra*, 458 U.S. at p. 926.)

20 Because "as in *NAACP v. Claiborne Hardware Co.*, tort liability [could not] be predicated
21 merely on Ngo's role as an 'organizer' of protests in which some protesters committed wrongful acts,"
22 the Court struck the action under the anti-SLAPP statute. (*Lam*, *supra*, 91 Cal.App.4th at p. 846.)[2]

23 The same principles apply with even more force here.
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27 [2] *Lam* remains bedrock authority. The California Supreme Court continues to cite it with approval (see, e.g., *Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism* (2018) 4
28 Cal.5th 637, 641, 643), and the California Courts of Appeal have relied on it in more than two dozen published decisions.

Claiborne Hardware and *Lam* could hardly be clearer that the type of derivative liability that the horse track seeks to impose on DAE is constitutionally permissible only for harms caused by those "specific tortious activit[ies]" an advocacy organization orders or directs. (*Claiborne Hardware*, *supra*, 458 U.S. at p. 927.)

Claiborne Hardware, as affirmed in *Lam*, announced a clear and definitive rule for suits seeking to hold a protest leader liable in damages for the "unlawful conduct of others" in the context of a protest: They are unconstitutional, unless the leader herself incited, authorized, or otherwise intended the specific harm inflicting behavior. (See *Claiborne Hardware*, *supra*, 458 U.S. at p. 927.) In this case, Plaintiffs have failed to even allege such authorization by DAE. Plaintiffs' claims fail on the law.

C. Vigorous Enforcement of *Claiborne Hardware*'s Command Is Required to Protect Political Association

The Court's adherence to the *Claiborne Hardware* rule is required here for the same reasons it was in *Claiborne Hardware*: because the rights at issue are both integral to "self-government," (*Claiborne Hardware*, *supra*, 458 U.S. at p. 913), and highly "fragile," (*id*. at p. 931).

Ours is a nation birthed by defiance: colonists hurling chests of tea into the Boston Harbor to oppose unjust monarchic rule. And we've carried that birthright throughout our history. Abolitionists burned the Constitution in support of their struggle while also smuggling and harboring fugitive slaves. Suffragists illegally voted to spread their message. The history America's labor movement is rife with illegal actions in protest of unsafe conditions, low pay, and unemployment. Pro-life activists champion their views through civil disobedience. And, of course, illegal protest activity—from the lunch counter sit-ins, to the Freedom Rides, to the Birmingham campaign, to the march from Selma to Montgomery (among many others)—helped garner the nation's attention and channel public momentum in the civil rights movement, leading to government action, including the Civil Rights Act of 1964 and the Voting Rights Act of 1965. (See, e.g., Cox, *Direct Action, Civil Disobedience, and the Constitution* (1996) 78 Proc. Mass. Hist. Soc'y 105.) Leaders such as Rosa Parks and Rev. Dr. Martin Luther King, Jr. are now revered for their tactics of nonviolent, illegal direct action that helped achieve the advancement of equal civil and human rights.

None of which is to say that those who violate laws in the name of progress cannot be held criminally or civilly liable. The 'disobedience' in 'civil disobedience' admits that such actions can create liability. But the principle of *Claiborne Hardware*—that loose and attenuated liability rules chill the exercise of First Amendment rights—allows redress against those who directly engage in such illegal activity without exposing the advocacy organization that share their aims (or even cheer their bravery) to ruinous civil litigation. If advocacy organization are vulnerable to liability for the undirected actions of others, they are likely to stop advocating and organizing altogether because financial liability chills speech. (See, e.g., *Timbs v. Indiana* (2019) 139 S. Ct. 682, 689 ["Excessive fines can be used ... to chill the speech of political enemies."].)

That is Golden Gate Fields' aim here: to silence a critic with the threat of ruinous litigation. The Complaint does not allege any activity by DAE that is not protected First Amendment activity. Thankfully, the California Legislature enacted the anti-SLAPP statute to punished such "well-heeled parties who can afford to misuse the civil justice system to chill the exercise of free speech by the threat of impoverishing the other party." (*FilmOn*, *supra*, 7 Cal.5th at 143., citing Assem. Com. on Judiciary, Analysis of Sen. Bill No. 1296 (1997–1998 Reg. Sess.) as amended June 23, 1997, p. 3.)

Vigorous enforcement of both the rule from *Claiborne Hardware* and the anti-SLAPP statute is needed to protect not just DAE, but our national commitment to free and robust advocacy.

D. No Plaintiff Can Prevail on the Third Cause of Action Because It Is Not One and Plaintiff Pacific Racing Association II Will Not Be Able to Prevail on Any Claim Because It Asserts None

While a more minor point, none of the Plaintiffs will be able to establish a probability of prevailing on their Third Cause of Action because it is a request for relief, not a cause of action. The Third Cause of Action simply seeks an injunction. Under California law, an injunction is a remedy, not a cause of action. (Code Civ. Proc § 525; *Shell Oil Co. v. Richter* (1942) 52 Cal.App.2d 164, 168 ["[i]njunctive relief is a remedy and not, in itself, a cause of action"].) As a result, Plaintiffs will be unable to show a probability of prevailing on this claim because it is not a claim. The Court should strike it.

1 In addition, Plaintiff Pacific Racing Association II will be unable to establish a probability of
2 prevailing on its claims because it does not assert *any* claim against *anyone*. Only Plaintiffs Pacific
3 Racing Association (the first one) and Golden Gate Land Holdings assert the Complaint's First Cause of
4 Action. And only Plaintiff Pacific Racing Association (the first one) asserts the Complaint's Second
5 Cause of Action. Plaintiff Pacific Racing Association II asserts only the purported Third Cause of
6 Action, which isn't a Cause of Action. And absent a Cause of Action, Plaintiff Pacific Racing
7 Association II has no right to any relief.

8 **Conclusion**

9 Plaintiffs may be entitled to recover for the trespass to their horse track. But any remedy is owed
10 by the trespassers. DAE did not trespass. It did not incite those who did. The determinative factual
11 allegations against DAE are that it advocates for animals right and against Plaintiffs' cruel horse races.
12 This is a protected First Amendment right, not a forfeiture of it.

13 This case is part of a renewed trend of destructive, deep-pocketed, dying industries taking
14 desperate swings at their critics. (See, e.g., *Resolute Forest Prods. v. Greenpeace Int'l* (N.D. Cal. 2017)
15 302 F.Supp.3d 1005, 1010 [one of the world's largest timber companies suing environmental
16 organization for its criticism]; *Energy Transfer Equity, L.P. v. Greenpeace Int'l* (D.N.D. Feb. 14, 2019)
17 No. 1:17-Cv-00173-BRW, 2019 U.S. Dist. LEXIS 32264, at *2 (D.N.D. Feb. 14, 2019) [company
18 behind Dakota Access Pipeline suing same organization for same reason].) Courts have thankfully been
19 vigilant about dismissing such cases, including under California's anti-SLAPP statute. (See *ibid*.) This
20 Court should do the same.

21 Preventing this kind of abusive litigation aimed at speech and association is why California
22 enacted the anti-SLAPP statute. DAE asks this Court to grant its Special Motion to Strike, dismiss all
23 claims against it with prejudice, and award it its attorney fees and costs by subsequent motion.

24

25 Date: May 25, 2021

27

28

Matthew Strugar
Attorney for Defendant Direct Action Everywhere

1
Proof of Service

2 I am employed in the County of Los Angeles, State of California. I am over the age of eighteen and not a party to the within action. My business address is 3435 Wilshire Blvd., Suite 2910, Los Angeles, CA
3 90010.
4 On May 25, 2021, I served the within document(s) described as:

5 Defendant Direct Action Everywhere's Memorandum in Support of Their Special Motion to Strike Complaint Pursuant to Code Civ. Proc. § 425.16
6

7 on the interested parties in this action as stated below:

8 Robert Moore
9 Michael Betz
Alexander Doherty
10 Allen Matkins Leck Gamble Mallory & Natsis
Three Embarcadero Center, 12th Floor
11 San Francisco, CA 94111-4074

12

13 by United States mail. I enclosed the documents in a sealed envelope of package addressed to the persons listed above. I placed the envelope for collection and mailing, following our ordinary business
14 practices. I am readily familiar with this business's practice for collection and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it
15 is deposited in the ordinary course of business with the United States Postal Service, in a seal envelope
16 with postage fully prepaid.

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

19 Executed on May 25, 2021, at Los Angeles, California.

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23
Matthew Strugar
24 ________________________________ ________________________

(Signature)

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