2015 IL App (1st) 140454-U
No. 1-14-0454

THIRD DIVISION
December 9, 2015

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DITTO HOLDINGS, INC.,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 2013 L 10424
	)	
PAUL SIMONS,	)	
	)	The Honorable
Defendant-Appellant.	)	Patrick J. Sherlock,
	)	Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Mason and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *Held:* On appeal from a denial of a motion to dismiss the lawsuit as a Strategic Lawsuit Against Public Participation (SLAPP) under the Illinois Citizen Participation Act (735 ILCS 110/1 *et seq*. (West 2012)), while the defendant's email to the Securities and Exchange Commission about alleged suspicious financial expenditures and share transactions by a corporate officer requesting consideration of those allegations is a protected act under the Illinois Citizen Participation Act (735 ILCS 110/1 *et seq*. (West 2012)), the defendant's email to shareholders was not in furtherance of his protected right to petition government for favorable action and was not a protected act. The defendant could not demonstrate that the lawsuit was a SLAPP and was based solely on, related to, or in response to his sole protected act in emailing

the SEC because the plaintiff's claims were largely based on the defendant's act of emailing the shareholders, an unprotected act.

¶ 2 BACKGROUND

¶ 3 Plaintiff Ditto Holdings, Inc. (Holdings) is a private shareholder-owned Delaware corporation headquartered in Los Angeles, California that has raised capital since 2009 by selling shares under Regulation D of the Securities Act of 1933. Ditto Trade, Inc. (Trade) is a registered broker/dealer operating as an online retail stock trading company and is the sole subsidiary of Holdings.

¶ 4 Defendant Paul Simons was the chief executive officer (CEO) of Trade. Defendant was also the executive vice president of Holdings. Defendant had been in the financial services industry for 25 years. Before joining Trade, defendant was a managing director and head of America's Wealth Management Solutions at Credit Suisse Securities. Defendant also served as the co-head of the U.S. Private Banking Division of Credit Suisse. Before his tenure at Credit Suisse, defendant was an executive for Merrill Lynch for more than 15 years. Defendant joined Holdings as the executive vice president and as the CEO of Trade in January 2013. Defendant was also elected by the board of directors to the board of directors of Holdings at the Holdings July 2013 annual meeting.

¶ 5 Joseph Fox is the co-founder, chairman, and CEO of Holdings.

¶ 6 Jeremy Mann was the chief financial officer (CFO) of Trade and an executive vice president of Holdings. Adam Stillman was the president of Holdings. Mann and Stillman also both co-founded Holdings along with Fox.

¶ 7 We provide the following recitation of facts from the parties' briefs. Any statements of facts which were unsupported by citations to the record, including Holdings' reference to

defendant's awareness that he would be fired before the events below took place, are not included. See Ill. S. Ct. R. 341(h)(6) (eff. Feb. 6, 2013).

¶ 8 Defendant executed two agreements for his employment with Trade. One agreement was a "Confidentiality, Intellectual Property, and Non-Competition Agreement" dated January 2, 2013. Section 1 of the confidentiality agreement defined "Confidential Information" as follows:

> "1. Confidential Information. As used herein, 'Confidential Information' means information (including information created by me) that is not generally known to the public about the organization, business and/or finances of the Company (or the information of any third party that the Company is under an obligation to keep confidential), including but not limited to, supplier lists and sources; the identity of and any other information pertaining to vendors, customers, employees and consultants to the Company; the business and marketing plans and strategies of the Company; trade secrets or other information about projects; financial information and financial plans and projections; product designs and formulations; production techniques and methods; accounting, record-keeping and financial reporting techniques and methods; developmental or experimental work; computer programs; databases; inventions; object code; source code and documentation of the same; formulas; processes; algorithms; system design; software; the details of third party interfaces; and the plans and results of research and development."

¶ 9 Subsection 1(a) of the confidentiality agreement provided that defendant "will keep strictly confidential all Confidential Information" and will not "disclose to anyone outside the Company or use any of the Confidential Information for [his] own or anyone else's benefit, or

attempt to do any of the same, either during or after the termination of my employment or engagement with the Company."

¶ 10 The other agreement was a "Letter Agreement for Employment" dated December 19, 2012, setting forth defendant's terms for joining Trade as its CEO. These terms included that defendant "maintain [his] current brokerage industry licenses" and "obtain any additional licenses necessary to [his] duties as CEO, as mutually agreed." According to Fox's affidavit, a Financial Industry Regulatory Authority (FINRA) brokerage license was required in order for defendant to be the actual CEO of Trade and, while defendant was hired as the CEO, Fox actually fulfilled that role because defendant did not have the licenses required by FINRA, in particular a "Series 23" exam. According to Fox's affidavit, on February 12, 2013 defendant signed an attestation for FINRA that he would not act in any "supervisory capacity" until he obtained the appropriate license.

¶ 11 According to defendant, on August 19, 2013 defendant was preparing for a meeting with potential investors from Martha's Vineyard and asked Mann to provide him with updated information relating to share register and capitalization tables. Defendant allegedly discovered evidence of what he believed were questionable transactions in company shares and company expenditures and cash withdrawals by Holding's CEO, Joseph Fox, including possible violations of state and federal securities laws. There were some anomalies in the corporate records which seemed to suggest that Fox had been selling his founder's shares in Holdings personally while reporting to the company's management team that he was raising "fresh investments" concurrently with a Regulation D offering of company shares, thereby diverting capital from the company to himself personally. The records allegedly also revealed over $1.5 million in expenditures that appeared to benefit Fox and his family and seemed to have no apparent

business purpose. These alleged expenditures included, among other things, funding $70,000 for a horror movie produced by Fox's son, wire transfer payments to various family members, nearly $144,000 in ATM cash withdrawals and other expenses at numerous Las Vegas casinos, about $323,000 collectively for Fox's two brothers and his wife with no apparent business purpose, and rent payment for both Fox and this son's primary residences in Los Angeles.

¶ 12 Defendant and Mann examined company records, bank statements, and various public SEC filings. They discussed these and other findings with Holding's president, Adam Stillman. Mann consulted with Holding's general counsel, Stuart Cohn, regarding Fox's personal share transactions. On September 4, 2014, defendant, Mann and Stillman sought the advice of Katten Muchin, Holdings' outside corporate counsel, to obtain advice regarding how to proceed on behalf of the company and its shareholders. Katten Muchin instructed that they should obtain their own counsel.

¶ 13 Upon advice of his own counsel, on the morning of Monday, September 9, 2013, defendant submitted a written letter to Holdings' Board calling for a special meeting of the board of directors, pursuant to the company's bylaws (board demand letter). The board demand letter stated:

> "Information has recently been brought to my attention that appears to call into question the propriety of a significant number of expenditures and other transactions by the Company and the Subsidiary that may have personally benefitted Joe Fox, his family members, and others connected to him."

¶ 14 The board demand letter provided numerous bullet points of transactions that appeared to be questionable expenses Fox and his family members. The board demand letter also proposed specific resolutions for authorization by the Board, including an independent audit.

Approximately two hours later, Jonathan Rosenberg, a director of Holdings, and general counsel Stuart Cohn entered defendant's office and Rosenberg demanded that defendant vacate the premises because "it's best that the person making these allegations not be in the office."

¶ 15 Again at the advice of counsel and based on the company's allegedly hostile response to his board demand letter, defendant directed his attorney, Paul Huey-Burns, to report Fox's conduct to the SEC. Later that same day, September 9, 2013, defendant's counsel sent an e-mail to the acting Director and Deputy Director of the Chicago office of the SEC making the SEC aware of the situation and attaching a copy of the board demand letter (SEC letter). The email stated, in relevant part, the following:

> "*** I'm hoping that you could review the attached letter or refer it to someone who is in a position to consider the allegations that it contains. *** The letter describes allegations of significant financial misfeasance by Joseph Fox, the Chairman of Ditto Holdings, Inc., the holding company for Ditto Trade, Inc. (a registered BD). Both Ditto Holdings and Ditto Trade have substantial operations in the Chicago area. These allegations were brought to our attention by Paul Simons, the signer of the attached letter, who is Director and EVP of Ditto Holdings and CEO of Ditto Trade. *** The allegations are substantive and well-documented and, I believe, raise serious questions as to whether Mr. Fox and certain others involved in senior management have perpetrated or are in the process of perpetrating a fraud on Ditto Holdings' shareholders, and perhaps others. (Ditto Holdings currently is raising capital through a Reg D offering.) ***
>
> *** Mr. Simons requested that the Board initiate an investigation into the matters described in detail in the letter. Mr. Simons has received no direct response and is concerned that Mr. Fox and others involved in senior management have decided not to

respond and may be preparing to take retaliatory action against Mr. Simons and two other more junior executives, Jeremy Mann and Adam Stillman, who agree with Mr. Simons that there is significant evidence of Mr. Fox's misfeasance and who support Mr. Simons' actions. Messrs. Simons, Mann and Stillman also are concerned that Mr. Fox and others may attempt to create post-hoc documents or other materials to justify the apparently illegal transactions."

¶ 16 The next morning, September 10, 2013, Fox emailed defendant stating that defendant was "no longer permitted in the Chicago office until further notice" and attaching two letters. In the first letter, the board of directors of Trade fired defendant as CEO of Trade. The sole stated reason for the termination was defendant's "failure to have taken, and passed, the principal's exam administered by FINRA – *i.e.*, either the Series 24 or 23 exam." In the second letter, Fox placed defendant on indefinite leave as executive vice president from Holdings. The sole stated reason was that "current circumstances" made it unfeasible for him to carry out his responsibilities for the company. All of defendant's Holdings email accounts were deactivated, with no further information or contact information being given, the locks to Holdings' offices were changed, and defendant's access to the building was revoked.

¶ 17 On the evening of September 10, 2013, Holdings' outside counsel contacted defendant, requesting contact information for defendant's independent counsel. Later that evening, Holdings' counsel asked defendant's counsel if defendant would be amenable to a unanimous written consent of the board in lieu of the special meeting defendant had called for the next day. Holdings' counsel indicated he would circulate a draft the next morning. Based on that representation, defendant's counsel advised that defendant was amenable to signing a board consent instead of holding a meeting and looked forward to receiving and reviewing the draft.

Accordingly, the special meeting of the board of directors called for September 11, 2013 was cancelled. But, no draft consent resolutions were circulated on September 11.

¶ 18 By the evening of September 11, defendant still had not seen a draft of any resolutions and maintains that he had no knowledge of any resolutions being drafted or proposed. Defendant allegedly received reports that Fox was selectively soliciting shareholder votes to have defendant removed from the board. Defendant then sent an e-mail on September 11, 2013 (shareholder email) to certain Holdings shareholders. This shareholder email was sent from defendant's personal email address, to more than 200 shareholders. No individuals were identified and no particular conduct or information was described. Although defendant quotes excerpts from his email in his appellate brief, we set forth the entire body of the shareholder email as follows:

> "Dear Shareholder,
>
> I feel it is my duty and obligation to the shareholders of Ditto Holdings, Inc, [sic] who elected me to the Board of Directors this past July, to make you aware of a series of events which transpired early this week.
>
> Recently I became aware of information and circumstances which raised serious questions and concerns regarding certain company expenditures and related transactions, certain transactions in company shares, and circumstances pertaining to financial governance generally. As an Officer and a Director of the company, I felt an obligation to the company, its shareholders, and employees to bring these concerns to the attention of the Board of Directors.
>
> Monday morning I together with several other officers of the company [sic] submitted a written, formal and detailed request (Board Action Demand Letter dated 9/9/2013) to the Board of Directors and General Counsel requesting a meeting of the Board to

Authorize an independent audit and investigation in order to determine whether or not this information evidenced any impropriety and/or required any remedy.

The first response I received was from one of my fellow board members accompanied by our general counsel asking me to vacate the premises.

The next morning I received notification via email from Joe Fox that I have been relieved of my role as CEO of Ditto Trade, placed on indefinite leave from Ditto Holdings, and no longer permitted access to company facilities. My email accounts and access have all been terminated, and I have received reports from my colleagues of disparaging and untrue explanations being offered as to the circumstances of my departure.

I am not at at [sic] liberty to share documents nor can I provide or discuss any further details, but I do believe that as shareholders you have a right to be aware of these circumstances generally. To be clear, I have not asserted, nor am I asserting through this notification, any allegations of conclusive wrongdoing; the facts and circumstances of which I became aware, with credible documentation, were of a nature serious enough to request an independent examination and presentation of findings.

Yours Truly,

Paul M. Simons"

¶ 19 Two days later, on September 13, defendant's counsel received an email from Holdings' outside corporate counsel regarding appointing a special committee to investigate defendant's allegations. According to defendant, the email indicated that as of September 13, the appointment of a special committee by the board was "still pending." Our review of the record, however, reveals that Holdings' outside counsel in fact forwarded a draft resolution of the board

of Holdings appointing Jon Rosenberg to serve as the special committee and requested that defendant sign and return a copy of the written consent in lieu of a special meeting so that Rosenberg could be appointed and the investigation could proceed. Defendant does not indicate in his statement of facts whether he ever signed and returned the written consent.

¶ 20 According to Fox's affidavit, defendant's shareholder email was "baseless and does not change the fact that he was going to be terminated." During April and May of 2013, defendant and Fox disagreed about commercials for Holdings and the strategy for communicating with the media about the size of the budget of the marketing campaign and had several terse email exchanges on April 14, 2013 and May 31, 2013. According to Fox, defendant also had exhibited open disrespect to Fox during a 90-minute telephone call with the Martha's Vineyard investors on August 26, 2013. Fox "believed it was in the shareholders' best interest to address [defendant's] concern solely at the Board level, without unnecessarily disrupting the employees and business operations. The Company's response to [defendant's] request for a Special Committee investigation was well underway by that time."

¶ 21 Stillman avers in his affidavit that he did not review documents with defendant, and that he had "no prior knowledge of [defendant's] email to all Ditto shareholders" and in fact was "upset" when he saw it. Stillman attested to the numerous disagreements between defendant and Fox. Stillman also stated in his affidavit that Fox had told him that he had been dissatisfied with Mann and Mann's work habits for some time.

¶ 22 On September 15, 2013, defendant was notified by email that he had been removed from the board of directors of Holdings allegedly by written consent of shareholders solicited by Fox and replaced with a member of Fox's choosing who was elected by the same shareholders.

¶ 23 On September 17, 2013, Fox sent an email to defendant informing him that the board of Holdings approved defendant's termination from employment as executive vice president of Holdings for cause at a meeting held on September 16, 2013. The stated reasons were as follows:

> "In addition to your conscious disregard for your obligation to obtain the license required of you under applicable FINRA rules, and in default of your promise to the Company to have done so, you have gained access without proper authorization to a list of the Company's stockholders and misused that information to contact the Company's stockholders to disseminate unverified information regarding the Company and its management. You were deliberately vague in your description of facts to the Company's stockholders, and disclaimed responsibility for spreading any misinformation, all of which you knew, or should have known, would likely create significant discomfort and uncertainty among investors, and would undermine confidence in the Company and management. Your lack of good faith in disseminating a litany of unverified information is evidenced in your deliberate failure to have addressed any questions or requests whatsoever to any member of Company management, answers to which could have provided context or an explanation to allay your purported concerns. Further, you did not report in your unauthorized communications with stockholders that management was in the process of undertaking an independent investigation of your concerns, pursuant to your request of the Company's board of directors first delivered the previous day. You also have communicated in a similar manner with Company employees and others.
>
> In the judgment of the Company's board of directors, you have acted destructively and recklessly in complete disregard for you obligations under your Confidentiality, Intellectual Property and Non-Competition Agreement and your duties to the Company

and its stockholders. Furthermore, these efforts have continued unabated despite the company's notice thereof and reasonable opportunities for you to cure these breaches of your obligations to the Company."

¶ 24 Also on that same day, September 17, 2013, Holdings filed this lawsuit for breach of fiduciary duty and breach of contract, seeking $40 million in damages against defendant.

¶ 25 According to defendant, Mann was asked to retract his involvement in the events of the prior week and support Ditto's position against defendant. Mann refused and was subsequently sent home and fired. Stillman was also removed as president and fired later in 2014.

¶ 26 Meanwhile, Holdings alleges that defendant and Fox had conflicts concerning the management, marketing, and direction of the company, and that defendant knew ahead of the alleged events that he would be terminated. The affidavits of defendant, Fox, and Stillman all acknowledge there were a number of disagreements between defendant and Fox. Holdings' complaint alleged that on September 6, 2013, defendant "learned that a decision had been made to terminate him," and argues on appeal, as he did below before the circuit court, that all of plaintiff's allegations regarding Fox were made "as a tactic to avoid termination."

¶ 27 On November 8, 2013, Holdings filed its first amended complaint adding Jeremy Mann, Holdings' CFO, as a defendant. The first amended complaint contains the same two counts against defendant: (I) breach of fiduciary duty; and (II) breach of contract. Count II for breach of contract alleges that defendant breached both the confidentiality agreement by sending the shareholder e-mail and the employment letter agreement by failing to obtain the necessary FINRA license. Holdings seeks damages of $20 million per count against defendant.

¶ 28 On November 20, 2013, defendant filed a section 2-619(a)(9) motion to dismiss (735 ILCS 5/2-619(a)(9) (West 2012)) the suit as a Strategic Lawsuit Against Public Participation

(SLAPP) under the Citizen Participation Act (735 ILCS 110/1 *et seq*. (West 2012)). Defendant alleges that he undertook the actions he did in an effort to protect the corporation, its employees, and its shareholders from what appeared to be past and ongoing suspicious expenditures and stock transactions perpetrated by Fox. Defendant alleges that this lawsuit was one of many responses by Holdings, at the behest of Fox, intended to remove, punish, and retaliate against him to deter further reporting to or discovery by law enforcement, shareholders, or employees to cover up evidence of Fox's "malfeasance."

¶ 29 On February 10, 2014, the circuit court denied the motion to dismiss Holdings' first amended complaint. It its ruling, the court found that "Simons' act of reporting what he thought to be financial improprieties to the SEC is the type of activity meant to be protected under the Act." The court also found that Holdings had filed the lawsuit with retaliatory intent, finding that "[t]he timing between Defendant's delivery of the Board Demand Letter and when the Plaintiff's [sic] filed suit affirmatively supports a finding that the suit was brought in retaliation for Defendant's protected activities." The court also found that "[p]laintiff presents minimal facts in the Response indicating that Plaintiff is entitled to any damages, let alone $40 million in damages." The court ruled, however, that defendant had "failed to demonstrate that the claims were meritless," and that there existed genuine issues of material fact which precluded dismissal.

¶ 30 On January 16, 2014, defendant filed a lawsuit in the United States District Court for the Northern District of Illinois against Holdings, as well as Trade and Fox.

¶ 31 On February 18, 2014, defendant filed a petition for leave to appeal pursuant to Illinois Supreme Court Rule 306(a)(9) (Ill. S. Ct. R. 306(a)(9) (eff. Feb. 16, 2011)), which we granted. Defendant argues that the court erred in denying his 2-619(a)(9) motion to dismiss this suit as a SLAPP suit.

¶ 32 On October 1, 2014, Holdings filed a motion to strike portions of defendant's reply brief and exhibit appendix, which we took with the case on appeal. We granted defendant's motion for leave to file a corrected copy of his response to Holdings' motion to strike portion of defendant's reply brief and exhibit appendix.

¶ 33 On May 7, 2015, defendant filed a motion for leave to submit supplemental authority in support of its appeal, which we took with the case. Defendant seeks to supplement the record on appeal with a Holdings Securities Exchange Commission (SEC) filing dated April 4, 2014; and (2) interlocutory federal court memorandum opinions and orders in a separate case between the parties in federal court (*Simons v. Ditto Trade, Inc., et al.*, No. 14 C 309), one dated August 8, 2014, granting in part Simons' motion to dismiss the counterclaims against him for breach of fiduciary duty and breach of contract, and the other dated April 28, 2015, dismissing the amended counterclaims by Trade for breach of fiduciary duty and breach of contract on the ground that that they failed to state a claim for relief.

¶ 34 On May 27, 2015, plaintiff filed a motion to supplement the record with: (1) an email message from Jeremy Mann to Paul M. Simons, dated September 8, 2013, obtained through discovery in the federal court litigation (*Simons v. Ditto Trade, et al.*, No. 14 CV 309)); and (2) an excerpt from the transcript of the May 14, 2015 deposition of Jeremy Mann, authenticating the September 8, 2013 email. Plaintiff argued that the email established that defendant was informed of Ditto's decision to fire him as of the date of the email. These materials were not part of the record before the circuit court below when it issued its ruling on plaintiff's anti-SLAPP motion, and they are not publicly available documents. We denied plaintiff's motion to supplement the record on appeal with these materials on July 31, 2015.

¶ 35 ANALYSIS

¶ 36 I. Plaintiff's Motion to Strike Portions of Defendant's Brief and Defendant's Motion for Leave to Submit Supplemental Authority

¶ 37 We first address the motions we took with the appeal: (1) plaintiff's motion to strike portions of defendant's reply brief and exhibit appendix; and (2) defendant's motion for leave to submit supplemental authority in support of its appeal.

¶ 38 Holdings asks us to strike the following materials included in defendant's reply brief and appendix: (1) a Holdings Securities Exchange Commission (SEC) filing dated April 4, 2014; and (2) an interlocutory federal court memorandum opinion and order in the federal case (*Simons v. Ditto Trade, Inc., et al*., No. 14 C 309) dated August 8, 2014, granting in part Simons' motion to dismiss the counterclaims against him for breach of fiduciary duty and breach of contract. See *Simons v. Ditto Trade, Inc*., 63 F. Supp. 3d 874 (N.D. Ill. 2014). In defendant's motion for leave to submit supplemental authority on appeal, defendant argued for submission of the August 8, 2014 federal court decision, as well as a subsequent opinion issued by the federal court on April 28, 2015.

¶ 39 The record on appeal may be supplemented pursuant to Illinois Supreme Court Rule 329 (eff. Jan.1, 2006) only with evidence that was before the trial court. See *Jones v. Ford Motor Co*., 347 Ill. App. 3d 176, 180 (2004). Generally attachments to briefs not included in the record are not properly before the reviewing court and cannot be used to supplement the record. *Zimmer v. Melendez*, 222 Ill. App. 3d 390, 394-95 (1991).

¶ 40 Pursuant to Illinois Rule of Evidence 201(b), however, we may take judicial notice of facts that are "either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Ill. Evid. R. 201(b) (eff. Jan 1, 2011). See also *Metropolitan Life*

Insurance Co. v. American National Bank & Trust Co., 288 Ill.App.3d 760, 764 (1997) (appellate court may take judicial notice of public documents that are included in the records of other courts); *Curtis v. Lofy*, 394 Ill. App. 3d 170, 172 (2009) (recognizing that public documents, including court records, are subject to judicial notice); *In re Marriage of Wojcik*, 362 Ill. App. 3d 144, 169 (2005) (same); *People v. Crawford*, 2013 IL App (1st) 100310, ¶ 118, n. 9 ("We may take judicial notice of information on a public website, even where the information does not appear in the record."). "An appellate court may take judicial notice of readily verifiable facts if doing so 'will "aid in the efficient disposition of a case," ' even if judicial notice was not sought in the trial court." *Aurora Loan Services, LLC v. Kmiecik*, 2013 IL App (1st) 121700, ¶ 37 (quoting *Department of Human Services v. Porter*, 396 Ill. App. 3d 701, 725 (2009), quoting *Muller v. Zollar*, 267 Ill. App. 3d 339, 341-42 (1994)).

¶ 41 "[A] court may take 'judicial notice of documents filed with the SEC for the purpose of showing what statements the documents contain, but not for the proof of the facts stated therein.' " (Citation omitted.) *George v. Kraft Foods Global, Inc*., 674 F. Supp. 2d 1031, 1044 (N.D. Ill. 2009). In its motion to strike, Ditto Holdings concedes that the SEC filing is "a matter of public record."

¶ 42 We may also take judicial notice of orders of the United States District Courts. Specifically, a reviewing court may take judicial notice of a written decision that is part of the record of another court because these decisions are readily verifiable facts that are capable of " 'instant and unquestionable demonstration.' " (Citations omitted.) *Aurora Loan Services, LLC*, 2013 IL App (1st) 121700 at ¶ 37. See also, *e.g.*, *Fryzel v. Miller*, 2014 IL App (1st) 120597, n.1 (2014) (taking judicial notice of orders of the United States District Court for the Northern District of Illinois and the United States Court of Appeals for the Seventh Circuit relating to *pro*

se defendant's unsuccessful efforts to remove his case to federal court). The fact that these rulings had not been issued as of the time of the circuit court's ruling is not a bar to their consideration, as we may take notice of the federal court's rulings at any stage of the proceedings in a case. See Ill. Evid. R. 201(f) (eff. Jan. 1, 2011).

¶ 43 Both materials – the SEC filing and the federal court decisions – are proper materials for judicial notice. We therefore deny Holdings' motion to strike these documents and references to these documents in defendant's reply brief. We take judicial notice of the SEC filing and both of the federal court's rulings in *Simons v. Ditto Trade, Inc., et al*., No. 14 C 309, dated August 8, 2014 and April 28, 2015. We clarify and underscore that we take judicial notice of these documents pursuant to Illinois Rule of Evidence 201 (b) (Ill. R. Evid. 201(b) (eff. Jan. 1, 2011)), not that these documents "supplement" the record.

¶ 44 II. The Circuit Court Did Not Err in Denying Defendant's Motion to Dismiss the Lawsuit as a SLAPP.

¶ 45 Next, we address the merits of defendant's appeal. Defendant argues that the court erred in ruling that defendant had "failed to demonstrate that the claims were meritless," which precluded dismissal as a SLAPP. Holdings argues that the crux of its complaint against defendant was his email to Holdings' shareholders, not his complaint to the SEC, and even if the email to the SEC was a protected act under the Act, the court correctly concluded that defendant did not establish that Holdings' lawsuit was a meritless SLAPP.

¶ 46 Defendant filed a section 2-619(a)(9) motion to dismiss based on the suit being a meritless SLAPP lawsuit. Motions to dismiss filed pursuant to the Illinois Citizen Participation Act must be raised in a section 2-619(a)(9) motion. *Garrido*, 2013 IL App (1st) 120466, ¶ 21 (citing *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 54). An affirmative matter under section 2-

619(a)(9) is "something in the nature of a defense that negates the cause of action completely or refutes crucial conclusions of law or conclusions of material fact contained in or inferred from the complaint." *In re Estate of Schlenker*, 209 Ill. 2d 456, 461 (2004). As this court has previously recognized, it is impossible to determine whether a lawsuit is a SLAPP based solely on the face of the complaint because, when considering a motion to dismiss under section 2-615, we must presume that all well-pled facts in the complaint are true. *Garrido v. Arena*, 2013 IL App (1st) 120466, ¶ 20. "This need to examine facts outside of the complaint is why the supreme court has specified that a motion to dismiss under the Act must be brought under section 2–619(a)(9) rather than section 2–615." *Garrido*, 2013 IL App (1st) 120466, ¶ 20 (citing *Sandholm*, 2012 IL 111443, ¶ 54).

¶ 47 "A motion to dismiss under section 2-619(a) admits the legal sufficiency of the plaintiff's claim but asserts certain defects or defenses outside the pleadings which defeat the claim." *Sandholm*, 2012 IL 111443, ¶ 55. " 'In ruling on a motion to dismiss under section 2-619, the trial court may consider pleadings, depositions, and affidavits.' " *Goral v. Kulys*, 2014 IL App (1st) 133236, ¶ 30 (quoting *Zedella v. Gibson*, 165 Ill. 2d 181, 185 (1995)). In a 2-619(a)(9) motion, "the defendant does not admit the truth of any allegation in plaintiff's complaint that may touch on the affirmative matter raised in the 2-619 motion." *Barber-Colman v. A&K Midwest Insulation Co.*, 236 Ill. App. 3d 1065, 1073 (1992). Where a 2-619 movant supplies affirmative matter, the opposing party cannot rely on bare allegations alone to raise issues of material fact. *Atkinson v. Affronti*, 369 Ill. App. 3d 828, 835 (2006). Neither conclusory allegations nor conclusory affidavits are sufficient to defeat properly submitted facts in a 2-619 motion. *Allegis Realty Investors v. Novak*, 379 Ill. App. 3d 636, 641 (2008). " 'When supporting affidavits have not been challenged or contradicted by counter-affidavits or other appropriate means, the facts

stated therein are deemed admitted.' " *Goral*, 2014 IL App (1st) 133236, ¶ 30 (quoting *Zedella*, 165 Ill. 2d at 185). The question on appeal is "whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law." *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116-17 (1993). The standard of review on appeal of a section 2-619(a)(9) motion to dismiss based on the Act is *de novo*. *Sandholm*, 2012 IL 1114433, ¶ 55.

¶ 48 The Citizen Participation Act is Illinois' version of an anti-SLAPP Act. 734 ILCS 110/1 *et seq*. (West 2010). The term "SLAPP" is an acronym for "Strategic Lawsuits against Public Participation." *Sandholm*, 2012 IL 111443, ¶ 1. "A SLAPP *** is a meritless lawsuit utilized to retaliate against a party for attempting to participate in government by exercising first amendment rights such as the right to free speech or the right to petition." *Chicago Regional Council of Carpenters v. Jursich*, 2013 IL App (1st) 113279, ¶ 15 (citing *Ryan v. Fox Television Stations, Inc*., 2012 IL App (1st) 120005, ¶ 12). As our supreme court explained in *Sandholm*, "[p]laintiffs in SLAPP suits do not intend to win but rather to chill a defendant's speech or protest activity and discourage opposition by others through delay, expense and distraction. [Citation.]" *Sandholm*, 2012 IL 111443, ¶ 34. A SLAPP plaintiff's goal is achieved not by success on the merits but by forcing defendants to expend funds on attorney fees and litigation costs, thus discouraging them from pursuing their protests. *Sandholm*, 2012 IL 111443, ¶¶ 34-35; *Chicago Regional Council of Carpenters v. Jursich*, 2013 IL App (1st) 113279, ¶ 15.

¶ 49 The Act, which became effective in 2007 (Pub. Act 95-506 (eff. Aug.28, 2007)), seeks to extinguish SLAPPs and protect citizen participation in government in three ways:

> "(1) immunizing citizens from civil actions based on acts made in furtherance of a citizen's free speech rights or right to petition government (735 ILCS 110/15 (West

2008)); (2) establishing an expedited legal process to dispose of SLAPPs both before the trial court and appellate court (735 ILCS 110/20 (West 2008)); and (3) mandating a prevailing movant be awarded reasonable attorney fees and costs incurred in connection with the motion (735 ILCS 110/25 (West 2008))." *Wright Development Group, LLC v. Walsh*, 238 Ill. 2d 620, 632 (2010).

Here, defendant sought to dispose of this lawsuit by filing a motion to dismiss before the trial court.

¶ 50 There is a three-step analysis for determining whether a claim is in fact a SLAPP and should be dismissed under the Act:

"(1) the movant's acts were in furtherance of his right to petition, speak, associate, or otherwise participate in government to obtain favorable government action; (2) the nonmovant's claims are solely based on, related to, or in response to the movant's acts in furtherance of his constitutional rights; and (3) the nonmovant fails to produce clear and convincing evidence that the movant's acts were not genuinely aimed at solely procuring favorable government action." *Jursich*, 2013 IL App (1st) 113279, ¶ 17. See also *Garrido v. Arena*, 2013 IL App (1st) 120466, ¶ 16; *Hammons v. Society of Permanent Cosmetic Professionals*, 2012 IL App (1st) 102644, ¶ 18 (citing *Sandholm*, 2012 IL 111443, ¶¶ 53-57).

¶ 51 "The movant bears the burden of proof under the first two prongs of the test, after which the burden shifts to the nonmovant." *Garrido*, 2013 IL App (1st) 120466, ¶ 16 (citing *Ryan v. Fox Television Stations, Inc.*, 2012 IL App (1st) 120005, ¶¶ 21, 30).

A. There Must Be a Protected Act In Furtherance of the Moving Party's Rights of Petition, Speech, Association, or to Otherwise Participate in Government.

¶ 52 First, section 15 of the Act requires the moving party to demonstrate that the plaintiff's complaint is "based on, relates to, or is in response to any act or acts of the moving party in furtherance of the moving party's rights of petition, speech, association, or to otherwise participate in government." 735 ILCS 110/15 (West 2012). "In deciding whether a lawsuit should be dismissed pursuant to the Act, a court must first determine whether the suit is the type of suit the Act was intended to address." *Sandholm*, 2012 IL 111443, ¶ 43. Under section 15 of the Act, a claim is subject to dismissal where it is "based on, relates to, or is in response to any act or acts of the moving party in furtherance of the moving party's rights of petition, speech, association, or to otherwise participate in government." 735 ILCS 110/15 (West 2012). Defendant argues that his communication to the SEC is an act "in furtherance of the constitutional rights to petition, speech, association, and participation in the government," pursuant to section 15 of the Act. 735 ILCS 110/15 (West 2012). Therefore, defendant argues, he established the first prong of the requirements to establish that a lawsuit is a SLAPP. See *Ryan v. Fox Television Stations, Inc*., 2012 Il App. (1st) 12005, ¶ 19.

¶ 53 Regarding defendant's email to the SEC, we agree. Defendant was exercising his constitutional first amendment right to petition the government when he sent his email to the SEC to report alleged fraud occurring at Holdings.

¶ 54 Defendant's email to the shareholders, however, is not a protected act, as it was not an act "in furtherance of the constitutional rights to petition, speech, association, and participation in the government," pursuant to section 15 of the Act. 735 ILCS 110/15 (West 2012). Defendant's email to the shareholders related solely to defendant's own private concern. Thus, the only protected act in this case was Simons' email to the SEC.

¶ 55 Defendant's alleged delay in obtaining the required FINRA license cannot be dismissed as part of a SLAPP in a 2-619 motion because it clearly is not a protected act.

B. The Act By the Non-Movant Must Be Solely Based On,

Related To or In Response to Defendant's Protected Action(s).

¶ 56 "[H]owever, merely because a defendant's activity is protected by the Act does not automatically mean that a plaintiff's claims must be dismissed under the Act." *Garrido*, 2013 IL App (1st) 120466, ¶ 18. The second requirement under the Act is that the movant bears the initial burden of proving that the lawsuit was "*solely based on*, related to or in response to acts in furtherance of the movant's rights of petition, speech and association." (Emphasis added.) *Chicago Regional Council of Carpenters v. Jursich*, 2014 IL App (1st) 113279, ¶ 20 (quoting *Sandholm*, 2012 IL 1114433, ¶ 56). "In order to carry their burden under the second prong, defendants 'must affirmatively demonstrate that the [plaintiff's] claim is a SLAPP within the meaning of the Act, that is, that the claim is meritless and was filed in retaliation against the [defendants'] protected activities in order to deter the [defendants] from further engaging in those activities.' " *Garrido*, 2013 IL App (1st) 120466, ¶ 18 (quoting Ryan, 2012 IL App (1st) 120005, ¶ 21).

¶ 57 In *Sandholm*, our supreme court construed the language of section 15 of the Act to mean *"solely* based on, relating to, or in response to 'any act or acts of the moving party in furtherance of the moving party's rights of petition, speech, association, or to otherwise participate in government.' " (Emphasis in original.) *Sandholm*, 2012 IL 111443, ¶ 45 (quoting 735 ILCS 110/15 (West 2008)). In reaching this conclusion, the supreme court noted Massachusetts precedent under its anti-SLAPP case law where the court "adopted a construction of ' "based on" ' that would exclude motions brought against meritorious claims *with a substantial basis other*

than or in addition to the petitioning activities implicated.' " (Emphasis added.*)* *Sandholm*, 2012 IL 111443, ¶ 47 (quoting *Duracraft Corp. v. Holmes Products Corp.*, 427 Mass. 156, 691 N.E.2d 935, 943 (1998)). Our supreme court held that its "construction of the phrase 'based on, relates to, or is in response to,' in section 15 similarly allows a court to identify meritless SLAPP suits subject to the Act." *Sandholm*, 2012 IL 111443, ¶ 48.

¶ 58 Further, the supreme court held, "construing the Act to apply only to meritless SLAPPs accords with another express goal in section 5: 'to strike a balance between the rights of persons to file lawsuits for injury and the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government.' " *Sandholm*, 2012 IL 111443, ¶ 49 (quoting 735 ILCS 110/5 (West 2008)). In analyzing the Act and common law precedent, the court concluded that "the legislature intended to target only *meritless*, *retaliatory* SLAPPs and did not intend to establish a new absolute or qualified privilege for defamation." (Emphases added.) *Sandholm*, 2012 IL 111443, ¶ 50. "SLAPPs are, by definition, meritless." *Sandholm*, 2012 IL 111443, ¶ 34 (citing John C. Barker, Common–Law and Statutory Solutions to the Problem of SLAPPs, 26 Loy. L.A. L.Rev. 395, 396 (1993)). However, "[i]f a plaintiff's complaint genuinely seeks redress for damages from defamation or other intentional torts and, thus, does not constitute a SLAPP, it is irrelevant whether the defendants' actions were 'genuinely aimed at procuring favorable government action, result, or outcome.' " *Sandholm*, 2012 IL 111443, ¶ 53 (quoting 735 ILCS 110/15 (West 2008)).

¶ 59 There are thus two required showings to prove that a lawsuit is a SLAPP solely based on, related to or in response to a protected Act. The movant must show that the lawsuit is: (1) retaliatory; and (2) meritless. See *Sandholm*, 2012 IL 111443, ¶¶ 43-45 (adopting these two

requirements); *Stein v. Krislov*, 2013 IL App (1st) 113806, ¶ 17 ("To satisfy this burden, defendants must affirmatively demonstrate that plaintiff's suit was retaliatory and meritless.").

¶ 60 As we stated above, the only protected act in this case was Simons' e-mail to the SEC. To prove that Holdings' lawsuit is solely based on, related to, or in response to Simons' act of emailing the SEC, Simons must show that the lawsuit is both: (1) retaliatory; and (2) meritless.

¶ 61 In determining whether a plaintiff had retaliatory intent in filing the lawsuit, two non-exclusive helpful factors to consider are: (1) the proximity in time of the protected activity and the filing of the complaint; and (2) whether the damages requested are a good faith estimate of the injury sustained. *Ryan*, 2012 IL App. (1st) 120005, ¶ 23 (citing *Hytel*, 405 Ill. App. 3d at 126).

¶ 62 This lawsuit was filed on September 17, only eight days after defendant sent the email to the SEC. Further, the prayer for relief of $40 million appears to have no basis and be grossly disproportionate to the acts alleged, as the complaint and amended complaint do not allege any facts from which it could be inferred that Holdings actually suffered economic harm of that magnitude as a proximate result of defendant's email to the SEC. In his affidavit, Fox refers to a "decrease in the Company's current market value versus historical and estimated future value" as the "primary actual harm Ditto Holdings alleges" in this case, but does not specify any dollar amount of this decrease. Defendant has not put forth any evidence that Ditto's market value remained unaffected. As the circuit court also recognized, we note Ditto's prayer for damages appears exorbitant, but defendant has not yet affirmatively disproved that Ditto suffered any damages.

¶ 63 However, here Holdings' lawsuit was also filed close in time to when defendant sent his email to the shareholders, and was closer in time to this act by defendant, only six days after the shareholder email on September 11.

¶ 64 The claims in this case are also largely based on defendant's email to the shareholders. Holdings' breach of fiduciary duty claim in the amended complaint is based on defendant's email to the shareholders, not his email to the SEC. Defendant's confidentiality agreement dated January 2, 2013 required that defendant "keep strictly confidential all Confidential Information" and not "disclose to anyone outside the Company or use any of the Confidential Information for [his] own or anyone else's benefit ***." Ditto's breach of contract claim based on the confidentiality agreement is based entirely on defendant's shareholder email. Defendant's shareholder email referred to "information and circumstances which raised serious questions and concerns regarding certain company expenditures and related transactions, certain transactions in company shares, and circumstances pertaining to financial governance generally." In the shareholder email defendant also referred to the fact that his findings were based on "credible documentation, were of a nature serious enough to request an independent examination and presentation of findings." Defendant's email to shareholders referred to confidential facts gleaned from confidential Ditto corporate documents. Holdings' claim for breach of fiduciary duty thus does not appear to be in retaliation for Simons' email to the SEC.

¶ 65 Holdings' claim for breach of contract based on defendant's alleged breach of the employment agreement was for his failure to obtain a license, and Holdings' claim for breach of contract based on breach of the confidentiality agreement was for sending the shareholder email. Again, this portion of the claim is based primarily on defendant's email to the shareholders, not his email to the SEC. Neither basis for the breach of contract claim – the breach of the letter

employment agreement or the breach of the confidentiality agreement – appears to arise from or be in response to defendant's email to the SEC. Defendant has not provided any affidavits or evidence that any of Holdings' claims were in retaliation to his email to the SEC, rather than in response to his shareholder email, or his delay in obtaining his FINRA license, or even merely his conflicts with Fox.

¶ 66 CONCLUSION

¶ 67 While defendant's act of emailing a complaint about alleged fraud by a corporate officer to the SEC satisfies the first required showing of a protected activity under the Act, plaintiff's email to shareholders is not protected under the Act because it does not implicate the constitutional right to petition, speak, associate or otherwise participate in government to obtain a favorable government action, and his delay in obtaining his FINRA license is clearly not protected by the Act. Under the second required showing under the Act, defendant failed to show that Holdings' lawsuit is based solely on, arising from or related to defendant's protected act of emailing the SEC. Holdings' breach of fiduciary duty claim and part of its breach of contract claim are based on defendant's email to shareholders and not defendant's email to the SEC. We therefore affirm the circuit court's order denying defendant's motion to dismiss the breach of fiduciary duty count of the lawsuit as a SLAPP.

¶ 68 We remand for further proceedings consistent with this opinion.

¶ 69 Affirmed.