IN THE SUPREME COURT OF THE STATE OF NEVADA

STEVE SANSON, AN INDIVIDUAL; AND ROB LAUER, AN INDIVIDUAL,

Appellants,

v.

LAWRA KASSEE BULEN,

Respondent.

Electronically Filed
May 28 2021 01:26 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

SUPREME COURT CASE NO. 82393

Dist. Court Case No. A-18-784807-C

ADDENDUM TO APPELLANTS' OPENING BRIEF ON APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT

VOLUME I

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Breeden & Associates, PLLC, and on the 28th day of May, 2021, a true and correct copy of the foregoing document was e-filed and e-served on all registered parties to the Supreme Court's electronic filing system.

Additionally, a hard copy of the Appendix with all documents on CD-ROM was served on Respondent by placing a copy in the US Mail, postage pre-paid, on the same date to:

Brandon L. Phillips, Esq.
BRANDON L. PHILLIPS ATTORNEY AT LAW PLLC
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Las Vegas, Nevada 89119
Attorneys for Respondent

/s/ Kristy L. Johnson
Attorney or Employee of
Breeden & Associates, PLLC

Banerjee v. Cont'l Inc.

United States District Court for the District of Nevada

September 17, 2018, Decided; September 17, 2018, Filed

Case No.: 2:17-cv-00466-APG-GWF

Reporter
2018 U.S. Dist. LEXIS 158687 *; 2018 WL 4469006

ADRISH BANERJEE and YAN HE, Plaintiffs v. CONTINENTAL INCORPORATED, INC. and LEAPERS, INC., Defendants

Subsequent History: Appeal dismissed by *Sep 18 2019 Adrish Banerjee & Yan He v. Inc., 2019 U.S. App. LEXIS 28315 (9th Cir., Sept. 18, 2019)*

Prior History: *Banerjee v. Cont'l Inc., 2017 U.S. Dist. LEXIS 104863 (D. Nev., July 6, 2017)*

Counsel: **[*1]** For Adrish Banerjee, Yan He, Plaintiffs: Jeffrey I Pitegoff, LEAD ATTORNEY, Morris, Sullivan, Lemkul & Pitegoff, Las Vegas, NV.

For Continental Incorporated, Inc., doing business as Continental Enterprises, Leapers, Inc., Defendants: Daniel R McNutt, LEAD ATTORNEY, Carbajal & McNutt, LLP, Las Vegas, NV; Jonathan G. Polak, LEAD ATTORNEY, PRO HAC VICE, Taft Stettinius & Hollister LLP, Indianapolis, IN; Matthew C Wolf, LEAD ATTORNEY, Carbajal & McNutt, Las Vegas, NV; Tracy Betz, LEAD ATTORNEY, PRO HAC VICE, Taft Stettinius & Hollister, Indianapolis, IN.

Judges: ANDREW P. GORDON, UNITED STATES DISTRICT JUDGE.

Opinion by: ANDREW P. GORDON

Opinion

Order Granting in Part Motion for Attorney's Fees

Defendants Continental Incorporated, Inc. and Leapers, Inc. move for attorney's fees, costs, and statutory damages related to their motion to dismiss under Nevada and Indiana's ***anti-SLAPP*** statutes. The defendants seek $143,760 in attorney's fees,

$2,068.14 in costs, and $***10,000*** per plaintiff in statutory damages. The plaintiffs oppose on a variety of grounds, generally arguing that the fees requested are excessive, block-billed, and involve billing for matters unrelated to the ***anti-SLAPP*** motion filed in this case.

The parties are **[*2]** familiar with the factual background, and I set forth the facts when I addressed the ***anti-SLAPP*** motion. ECF No. 52. I will not repeat the allegations here except where necessary to resolve the motion. I grant the motion in part.

I. ANALYSIS

Both Nevada and Indiana's ***anti-SLAPP*** statutes provide for the mandatory award of reasonable attorney's fees and costs if the court grants an ***anti-SLAPP*** motion to dismiss. Nev. Rev. Stat. § 41.670(1)(a); Ind. Code § 34-7-7-7. Nevada law also provides for a discretionary award of up to $***10,000***. Nev. Rev. Stat. § 41.670(1)(b). Both Nevada and Indiana look to California law for guidance with respect to their ***anti-SLAPP*** statutes. *See Shapiro v. Welt, 389 P.3d 262, 268 (Nev. 2017)*; Brandom v. Coupled Prods., LLC, 975 N.E.2d 382, 386 (Ind. Ct. App. 2012). Under California law, a prevailing defendant may recover fees and costs only for the motion to strike, not the entire litigation. S. B. Beach Properties v. Berti, 39 Cal. 4th 374, 46 Cal. Rptr. 3d 380, 138 P.3d 713, 717 (Cal. 2006). I predict[1] Nevada and Indiana would follow a similar rule. The statutory language refers to awarding fees and costs to a defendant who prevails on the ***anti-SLAPP*** motion. The language does not suggest the state legislatures intended to award a defendant a windfall by granting fees and costs that were incurred defending against claims that are not covered by the statute.

In Nevada,[2] "the method upon which a reasonable fee is determined is subject to the discretion of the **[*3]** court," which "is tempered only by reason and fairness." Shuette v. Beazer Homes Holdings Corp., 121 Nev. 837, 124 P.3d 530, 548-49 (Nev. 2005) (en banc) (quotation omitted). One permissible method of calculation is the lodestar approach, which involves multiplying "the number of hours reasonably spent on the case by a reasonable hourly rate." *See* id. at 549 & n.98 (quotation omitted); *see also* Sobel v. Hertz Corp., 53 F. Supp. 3d 1319, 1325-26 (D. Nev. 2014). In most cases, the lodestar figure is a presumptively reasonable fee award. Camacho v. Bridgeport Fin., Inc., 523 F.3d 973, 978 (9th Cir. 2008).

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[1] "Where the state's highest court has not decided an issue, the task of the federal courts is to predict how the state high court would resolve it." Giles v. Gen. Motors Acceptance Corp., 494 F.3d 865, 872 (9th Cir. 2007) (quotation omitted). "In answering that question, this court looks for 'guidance' to decisions by intermediate appellate courts of the state and by courts in other jurisdictions." *Id.* (quotation omitted).

[2] Indiana follows similar principles for reasonable attorney's fees calculations, so I do not separately cite Indiana law. *See* Shepard v. Schurz Commc'ns, Inc., 847 N.E.2d 219, 226-27 (Ind. Ct. App. 2006); In re Estate of Inlow, 735 N.E.2d 240, 250-51, 255-57 (Ind. Ct. App. 2000); Ind. R. Prof. Conduct 1.5.

In determining the reasonableness of a fee request, I am guided by the factors listed in *Brunzell v. Golden Gate National Bank*:

> (1) the qualities of the advocate: his ability, his training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; [and] (4) the result: whether the attorney was successful and what benefits were derived.

85 Nev. 345, 455 P.2d 31, 33 (Nev. 1969); *see also Haley v. Dist. Ct., 128 Nev. 171, 273 P.3d 855, 860 (Nev. 2012)* ("[I]n determining the amount of fees to award, the court is not limited to one specific approach; its analysis may begin with any method **[*4]** rationally designed to calculate a reasonable amount, so long as the requested amount is reviewed in light of the factors set forth in *Brunzell*" (quotation and citation omitted)). I am also guided by the factors set forth in Local Rule 54-14(b). *See Schneider v. Elko Cty. Sheriff's Dep't, 17 F. Supp. 2d 1162, 1166 (D. Nev. 1998)*. That rule provides that the motion must include the following:

> (1) A reasonable itemization and description of the work performed;
> (2) An itemization of all costs sought to be charged as part of the fee award and not otherwise taxable pursuant to LR 54-1 through 54-13;
> (3) A brief summary of:
> (A) The results obtained and the amount involved;
> (B) The time and labor required;
> (C) The novelty and difficulty of the questions involved;
> (D) The skill requisite to perform the legal service properly;
> (E) The preclusion of other employment by the attorney due to acceptance of the case;
> (F) The customary fee;
> (G) Whether the fee is fixed or contingent;
> (H) The time limitations imposed by the client or the circumstances;
> (I) The experience, reputation, and ability of the attorney(s);
> (J) The undesirability of the case, if any;
> (K) The nature and length of the professional relationship with the client;
> (L) Awards in similar cases; and,
> (4) Any other information the court may request.

LR 54-14(b).

A. Reasonable Rate [*5]

Continental and Leapers seek the following rates for the attorneys and paralegals who worked on the case: $450 for partners Daniel McNutt, Jonathan Polak, Tracy Betz, and Anne

Cowgur; $275 for associates Matthew Wolf, Jeffrey Stemerick, Manny Herceg, Cristina Costa, and Brittan Shaw; and $175 for paralegal Lisa Heller. They support their request with an affidavit regarding the rates in Las Vegas for partners and associates with the level of experience comparable to McNutt and Wolf, and paralegal Heller. ECF No. 60-1 at 3.

Banerjee and He respond that Continental and Leapers have not shown why every partner and associate qualifies for the highest prevailing rates, particularly the associates who have a wide range of experience, including one who is only two years out of law school. Banerjee and He also assert that prevailing paralegal rates range from $75 to $125 per hour.

Continental and Leapers reply that Banerjee and He offered no evidence in support of their challenge to the rates for Polak and Betz, who are both experienced partners. They also argue that Banerjee and He offer no evidence to support a different rate for any of the associates. Continental and Leapers indicate they would **[*6]** not object to the court using a lower rate for the less experienced attorneys, although they do not provide evidence of what Costa and Shaw's normal billing rates are. They also do not object to a lower rate for paralegal Heller.

The reasonable hourly rate is the "rate prevailing in the community for similar work performed by attorneys of comparable skill, experience, and reputation." *Camacho, 523 F.3d at 979* (quotation omitted). The party requesting fees bears the burden of producing evidence, such as affidavits from attorneys, that the requested rates are in line with the prevailing market rate. *Id. at 980*. "The party opposing the fee application has a burden of rebuttal that requires submission of evidence to the district court challenging the accuracy and reasonableness of the . . . facts asserted by the prevailing party in its submitted affidavits." *Id.* (quotation omitted).

This court previously has approved reasonable hourly rates of $450 for partners and $250 for experienced associates in the Nevada market. *See Crusher Designs, LLC v. Atlas Copco Powercrusher GmbH, No. 2:14-cv-01267-GMN-NJK, 2015 U.S. Dist. LEXIS 142394, 2015 WL 6163443, at *2 (D. Nev. Oct. 20, 2015)*. The court has approved rates ranging from $95 to $200 for less experienced associates. *See Home Gambling Network, Inc. v. Piche, No. 2:05-cv-00610-DAE, 2015 U.S. Dist. LEXIS 50264, 2015 WL 1734928, at *11 (D. Nev. Apr. 16, 2015)*. **[*7]** The prevailing rate two to three years ago for a very experienced paralegal was $125, and $100 for less experienced paralegals. *Id.*; *Walker v. N. Las Vegas Police Dep't, No. 2:14-cv-01475-JAD-NJK, 2016 U.S. Dist. LEXIS 83706, 2016 WL 3536172, at *2 (D. Nev. June 27, 2016)* (stating that "[]in this forum, paralegals command rates

between $75 and $125," and approving a $100 rate for a paralegal with 2 years' experience). In addition to the evidence submitted and guidance from other rate determinations in this jurisdiction, I may rely on my own knowledge and experience concerning customary rates in this market. *Ingram v. Oroudjian, 647 F.3d 925, 928 (9th Cir. 2011)*.

I will apply a rate of $450 for all of the partners. Although Banerjee and He contend there is no basis to award the highest prevailing rate, they do not suggest an alternative rate nor point to evidence that would support that rate. Each of the partners is experienced and their requested rates are supported by the affidavits filed with the fee petition. The $250 rate for Wolf, Stemerick, and Herceg is unchallenged and is in line with the prevailing rate for experienced associates in this market, so I will apply that rate. Finally, although Banerjee and He dispute the rate for the less experienced associates, they do not identify what rate **[*8]** they think is appropriate or support that rate with evidence. Given the lack of evidentiary response, and given my own knowledge of customary rates in this market, I will apply the $250 rate to all associates. Additionally, I approve a rate of $150 for paralegal Heller.

B. Reasonable Hours

Continental and Leapers assert they have reasonably spent 275.7 hours of partner time, 74.4 hours of associate time, and 7.3 hours of paralegal time on the ***anti-SLAPP*** motion. They assert they have not billed for an additional 125.2 hours that were spent on tasks such as early case administration, the motion to dismiss for failure to state a claim, the motion to consolidate, and case administration. Banerjee and He raise a variety of objections, including that the time requested includes time spent on tasks other than the ***anti-SLAPP*** motion, that the bills reflect work done in other cases, and that block billing prevents them and the court from determining whether the time spent on tasks was reasonable.

1. Billing for Only ***Anti-SLAPP***

I agree with Banerjee and He that Continental and Leapers may recover only for time spent on tasks related to the ***anti-SLAPP*** motion. Although Continental and Leapers claim **[*9]** they have limited their bills to these tasks, the bills suggest otherwise. For example, paralegal Heller block billed five hours of time on May 23, 2017 for finalizing both motions to dismiss, which were filed on the same date. ECF No. 60-2 at 2. I cannot tell from the billing entry how much time she spent on each motion. Likewise, Heller charges for finalizing a reply to the motion to dismiss on July 3, 2017. *Id.* That more likely relates to the reply to the motion to dismiss, which was filed on July 11, rather than the reply for the ***anti-SLAPP*** motion, which was filed on July 21. *See* ECF Nos. 33, 37. Indeed, Heller has a

later entry on July 21 for finalizing the ***anti-SLAPP*** reply brief. ECF No. 60-2 at 2.

Similarly, several entries from Polak and Betz in May 2017 state that time was spent on both the ***anti-SLAPP*** motion and the motion to dismiss. ECF No. 60-4 at 2-3. The records also show block-billed time in relation to the reply briefs in late June. *Id.* Block-billed entries also include time for motions unrelated to either the ***anti-SLAPP*** motion or the motion to dismiss. For example, in mid-July, time was block-billed for drafting the ***anti-SLAPP*** reply along with reviewing a reply brief **[*10]** filed in support of a motion to consolidate. ECF No. 60-4 at 4.

Finally, the billing records show that time was billed for work done on other cases, including depositions conducted in another case and a separate ***anti-SLAPP*** motion that was to be filed in a Michigan case. *Id.* at 2-3; ECF No. 60-5 (attempting to charge for partner Betz's time in conducting depositions in *Leapers, Inc. v. Shi*); ECF No. 60-6 (charging costs for travel to depositions conducted in *Leapers, Inc. v. Shi*). There are entries from May 24 to June 7, 2017 which refer to ***anti-SLAPP*** but the ***anti-SLAPP*** motion had already been filed in this case. ECF No. 60-4 at 3. In sum, Leapers and Continental have included items in their fee request that cannot be recovered in relation to their ***anti-SLAPP*** motion in this case. As a result, I am denying the requested hours related to these entries as follows:

Go to table1

Go to table2

2. Unreasonable Hours

Banerjee and He also argue that the amount of time spent was unreasonable because Continental and Leapers claim 122.5 hours, including 93.3 hours of partner time, for the initial ***anti-SLAPP*** motion even though two of the partners claim to be experienced in ***anti-SLAPP*** matters. Banerjee and He also argue the 68.9 hours, including 49 hours of partner time, is unreasonable for the ***anti-SLAPP*** reply brief. Finally, Banerjee and He argue the amount of time expended in filing the fee request is excessive. They also suggest that no amount should be awarded for the reply brief in support of the fee request because, had Continental and Leapers properly edited their bills, no response or reply would have been necessary.

The reasonable number of hours means "[t]he number of hours . . . [which] **[*12]** could reasonably have been billed to a private client." *Gonzalez v. City of Maywood, 729 F.3d 1196, 1202 (9th Cir. 2013)* (quotation omitted). The party seeking fees bears the burden of "submitting billing records to establish that the number of hours it has requested are (sic) reasonable." *Id.* Those records are not dispositive of the

issue, however, and hours may be reduced for various reasons, such as "for hours that are excessive, redundant, or otherwise unnecessary." *Id. at 1202-03* (quotation omitted). I may also reduce hours where I find, based on my experience and familiarity with the litigation, that the amount of time spent on various tasks was not reasonable. *Ingram, 647 F.3d at 928*.

a. Time spent from filing of the complaint through filing of the motion

Continental and Leapers request the following hours for this category:

MLF:
0.7 associate
2.5 paralegal

Taft:
61.4 partner
25.65 associate

I grant MLF's hours as reasonable. However, Taft's time spent on the motion is unreasonable. The bulk of time was billed at a partner rate. Because the partners are experienced with ***anti-SLAPP*** motions (thus supporting their request for a higher prevailing rate), it should not have taken 60 hours to prepare the 24-page ***anti-SLAPP*** motion. *See* ECF No. 8. I therefore reduce the partner hours to 20. **[*13]** I will not reduce the associate hours.

b. Time spent from time of opposition through filing of reply

Continental and Leapers request the following hours for this category:

MLF:
0.6 paralegal

Taft:
47 partner
18.5 associate

I grant MLF's hours as reasonable. However, Taft's time spent on the reply is unreasonable. The bulk of time was again billed at a partner rate. Because the partners are experienced with ***anti-SLAPP*** motions (thus supporting their request for a higher prevailing rate), it should not have taken 47 hours to prepare the 12-page ***anti-SLAPP*** reply. *See* ECF No. 37. I therefore reduce the partner hours to 15. I will not reduce the associate hours.

c. Time spent on supplements

Continental and Leapers request the following hours for this category:

MLF:
1 associate
0.6 paralegal

Taft:
51.5 partner

I grant MLF's hours as reasonable. However, Taft's time spent on the supplements is unreasonable. All the requested time was billed at a partner rate. It should not have taken 51.5 hours to prepare the 8-page opposition

to the motion to supplement and the 3-page motion to supplement (with less than one full page of actual text). *See* ECF Nos. 42, 50. I therefore reduce the partner hours to 10.

*d. Time **[*14]** spent on motion for fees*

Continental and Leapers request the following hours for this category:

MLF:
1 associate
1 paralegal

Taft:
53.05 partner
24.5 associate

I grant MLF's hours as reasonable. However, Taft's time spent on the fee motion is unreasonable. The bulk of time was again billed at a partner rate. A fee motion can be handled by associates and paralegals, with review by partners. It should not have taken 53 partner hours to prepare the 17-page fee motion. *See* ECF No. 60. I therefore reduce the partner hours to 10. I will not reduce the associate hours.

e. Time spent on reply brief for fee motion

Continental and Leapers request the following hours for this category:

Taft:
29.8 partner
3.3 associate

Taft's time spent on the fee reply is unreasonable. The bulk of time was again billed at a partner rate. A fee reply can be handled by associates and paralegals, with review by partners. It should not have taken nearly 30 partner hours to prepare the 13-page reply. *See* ECF No. 64. I therefore reduce the partner hours to 10. I will not reduce the associate hours.

C. Lodestar

Taking the reasonable hours from above by the applicable reasonable rates, the lodestar is calculated as follows:

65 hours **[*15]** x partner rate of $450: $29,250
74.65 hours x associate rate of $250: $18,662.50
4.7 hours x paralegal rate of $150: $705
Total: $48,617.50

Neither side has asked that the lodestar be adjusted up or down. Accordingly, I award $48,617.50 in reasonable attorney's fees.

D. Statutory Damages

Continental and Leapers seek $***10,000*** each against Banerjee and He under the statutory damage provision. Banerjee and He respond that their lawsuit was not frivolous and the defendants' conduct in initiating the criminal action against them in Indiana has cost them more than what the defendants claim to have suffered. They

also state that they are of limited means and Banerjee has health issues, which they offer to establish through an *in camera* submission if requested to do so.

The Nevada statute does not outline the parameters of when a court should award statutory damages under § 41.670(1)(b), other than committing it to the court's discretion. Nev. Rev. Stat. § 41.670(1)(b) (stating the court "may" award up to $***10,000***); *see also* Butler v. State, 120 Nev. 879, 102 P.3d 71, 81 (Nev. 2004) (en banc) (interpreting the word "may" in a statute as conferring discretion). However, the remainder of § 41.670 offers clues to when such an award is warranted. A defendant whose ***anti-SLAPP*** motion is successful may bring a separate **[*16]** action against the plaintiff for compensatory damages, punitive damages, and attorney's fees and costs for the separate action. Nev. Rev. Stat. § 41.670(1)(c). That suggests that the statutory damage award in the original action may be the analog to compensatory and punitive damages recoverable in a separate action. Further, when a defendant's ***anti-SLAPP*** motion is unsuccessful, the court may award reasonable fees and costs to the plaintiff if it finds the motion was "frivolous or vexatious." Nev. Rev. Stat. § 41.670(2). It may also award up to $***10,000*** along with "such additional relief as the court deems proper to punish and deter the filing of frivolous or vexatious motions." Nev. Rev. Stat. § 41.670(3). Thus, it appears the $***10,000*** statutory award is aimed at frivolous or vexatious conduct that warrants a type of punitive (and perhaps in the right case, compensatory) award.

I find no basis to award statutory damages. The complaint was not frivolous or vexatious. Indeed, although Leapers and Continental like to paint themselves as the victims, another court found Leapers and Continental's conduct in instigating a similar criminal prosecution against a different individual so exceptional (and not in a good way) as to warrant an award of attorney's fees against them. **[*17]** *See* ECF No. 41-1.[3] Vexatious conduct may be in the eye of the beholder in the context of the parties' overall history of disputes. In any event, the substantial fee award amply serves the deterrence and compensation goals behind the ***anti-SLAPP*** statute's fee shifting provision. I therefore deny the request for statutory damages in any amount.

E. Costs

Continental and Leapers cannot recover costs for the depositions conducted in a separate case. I therefore deduct

[3] That court referred to Leapers' "hyper-aggressive strategy targeting its competitor across multiple forums—including through successfully pursuing public arrest and criminal prosecution in another state—at great expense to itself and Defendants." ECF No. 41-1 at 6. The Sixth Circuit overturned that decision on the merits of the district court's trade dress rulings. *See* Leapers, Inc. v. SMTS, LLC, 879 F.3d 731, 2018 WL 341880, at *7 (6th Cir. 2018). On remand, those parties settled their disputes. *Leapers, Inc. v. SMTS, LLC*, No. 2:14-cv-12290-RHC-DRG, 2018 WL 2007073, at *1 (E.D. Mich. Jan. 26, 2018).

$177.62 for the travel to the Weiss deposition and $953.30 for the Weiss and Gwinn deposition transcripts. ECF No. 60-6. Only copies of those transcripts would be properly charged to this case. The other research and copying charges correlate to dates when the ***anti-SLAPP*** motion was being drafted, so I will award those costs for a total award of $937.22.

II. CONCLUSION

IT IS THEREFORE ORDERED that defendants' motion for attorney's fees **(ECF No. 60) is GRANTED in part**. The clerk of court is instructed to enter judgment in favor of defendant Continental Incorporated, Inc. and Leapers, Inc. and against plaintiffs Adrish Banerjee and Yan He in the amount of $49,554.72 ($48,617.50 in attorney's fees and $937.22 **[*18]** in costs).

DATED this 17th day of September, 2018.

/s/ Andrew P. Gordon

ANDREW P. GORDON

UNITED STATES DISTRICT JUDGE

SB 286 - 2013

Introduced in the Senate on Mar 15, 2013.

By: (**Bolded** name indicates primary sponsorship)
Jones, **Segerblom**, **Kihuen**, Ford

Provides immunity from civil action under certain circumstances. (BDR 3-675)

Fiscal Notes

Effect on Local Government: No.
Effect on State: No.

Most Recent History Action: Chapter 176.
(See full list below)

Past Hearings

Senate Judiciary	Mar 28, 2013	09:00 AM	No Action
Senate Judiciary	Apr 05, 2013	08:00 AM	Amend, and do pass as amended
Assembly Judiciary	May 06, 2013	08:00 AM	No action
Assembly Judiciary	May 14, 2013	08:00 AM	Do pass

Final Passage Votes

Senate Final Passage	(1st Reprint)	Apr 22, 2013	Yea 21,	Nay 0,	Excused 0,	Not Voting 0,	Absent 0
Assembly Final Passage	(1st Reprint)	May 22, 2013	Yea 41,	Nay 0,	Excused 1,	Not Voting 0,	Absent 0

Bill Text As Introduced 1st Reprint As Enrolled

Adopted Amendments Amend. No. 187

Bill History

Mar 15, 2013
- Read first time. Referred to Committee on Judiciary. To printer.

Mar 18, 2013
- From printer. To committee.

Apr 19, 2013
- From committee: Amend, and do pass as amended.
- Placed on Second Reading File.
- Read second time. Amended. (Amend. No. 187.) To printer.

Apr 22, 2013
- From printer. To engrossment. Engrossed. First reprint.
- Read third time. Passed, as amended. Title approved. (Yeas: 21, Nays: None.) To Assembly.

Apr 23, 2013
- In Assembly.
- Read first time. Referred to Committee on Judiciary. To committee.

May 16, 2013
- From committee: Do pass.
- Placed on Second Reading File.
- Read second time.

May 17, 2013
- Taken from General File. Placed on General File for next legislative day.

May 18, 2013
- Taken from General File. Placed on General File for next legislative day.

May 20, 2013
- Taken from General File. Placed on General File for next legislative day.

May 21, 2013
- Taken from General File. Placed on General File for next legislative day.

May 22, 2013
- Read third time. Passed. Title approved. (Yeas: 41, Nays: None, Excused: 1.) To Senate.

May 23, 2013
- In Senate. To enrollment.

May 27, 2013
- Enrolled and delivered to Governor.
- Approved by the Governor.
- Chapter 176.

Effective October 1, 2013.

PREPARED BY
RESEARCH DIVISION
LEGISLATIVE COUNSEL BUREAU
Nonpartisan Staff of the Nevada Legislature

BILL SUMMARY

77th REGULAR SESSION
OF THE NEVADA LEGISLATURE

SENATE BILL 286 (Enrolled)

Relates to the Right to Free Speech

Summary

Senate Bill 286 defines the right to free speech in direct connection with an issue of public concern to be communication made in a place open to the public or in a public forum. A person who engages in such communication is immune from any civil action for claims based upon that communication. If a civil action is sought and the person who engaged in the communication files a special motion to dismiss, the measure adds a process for the court to follow and provides that a court ruling on the motion must be made within seven judicial days after the motion is served upon the plaintiff.

If a court grants a special motion to dismiss, the measure provides that in addition to reasonable costs and attorney's fees, the court may award an amount up to $10,000 to the person against whom the action was brought. If the court denies a special motion to dismiss and finds that the motion was frivolous or vexatious, the measure provides that the prevailing party shall receive reasonable costs and attorney's fees and may be granted an amount up to $10,000 and any such additional relief as the court deems proper to punish and deter the filing of frivolous or vexatious motions. Finally, the measure provides that if the court denies a special motion to dismiss, an interlocutory appeal lies to the Supreme Court.

Effective Date

This measure is effective on October 1, 2013.

SENATE BILL NO. 286–SENATORS JONES, SEGERBLOM, KIHUEN; AND FORD

MARCH 15, 2013

Referred to Committee on Judiciary

SUMMARY—Provides immunity from civil action under certain circumstances. (BDR 3-675)

FISCAL NOTE: Effect on Local Government: No.
Effect on the State: No.

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EXPLANATION – Matter in ***bolded italics*** is new; matter between brackets [~~omitted material~~] is material to be omitted.

AN ACT relating to civil actions; providing immunity from civil action for certain claims based on the right to petition and the right to free speech under certain circumstances; establishing the burden of proof for a special motion to dismiss; providing for the interlocutory appeal from an order denying a special motion to dismiss; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Existing law establishes certain provisions to deter frivolous or vexatious lawsuits (Strategic Lawsuits Against Public Participation, commonly known as "SLAPP lawsuits"). (Chapter 387, Statutes of Nevada 1997, p. 1363; NRS 41.635-41.670) A SLAPP lawsuit is characterized as a meritless suit filed primarily to discourage the named defendant's exercise of First Amendment rights. "The hallmark of a SLAPP lawsuit is that it is filed to obtain a financial advantage over one's adversary by increasing litigation costs until the adversary's case is weakened or abandoned." (*Metabolic Research, Inc. v. Ferrell*, 693 F.3d 795, 796 n.1 (9th Cir. 2012))

The Ninth Circuit Court of Appeals recently held that the provisions of NRS concerning such lawsuits only protect communications made directly to a governmental agency. The Ninth Circuit also held that, as written, these provisions of NRS provide protection from liability but not from trial. That distinction, when coupled with the lack of an express statutory right to an interlocutory appeal, led the court to conclude that these provisions of NRS do not provide for an immediate appeal of an order denying a special motion to dismiss a SLAPP lawsuit. (*Metabolic*, at 802)

Existing law provides that a person who engages in good faith communication in furtherance of the right to petition is immune from civil liability for claims based upon that communication. (NRS 41.650) **Section 2** of this bill expands the scope of

that immunity by providing that a person who exercises the right to free speech in direct connection with an issue of public concern is also immune from any civil action for claims based upon that communication.

Existing law defines certain communications, for purposes of statutory provisions concerning SLAPP lawsuits, as communications made by a person in connection with certain governmental actions, officers, employees or entities. (NRS 41.637) **Section 1** of this bill includes within the meaning of such communications those that are made in direct connection with an issue of public interest in a place open to the public or in a public forum. **Section 3** of this bill establishes the burden of proof for a dismissal by special motion of a SLAPP lawsuit. **Section 3** reduces from 30 days to 7 days the time within which a court must rule on a special motion to dismiss.

Existing law requires, under certain circumstances, an award of reasonable costs and attorney's fees to the person against whom a SLAPP lawsuit was brought if a court grants a special motion to dismiss. (NRS 41.670) **Section 4** of this bill requires, in addition to an award of costs and attorney's fees, an award of $10,000 if a special motion to dismiss is granted. **Section 4** also provides that if a court finds that a special motion to dismiss was frivolous or vexatious, the court shall award the prevailing party reasonable costs and attorney's fees, an award of $10,000 and any such additional relief as the court deems proper to punish and deter the filing of frivolous or vexatious motions.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. NRS 41.637 is hereby amended to read as follows:

41.637 "Good faith communication in furtherance of the right to petition ~~[",]~~ ***or the right to free speech in direct connection with an issue of public concern"*** means any:

1. Communication that is aimed at procuring any governmental or electoral action, result or outcome;

2. Communication of information or a complaint to a Legislator, officer or employee of the Federal Government, this state or a political subdivision of this state, regarding a matter reasonably of concern to the respective governmental entity; ~~[or]~~

3. Written or oral statement made in direct connection with an issue under consideration by a legislative, executive or judicial body, or any other official proceeding authorized by law ~~[,]~~ ***; or***

4. Communication made in direct connection with an issue of public interest in a place open to the public or in a public forum,

➥ which is truthful or is made without knowledge of its falsehood.

Sec. 2. NRS 41.650 is hereby amended to read as follows:

41.650 A person who engages in a good faith communication in furtherance of the right to petition ***or the right to free speech in direct connection with an issue of public concern*** is immune from ***any*** civil ~~[liability]~~ ***action*** for claims based upon the communication.

Sec. 3. NRS 41.660 is hereby amended to read as follows:

41.660 1. If an action is brought against a person based upon a good faith communication in furtherance of the right to petition ~~[:]~~ ***or the right to free speech in direct connection with an issue of public concern:***

(a) The person against whom the action is brought may file a special motion to dismiss; and

(b) The Attorney General or the chief legal officer or attorney of a political subdivision of this State may defend or otherwise support the person against whom the action is brought. If the Attorney General or the chief legal officer or attorney of a political subdivision has a conflict of interest in, or is otherwise disqualified from, defending or otherwise supporting the person, the Attorney General or the chief legal officer or attorney of a political subdivision may employ special counsel to defend or otherwise support the person.

2. A special motion to dismiss must be filed within 60 days after service of the complaint, which period may be extended by the court for good cause shown.

3. If a special motion to dismiss is filed pursuant to subsection 2, the court shall:

(a) ~~[Treat the motion as a motion for summary judgment;]~~ ***Determine whether the moving party has established, by a preponderance of the evidence, that the claim is based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern;***

(b) ***If the court determines that the moving party has met the burden pursuant to paragraph (a), determine whether the plaintiff has established by clear and convincing evidence a probability of prevailing on the claim;***

(c) If the court determines that the plaintiff has established a probability of prevailing on the claim pursuant to paragraph (b), ensure that such determination will not:

(1) Be admitted into evidence at any later stage of the underlying action or subsequent proceeding; or

(2) Affect the burden of proof that is applied in the underlying action or subsequent proceeding;

(d) Consider such evidence, written or oral, by witnesses or affidavits, as may be material in making a determination pursuant to paragraphs (a) and (b);

(e) Stay discovery pending:

(1) A ruling by the court on the motion; and

(2) The disposition of any appeal from the ruling on the motion; and

~~[(c)]~~ *(f)* Rule on the motion within ~~[30]~~ *7* days after the motion is filed.

4. If the court dismisses the action pursuant to a special motion to dismiss filed pursuant to subsection 2, the dismissal operates as an adjudication upon the merits.

Sec. 4. NRS 41.670 is hereby amended to read as follows:

41.670 *1.* If the court grants a special motion to dismiss filed pursuant to NRS 41.660:

~~[1.]~~ *(a)* The court shall award reasonable costs and attorney's fees to the person against whom the action was brought, except that the court shall award reasonable costs and attorney's fees to this State or to the appropriate political subdivision of this State if the Attorney General, the chief legal officer or attorney of the political subdivision or special counsel provided the defense for the person pursuant to NRS 41.660.

~~[2.]~~ *(b) The court shall award, in addition to reasonable costs and attorney's fees awarded pursuant to paragraph (a), the amount of $10,000 to the person against whom the action was brought.*

(c) The person against whom the action is brought may bring a separate action to recover:

~~[(a)]~~ *(1)* Compensatory damages;

~~[(b)]~~ *(2)* Punitive damages; and

~~[(c)]~~ *(3)* Attorney's fees and costs of bringing the separate action.

2. If the court denies a special motion to dismiss filed pursuant to NRS 41.660 and finds that the motion was frivolous or vexatious, the court shall award to the prevailing party:

(a) Reasonable costs and attorney's fees incurred in responding to the motion;

(b) The amount of $10,000, not including reasonable costs and attorney's fees awarded pursuant to paragraph (a); and

(c) Any such additional relief as the court deems proper to punish and deter the filing of frivolous or vexatious motions.

3. If the court denies the special motion to dismiss filed pursuant to NRS 41.660, an interlocutory appeal lies to the Supreme Court.

THE FORTIETH DAY

CARSON CITY (Friday), March 15, 2013

Senate called to order at 11:29 a.m.
President Krolicki presiding.
Roll called.
All present except Senator Denis, who was excused.
Prayer by Pastor Bob Chambers, First Baptist Church of Carson City.

Almighty God, we pause at the beginning of this Session to acknowledge You as the source of wisdom and understanding. We acknowledge that You have created us in Your image and given us gifts and talents with which we can use to serve each other. We thank You again for these who have chosen to live lives of service. I pray that they will feel the reward that comes by serving, especially in the affairs of government.

We think today of Senator Denis and his family and ask for Your grace to be extended to them.

In the days ahead, many important bills will be considered and voted upon here. I pray that You will give wisdom from above, and may each member have the courage to vote according to their own values. I pray that the laws enacted will benefit the people of this great state.

In the Name of Him who gives us wisdom and courage.

AMEN.

Pledge of Allegiance to the Flag.

REMARKS FROM THE FLOOR

PRESIDENT KROLICKI:

We have a special treat this morning. Everyone is smiling because we have the Truckee River Dance Company in the Chamber in honor of St. Patrick's Day. Please help me welcome Christiana Cabrera, who is also a Nevada Youth Legislator, Hannah Myers and Sienna Shane who will perform for us now.

The Senate observed a performance by the Truckee River Dance Company.

The President announced that under previous order, the reading of the Journal is waived for the remainder of the 77th Legislative Session and the President and Secretary are authorized to make any necessary corrections and additions.

REPORTS OF COMMITTEES

Mr. President:

Your Committee on Commerce, Labor and Energy, to which was referred Senate Bill No. 153, has had the same under consideration, and begs leave to report the same back with the recommendation: Do pass.

KELVIN ATKINSON, *Chair*

Mr. President:

Your Committee on Judiciary, to which was referred Senate Bill No. 28, has had the same under consideration, and begs leave to report the same back with the recommendation: Do pass.

TICK SEGERBLOM, *Chair*

the Nevada Ethics in Government Law; and providing other matters properly relating thereto.

Senator Hardy moved that the bill be referred to the Committee on Legislative Operations and Elections.

Motion carried.

By Senators Hardy and Goicoechea:

Senate Bill No. 284—AN ACT relating to law enforcement; requiring a law enforcement agency in certain counties to adopt policies and procedures to govern the investigation of motor vehicle accidents in which peace officers employed by the law enforcement agency are involved; and providing other matters properly relating thereto.

Senator Hardy moved that the bill be referred to the Committee on Government Affairs.

Motion carried.

By Senator Hardy:

Senate Bill No. 285—AN ACT relating to emergency medical services; revising provisions governing the exemption of certain air ambulances and attendants from the provisions governing emergency medical services; limiting the scope of certain provisions governing the regulation of air ambulances; and providing other matters properly relating thereto.

Senator Hardy moved that the bill be referred to the Committee on Health and Human Services.

Motion carried.

By Senators Jones, Segerblom, Kihuen and Ford:

Senate Bill No. 286—AN ACT relating to civil actions; providing immunity from civil action for certain claims based on the right to petition and the right to free speech under certain circumstances; establishing the burden of proof for a special motion to dismiss; providing for the interlocutory appeal from an order denying a special motion to dismiss; and providing other matters properly relating thereto.

Senator Jones moved that the bill be referred to the Committee on Judiciary.

Motion carried.

Assembly Bill No. 23.

Senator Smith moved that the bill be referred to the Committee on Commerce, Labor and Energy.

Motion carried.

Assembly Bill No. 72.

Senator Smith moved that the bill be referred to the Committee on Commerce, Labor and Energy.

Motion carried.

MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-Seventh Session
March 28, 2013

The Senate Committee on Judiciary was called to order by Chair Tick Segerblom at 9:05 a.m. on Thursday, March 28, 2013, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to Room 4412 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Tick Segerblom, Chair
Senator Ruben J. Kihuen, Vice Chair
Senator Aaron D. Ford
Senator Justin C. Jones
Senator Greg Brower
Senator Scott Hammond
Senator Mark Hutchison

GUEST LEGISLATORS PRESENT:

Senator Joseph P. Hardy, Senatorial District No. 12
Senator Michael Roberson, Senatorial District No. 20

STAFF MEMBERS PRESENT:

Mindy Martini, Policy Analyst
Nick Anthony, Counsel
Lynn Hendricks, Committee Secretary

OTHERS PRESENT:

Marc Randazza, Randazza Legal Group
Allen Lichtenstein, American Civil Liberties Union
Wayne Carlson, Executive Director, Nevada Public Agency Insurance Pool
Steve Balkenbush, Nevada Public Agency Insurance Pool
Rebecca Bruch, Nevada Public Agency Insurance Pool

Kenneth A. Carabello, Vice President Operations, Liberty Healthcare Corporation
Jayne Shale, Liberty Healthcare Corporation
Richard Whitley, M.S., Administrator, Division of Mental Health and Developmental Services, Department of Health and Human Services
Elizabeth Neighbors, Ph.D., Director, Mental Health Developmental Services, Lake's Crossing Center
Christy Craig, Office of the Public Defender, Clark County
Robert Compan, Farmers Insurance Group
David Goodheart, American Insurance Association
Jeanette K. Belz, Property Casualty Insurers Association of America
George Ross, Las Vegas Metro Chamber of Commerce
Tray Abney, The Chamber, Reno-Sparks-Northern Nevada
Mark C. Wenzel, President, Nevada Justice Association
Diana Alba, Clerk, Clark County
Nancy Parent, Chief Deputy Clerk, Washoe County
Margaret Flint

Chair Segerblom:
Today we have Senate Bill (S.B.) 286.

SENATE BILL 286: Provides immunity from civil action under certain circumstances. (BDR 3-675)

Senator Justin C. Jones (Senatorial District No. 9):
I am presenting S.B. 286. The First Amendment of the United States Constitution guarantees the right to petition the government for redress and is one of the most important rights the citizens possess. Nevada addresses, upholds and protects this right to petition. Chapter 41 of *Nevada Revised Statutes* (NRS) protects citizens from civil liability for claims based upon protected communication. Protected communication must be made in good faith and be truthful. The provisions of NRS 41 are meant to deter frivolous lawsuits commonly known as Strategic Lawsuits Against Public Participation (SLAPP). These SLAPP lawsuits are primarily used to stop someone from exercising his or her First Amendment rights. When a plaintiff files a SLAPP suit, NRS 41 allows the defendant to file a special motion to dismiss the lawsuit. If the court grants a special motion, it must also award attorney's fees to the defendant. The defendant may also file a new lawsuit for compensatory damages, punitive damages, and attorney's fees and costs. In a recent decision, the Ninth Circuit Court of Appeals held that Nevada's anti-SLAPP provision in NRS 41 only

protects communications made directly to a governmental agency. The Court also held that Nevada provisions only protect defendants from liability and not trial. Finally, the Ninth Circuit Court concluded that in Nevada, there is no right to immediately appeal an order denying a special motion to dismiss a SLAPP suit.

The purpose of S.B. 286 is to address concerns raised by the Ninth Circuit Court of Appeals with regard to NRS 41. Marc Randazza will address how this legislation is good for defendants as well as businesses wanting to move into Nevada. He will also propose additional language to strengthen S.B. 286.

I have submitted my written testimony (Exhibit C).

Marc Randazza (Randazza Legal Group):
As a First Amendment attorney who practices nationwide, I have much exposure to anti-SLAPP legislation. I have also had much exposure to victims of SLAPP litigation. I defend defamation suits and bring SLAPP suits as a plaintiff's attorney. Frivolous lawsuits must be eliminated. Lawsuits often bankrupt the defendant.

For example, I had a case involving a gentleman who wrote an online newspaper for his community. He wrote some articles about how he did not like the plants that the community had planted at the entrance. This article offended the person who ran the homeowners' association. He sued the author of the article for defamation. We did win this case and were granted attorney's fees. The article's author and I thought we were vindicated; however, the plaintiff dissolved his LLC. The $186,000 attorney's fee award is a nice trophy but has meant nothing because the newspaper author's bank account was depleted. The costs, monetarily and psychological, were significant.

Chair Segerblom:
Will this bill make us like California?

Mr. Randazza:
Yes. As it is written, S.B. 286 is a fantastic bill.

I have some proposed amendments which will improve it more. I have imported some provisions from other states with similar laws. For example, Florida has a presuit notice requirement before a defamation claim can be filed. This is not a

new concept; Florida Statute 770.01 has been in place for 50 or 60 years. This would help by adding a degree of alternative dispute resolution and, therefore, lessen a burden on the courts.

I have also suggested utilizing some portions of California Civil Procedure Code 1030, which allows the defendant to seek a bond from the plaintiff if he or she has a reasonable probability of prevailing in the anti-SLAPP motion.

As it stands, this a great bill.

Chair Segerblom:
Does a party have to initiate a lawsuit, and then this anti-SLAPP law comes into play? Or does the party being threatened with the lawsuit go into court with the claim of the threat of the SLAPP lawsuit and stop the suit before it starts?

Mr. Randazza:
This is a special motion to strike or to dismiss, so the plaintiff would still have to initiate the litigation.

Chair Segerblom:
For example, you, Mr. Randazza, are sued. You think this is a frivolous lawsuit because it is enacted to prevent you from expressing your First Amendment rights, and that is when your attorney initiates the anti-SLAPP litigation?

Mr. Randazza:
Correct. The lawyer would quickly initiate the anti-SLAPP law so that the First Amendment mettle of the case could be tested. Otherwise a motion to dismiss, if pleaded correctly, is easily achieved; then comes an expensive and long-standing discovery, and by the time the win comes to the defendant, it is a Pyrrhic victory.

Chair Segerblom:
Absolutely.

Senator Ford:
Why was that complaint about the plants considered a public concern?

Mr. Randazza:
It is a public concern if it is important to one's community. It was a matter of governance for his community.

Senator Ford:
Does caselaw define the issue of public concern for purposes of anti-SLAPP statutes?

Mr. Randazza:
Yes. Nevada's courts would be able to rely upon robust caselaw in California, Washington and Oregon in order to define those terms.

Senator Ford:
Is there a federal counterpart to anti-SLAPP?

Mr. Randazza:
Congressman Steve Cohen from Tennessee has proposed federal anti-SLAPP legislation. It has not passed. There may be issues of separation of powers with this federal legislation. Nevada should consider the benefit to business as well. Tech start-ups, for example, are not as attracted to Nevada as to California, Washington or Oregon because of these states' strong anti-SLAPP laws.

Senator Ford:
What is the definition of public concern relative to the caselaw definition?

Mr. Randazza:
Public concern is broadly defined. Public concern is a matter of interest to multiple people. It does not necessarily have to be a matter of governance. Public concern can even be said to be matters of local importance, local governments, local news. It would not be a narrow definition. Any statute needs to make the term public concern broad. There is caselaw in the handout I have provided to you (Exhibit D). I can also provide the Committee with follow-up research if that is something that concerns you.

Chair Segerblom:
In response to Senator Ford's questions, is this based on other states that have already enacted anti-SLAPP laws?

Mr. Randazza:
Right.

Senator Hutchison:
If the issue of public concern is defined so broadly, it seems that any lawsuit could be defined that way. For example, partner disputes in commercial litigation could be a matter of public concern, right? Then we are now modifying the motion to dismiss standards for almost anything. Will we now have a lot of cases under this definition?

Mr. Randazza:
This bill drafted with the proposed amendments is not so broad that it encompasses every method of conduct in the State. It will just encompass whether a citizen is exercising his or her First Amendment rights.

Senator Hutchison:
In exercising a citizen's First Amendment rights on an issue of public concern, you admit the definition is very broad?

Mr. Randazza:
Correct. If I am speaking out about how an investigation is going, of course that is a matter of public concern. If I am speaking about the lack of a traffic light at an intersection, that is a matter of public concern. If I am speaking out about how a neighbor can mow his or her lawn, then that is not a matter of public concern.

Senator Hutchison:
What about how I treat my partners in my law firm? Is that a matter of public concern? Could it be construed that way?

Mr. Randazza:
You may not have the privilege of making that a private matter. If it is a matter of internal politics at your law firm, that is a matter of private concern. However, if the *Las Vegas Sun* begins to report on a strike at your law firm and your associates are picketing in front of the building, then it has become a matter of public concern.

Senator Hutchison:
Why is there a clear and convincing evidence standard? For example, the moving party initially starts by preponderance of the evidence that in fact the claim is based on free speech-First Amendment rights. Then if the court determines the moving party has met that burden of proof, the court then has to determine by clear and convincing evidence a probability of prevailing on the claim. Now the burden shifts to the plaintiff. The defendant points out the First Amendment right demonstrated by preponderance of the evidence. Is that correct?

Mr. Randazza:
Correct.

Senator Hutchison:
The burden shifts now to the plaintiff who wants to win this lawsuit by clear and convincing evidence to the court in that early stage, which is a fraud standard—a very high standard in the law. What is the rationale for setting the standard that high?

Mr. Randazza:
The way it has worked in California, Washington and Oregon cases, the plaintiff needs to front load his or her case. The plaintiff needs to show this evidence is going beyond the motion-to-dismiss standard. It is a burden-shifting statute. But without that important element, defendants can be quieted and punished for exercising free speech rights simply by winning a case. That burden-shifting is important, necessary and proper.

Chair Segerblom:
Is the lawsuit for defamation? Or is the lawsuit characterized as being something designed to suppress First Amendment rights?

Mr. Randazza:
The lawsuit is anything designed to quash First Amendment rights. This proposed law will be most frequently used in defamation lawsuits. Possibly, this proposed law could also be used in intellectual property lawsuits. For example, the company Righthaven, which operates in southern Nevada, has over 200 cases on the federal docket. Some of the cases involved Righthaven suing bloggers for exercising their right to free speech.

Chair Segerblom:
So this anti-SLAPP law could be used against Righthaven?

Mr. Randazza:
Senate Bill 286 could have been used for those cases, yes.

Senator Jones:
Concerning section 3, subsection 3, paragraph (f) of S.B. 286, I received a request from District Judge Elizabeth Goff Gonzales that the rule be 7 days after notice. I agree with that. We do not want a circumstance in which motions are scheduled in the courts before someone has received notice of the motion.

If Nevada wants to attract tech start-up companies from other states, particularly California and Washington, S.B. 286 models those states that are properly using anti-SLAPP laws.

Mr. Randazza:
Texas has recently added anti-SLAPP legislation similar to those states on the West Coast. We are now competing with Texas as well to attract tech start-up companies for their business.

Senator Hutchison:
Can this law be narrowed to relate more specifically to the tech companies and what Nevada is trying to protect as opposed to the law being so broad concerning the definition of public interest?

Senator Jones:
We can discuss that.

Chair Segerblom:
Is there anyone else who would like to speak in support of S.B. 286?

Allen Lichtenstein (American Civil Liberties Union):
The question was raised of the public interest standard being so broad that that standard might swallow the rule. This issue was present when the ruling on *New York Times Co. v. Sullivan* 376 U.S. 254 (1964) became the standard for proving actual malice for public officials or public figures and matters of public interest. People dealing with these cases assumed that every defamation case would come under that ruling and require the actual malice standard. That has

not been the case. Far more of these cases are between particular individuals within a company or within a small business where the regular negligence standard does exist. I am less sanguine about the field of defamation law in general because it is so often used for the purpose of hurting a defendant with a lawsuit rather than having a real claim in the lawsuit. Senate Bill 286 progresses the lessening of using SLAPP lawsuits to hurt defendants—all of which amounts to an abuse of the court system. The public interest standard can be far-reaching and broad, but it is incorrect to say that that phrase swallows the entire rule.

Chair Segerblom:
Would anyone in opposition like to speak?

Wayne Carlson (Executive Director, Nevada Public Agency Insurance Pool):
With me are two attorneys who have defended anti-SLAPP cases, and they will both comment on S.B. 286.

Steve Balkenbush (Nevada Public Agency Insurance Pool):
Nevada Revised Statutes 41.635 through 41.670 have worked well. The NRS 41 requires that a special motion to dismiss be filed within 60 days. If the motion is granted, the case is over. Pursuant to the legislative history, that is the purpose for which this anti-SLAPP statute was crafted by the Legislature.

Chair Segerblom:
You are speaking from experience of defending a city or county?

Mr. Balkenbush:
Yes. As an attorney, I have defended a number of individuals who are public officials.

The NRS 41 has worked seamlessly. The concern is in regard to these shifting burdens of proof in amending this law. We do not have an objection if the Committee wants to expand NRS 41 to include the new provision to whom it relates. As it says in section 1, subsection 4 of S.B. 286: "Communication made in direct connection with an issue of public interest in a place open to the public or in a public forum."

The one objection we do have is having the $10,000 damage award which would be levied upon the defendant if he or she does not prevail in a motion to

dismiss. These motions to dismiss have been valuable tools in defending these lawsuits. This penalty would conflict with the idea of an anti-SLAPP statute. Anti-SLAPP statutes were created to provide the opportunity to extricate the defendant from the lawsuit at the very beginning of the case. This penalty would be a disincentive for filing these motions to dismiss. The provision in S.B. 286, section 4, subsection 2 should be removed from the bill.

I am concerned with how the courts will struggle with the shifting burdens of proof. Three cases have passed through the Nevada Supreme Court and the Justices have had no problems with any provisions in the existing statute. The Supreme Court had no problem interpreting the provisions and breadth of the statute. The Court has found no irregularities in the statute. If the statute works, keep it the way it is.

Senator Ford:
There is a clear and convincing standard in S.B. 286 that the defendant must meet to dismiss a SLAPP suit, is that correct?

Mr. Balkenbush:
Yes, that is correct. That is a confusing provision. Under existing statute, the defendant files a motion to dismiss and provides the proof to the court. Then the plaintiff provides proof to the court as a motion for summary judgment standard. Then the court decides the case.

The proposed change in the law is that the defendant files the motion to dismiss, which is treated as a motion for summary judgment. The court would determine whether there was a good faith communication, a matter of public concern. If so, as the law stands now, the defendant has won. Senate Bill 286 goes beyond that. The burden shifts to the plaintiff to prove that his or her case would be sustained on clear and convincing evidence standard. This unduly complicates NRS 41. Under S.B. 286, the plaintiff would have a higher burden of proof than he or she currently has. This whole provision becomes murky.

Senator Ford:
That is my question. If the plaintiff actually prevails upon the clear and convincing standard, which is a high standard, why should he or she not receive a $10,000 award if he or she won?

Mr. Balkenbush:
He or she would not get a reward just by proving through clear and convincing evidence. The motion to dismiss would be defeated. In order to get the $10,000 award, he or she would have to win the case. The provision of the clear and convincing evidence applies to the motion to dismiss at the beginning of the case. The defendant must prove his or her motion to dismiss; the plaintiff, in order to defeat that, must prove his or her case by clear and convincing evidence. That does not end the case, though. That is just the motion to dismiss. That is all this provision applies to: a special motion to dismiss. If the plaintiff proves by clear and convincing evidence a probability of prevailing on the claim, then the case will continue on to discovery. It may go to a trial. All that the clear and convincing evidence standard does is relate to the special motion to dismiss.

Senator Ford:
So if the plaintiff defeats the motion to dismiss on the clear and convincing evidence standard and ultimately wins the case, he or she can get $10,000?

Mr. Balkenbush:
That is correct.

Senator Ford:
But if the defendant wins on a special motion to dismiss, he or she gets $10,000?

Mr. Balkenbush:
That is correct. The defendant gets $10,000 if he or she wins on the motion to dismiss. There is a provision for attorney's fees and costs for the plaintiff, if he or she prevails.

Senator Ford:
But my question remains the same. If a defendant wins and proves that the plaintiff has brought a SLAPP lawsuit against the defendant, why should the defendant not get $10,000?

Mr. Balkenbush:
The defendant should get $10,000. We do not object to the defendant getting paid $10,000. This is what we object to: the defendant files the motion to dismiss and that motion is defeated; although the defendant does not lose the

case, yet the defendant is still subjected to a $10,000 award to the court because he or she lost the motion to dismiss.

That, however, is not the existing law. The concern is that S.B. 286 would be a disincentive for defendants to extricate themselves early in the case by filing these motions to dismiss.

Senator Brower:
This needs to be clear: are the lawsuits SLAPP suits and the Nevada statutes are anti-SLAPP statutes, right?

Mr. Balkenbush:
That is correct.

Senator Brower:
Can you give an example of a typical SLAPP lawsuit from your own experience?

Mr. Balkenbush:
I can. One case that I handled involved a former employee of a district attorney's office who did certain things involving drugs and alcohol. This employee was also working at a school as an intern to be a counselor. The district attorney learned of those problems and made those problems known to the school district. The district attorney was then sued by the former employee for defamation. I raised the concern of the anti-SLAPP statutes to the court. The district attorney had learned of this employee's problems and believed that these problems were issues of public concern, mainly, that a person with problems concerning drugs and alcohol was in a school studying to be a counselor. Those problems were raised as part of the defense to the defamation lawsuit.

Senator Brower:
The district attorney's response to the defamation lawsuit was to describe it as a SLAPP lawsuit?

Mr. Balkenbush:
That is correct.

Senator Brower:
And you utilized the anti-SLAPP statutes as the district attorney's defense?

Mr. Balkenbush:
That is correct. The district attorney said it was a matter of public concern. He believed these problems that the employee had were truthful or, at least, had no knowledge of their falsity. The judge agreed and granted the motion. The case went to the Nevada Supreme Court and the Justices affirmed the ruling.

Senator Brower:
Your view is that the current anti-SLAPP statute worked properly in this case?

Mr. Balkenbush:
That is correct. And the Supreme Court Justices have had no trouble with the current anti-SLAPP statute. Nor have they had any trouble applying NRS 41 in any of the cases in which I have used it. I have had two cases go to the Nevada Supreme Court, and the Court has affirmed both of the decisions. The Court has not had any trouble interpreting any of the provisions in NRS 41. Some of the provisions proposed in S.B. 286 are cumbersome.

Senator Brower:
Might the outcome of the case be different if it is an individual not working for a county who could hire a lawyer experienced with these anti-SLAPP litigations? Would the current statute be just as logical and workable as in the case you just described?

Mr. Balkenbush:
The statute would be just as logical. What the statute does not do now is cover these private individuals. That is an expansion of the language proposed in S.B. 286. We are not opposed to keeping the language covering private individuals. The rest of S.B. 286 seems unduly cumbersome by penalizing people who file motions to dismiss, if they do not prevail on the motions. It prolongs the amount of time required to litigate these cases. Legislative history says cases should not be unduly lengthy. The existing anti-SLAPP statute works well as a practical matter.

Rebecca Bruch (Nevada Public Agency Insurance Pool):
I was one of the attorneys on the *John v. Douglas Cnty. Sch. Dist.,* 125 Nev. 746, 219 P.3d 1276 (2009) case that went before the Supreme Court, and the statute was upheld.

Mr. John filed union grievances along with a lawsuit. Every time someone at various stages of the grievance level would offer testimony, Mr. John would amend the lawsuit and add new parties. He did this trying to intimidate those who would offer testimony.

I had come across the anti-SLAPP statute and knew that the *John v. Douglas County School District* was the perfect case. Mr. John was clearly trying to intimidate people from participating in the serious claims made against him. District Judge David R. Gamble ruled in our favor. It then went to the Nevada Supreme Court on the issue of whether Nevada's anti-SLAPP statutes could apply to federal claims in State court. The Court ruled and upheld the Ninth Judicial District Court's ruling.

There were attorney's fees awarded because of the existing NRS 41.670.

I join in Mr. Balkenbush's comments on the chilling effect of the $10,000 award. I often file the special motion to dismiss on behalf of large entities that can absorb the cost if they must. But a serious conversation takes place warning the clients that if the motion to dismiss is lost, it could cost them $10,000. That is still a lot of money. The chilling effect comes because of a provision in NRS 41.670 subsection 1 that: "the court shall award reasonable costs and attorney's fees."

The 7-day provision in S.B. 286 is also problematic for judges and their calendars. The idea is to speed along or, possibly, stop litigation from the beginning. That places an undue burden on the courts. In our case, the judges know they must rule within 30 days, and they request an excusal from that time limit.

Chair Segerblom:
So they work around that?

Ms. Bruch:
Yes.

Chair Segerblom:
Would you like to point out anything else?

Ms. Bruch:
There was a question regarding whether a federal caselaw equivalent exists. It is called the *Noerr-Pennington* doctrine. I refer to that on federal claims and when I am in federal court.

Senator Ford:
I am still stuck on the $10,000 award. Looking at S.B. 286, section 4, subsection 2, "If the court denies a special motion to dismiss filed pursuant to NRS 41.660 and finds that the motion was frivolous or vexatious"; that last phrase "finds that the motion was frivolous or vexations" makes a big difference. That makes the defendant more contemplative before they file a motion to dismiss. Those are hard standards to meet. The court seldom calls a motion frivolous or vexatious. The $10,000 award does not seem to be an automatic award just because the defendant does not win the motion to dismiss. The question now is why should the defendant not be penalized $10,000 for filing a motion to dismiss that was frivolous or vexatious?

Mr. Balkenbush:
You are correct. The frivolous and vexatious standard does exist in the proposed bill. But that standard exists regardless of S.B. 286. Under Rule 11 of the *Federal Rules of Civil Procedure*, a defendant cannot file frivolous and vexatious motions. There does not seem to be any other statute in Nevada law with a $10,000 penalty if the defendant loses the motion to dismiss. I agree that the frivolous and vexatious standard is a difficult standard. The $10,000 award is not a part of Nevada statute and can cause the defendant to pause moving forward with filing the special motion to dismiss.

Chair Segerblom:
What if S.B. 286 was amended to say "up to $10,000"?

Mr. Balkenbush:
I do not believe that $10,000 penalty should be levied on the defendant if he or she loses the motion to dismiss.

Chair Segerblom:
But the $10,000 award is only if the motion to dismiss is frivolous.

Mr. Balkenbush:
I understand.

Senator Brower:
I hear what you are saying, Mr. Balkenbush. Nowhere in the NRS or the *Nevada Rules of Civil Procedure* is a dollar amount penalty levied toward something someone does in litigation. This would be very unusual. Not to say that it should not be considered. There is still much work to be done on S.B. 286.

Senator Jones:
I am willing to work with Mr. Balkenbush and Ms. Bruch to resolve the concerns raised.

I do want to emphasize Senator Ford's point: the standard for award of attorney's fees on the plaintiff's side is clear and convincing evidence. On the defendant's side the standard is frivolous and vexatious. Both are very high standards.

With regard to Mr. Balkenbush's statement that NRS 41 has worked well in Nevada, I do not contest that. However, in light of the Ninth Circuit Court's decision last year, there is cause for concern. I echo Mr. Randazza's comments. If Nevada wants to compete for businesses which want to move in, we must compete with those states which have sufficient protection against SLAPP lawsuits: California, Washington and Texas.

Chair Segerblom:
Do these other states have the $10,000 award?

Senator Jones:
Senate Bill 286 came from the Washington statute. I will have to check with Mr. Randazza on that amount.

Mr. Balkenbush:
The $10,000 provision only exists in Washington. California, Oregon and Texas do not have this provision.

Chair Segerblom:
We will close the hearing on S.B. 286. Senator Hardy is presenting S.B. 323.

SENATE BILL 323: Revises provisions relating to incompetent defendants. (BDR 14-1063)

EXHIBITS				
Bill	**Exhibit**		**Witness / Agency**	**Description**
	A	1		Agenda
	B	6		Attendance Roster
S.B. 286	C	3	Senator Justin C. Jones	Opening Remarks for Senate Bill 286
S.B. 286	D	72	Marc Randazza	Report to Senate on Proposed Changes to Nevada's Anti-SLAPP Laws
S.B. 323	E	1	Senator Joseph P. Hardy	Senate Bill 323 Suggested Amendment
S.B. 323	F	2	Ken Carabello	Jail-Based Restoration of Competency Program Fact Sheet
S.B. 323	G	2	Elizabeth Neighbors	Testimony in support
S.B. 296	H	1	Senator Michael Roberson	Government and Industry Affairs: Nevada
S.B. 296	I	1	Assemblyman Pat Hickey	Testimony in support
S.B. 296	J	2	Robert Compan	Testimony in support
S.B. 296	K	1	Property Casualty Insurers Association of America	Letter in support from Mark Sektnan
S.B. 296	L	4	National Association of Mutual Insurance Companies	Written testimony from Christian J. Rataj
S.B. 419	M	1	Diana Alba	Letter in support
S.B. 419	N	2	Amy Harvey	Letter in support

OPENING REMARKS FOR SENATE BILL 286

SENATOR JUSTIN C. JONES

Thursday, March 28, 2013

Senate Committee on Judiciary

- Good morning Mr. Chair and members of the Committee. I am Justin Jones representing Senate District No. 9 from Clark County.

- I am here today to present Senate Bill 286 for your consideration.

- As guaranteed by the First Amendment, the right to petition our government for redress is arguably one of the most important rights we have.

- Nevada recognizes this right and protects people who exercise their First Amendment right to petition.

- Specifically, Chapter 41 of *Nevada Revised Statutes* protects people from civil liability for claims based on protected communication.

- Generally speaking, protected communication must be made in good faith and be truthful, or at least made without knowing it is false.

- The provisions of Chapter 41 are meant to deter frivolous lawsuits, commonly known as a Strategic Lawsuit Against Public Participation, or SLAPP.

- A SLAPP is a meritless lawsuit that a plaintiff initiates primarily to stop someone from exercising their First Amendment rights.

EXHIBIT C Senate Committee on Judiciary
Date: 3-28-2013 Page: 1 of 3

- When a plaintiff files a SLAPP, Chapter 41 allows the defendant to file a special motion to dismiss the lawsuit.

- If the court grants a special motion, it must also award attorney's fee to the defendant.

- The defendant may also file a new lawsuit for:
  - Compensatory damages;
  - Punitive damages; and
  - Attorney's fees and costs for bringing the new lawsuit.

- In a recent decision, the 9th Circuit Court of Appeals held that the anti-SLAPP provisions of Chapter 41 only protect communications made directly to a governmental agency.

- The Court also held that the Nevada provisions only protect defendants from liability, not from trial.

- Finally, the 9th Circuit Court concluded that in Nevada there is no right to immediately appeal an order denying a special motion to dismiss a SLAPP.

- I am introducing Senate Bill 268 to resolve those limitations.

- Beginning with Section 1, the bill expands the type of protected communication to include the right to free speech if it is about an issue of public concern.

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- Section 1 also protects communications about an issue of public interest made in public places.

- Next, Section 2 expands the anti-SLAPP provisions to cover any civil action, not just liability.

- Section 3 specifies standards of proof for motions to dismiss a SLAPP, and requires the court to rule on those motions within seven days.

- If a court grants a motion to dismiss a SLAPP, Section 4 requires the court to grant the defendant, in addition to attorney's fees and costs, $10,000.

- If a court denies a motion to dismiss and finds that it was frivolous, the bill requires the court to grant the plaintiff:
  - Reasonable costs and attorney's fees for responding to the motion;
  - $10,000; and
  - Any additional relief the court thinks will punish and deter the filing of frivolous or vexatious motions.

- Finally, S.B 286 creates an immediate right to appeal if a special motion to dismiss is denied.

- Chair Segerbloom and Committee Members, I thank you for your time and I'd be happy to answer any questions.

,W133584

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March 28, 2013

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Re: Report to Senate on Proposed Changes to Nevada's Anti-SLAPP Laws

Dear Esteemed Senators:

Nevada stands among the states with largely ineffective Anti-SLAPP laws. NRS 41.635-670 (the "Anti-SLAPP Laws"). It stands in the shadows of California, Oregon, Washington, and Texas, which have passed far more effective legislation that acts not only to protect freedom of expression in those states, but which also act as an attraction to the establishment of business in those states.

Nevada's Anti-SLAPP Laws protects **only** "good faith communication in furtherance of the right to petition." NRS 41.650. This **limits** its scope to speech made to a government agency, or directly in connection with a matter under consideration by one of the government's arms. NRS 41.637. This is not enough.

With the dawn of the Internet's user-generated content era, individuals have found themselves in the crosshairs of SLAPPs brought over Constitutionally protected speech. Reviews on sites like Yelp! and Avvo beget crushingly expensive litigation by subjects of factual but unflattering reviews. These lawsuits primarily serve to harass and intimidate small defendants and the websites themselves while pummeling them with significant legal fees. Caught in the crossfire are Nevada's already backlogged and overburdened Courts, which must referee these one-sided fights.

Similarly, businesses have been faced with lawsuits over their own First Amendment protected activity, ranging from advertising and marketing practices to the management of their employees. This drives down the profits of these businesses and interferes with their ability to grow and hire new employees. Once again, Nevada's courts suffer the costs of these suits as well.

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Broadened Anti-SLAPP Laws serve numerous public services. First, it protects the public – individuals and businesses alike – from going broke fighting meritless claims. Meritorious claims will still proceed; new Anti-SLAPP Laws will not mean the end of defamation law in Nevada. Anti-SLAPP statutes have had no impact upon meritorious defamation cases in California, Oregon, Texas, or Washington. It will, however, mean that marginal cases are kept out of the courts – and if they are brought, the costs will fall on the plaintiff who filed suit.

Second, the proposed changes to Nevada's Anti-SLAPP Laws create new safeguards to ensure the laws have effect. At any time, a defendant may require a plaintiff to post a bond for the estimated value of his or her attorneys' fees, provided the defendant can show a reasonable possibility of succeeding on an Anti-SLAPP motion. If the plaintiff cannot post a bond, the case is dismissed. This ensures that defendants who win Anti-SLAPP motions do not merely obtain pyrrhic victories.

Expanding the scope of Nevada's Anti-SLAPP Laws to apply to *all* speech about matters of public concern – not merely speech seeking government action – will benefit individuals and Nevada's courts. Abusive uses of the judicial process will be resolved privately with these motions, rather than requiring the courts to exercise close control over every single case before it. Businesses will be able to truncate or at least significantly limit questionable litigation, making more funds available for expansion and hiring. While there are numerous factors affecting the technology sector's growth over the last 20 years, it is not an accident that social media companies such as Yelp, Avvo, Twitter, Zynga, Facebook, and others are based in California and Washington – states with robust Anti-SLAPP statutes that protect a wide range of speech.

My law firm represents a large number of journalists and tech startups. Despite the fact that we are headquartered in Las Vegas, we reluctantly advise clients to organize or incorporate in California, Oregon, and Washington so that they can benefit from those states' Anti-SLAPP statutes. Most significantly, individuals will be spared from personal bankruptcy and financial destruction arising from all-consuming litigation against a more powerful party.

The trend of litigation against Constitutionally protected speech within Nevada cannot be denied. Military veterans have been sued for expressing opposition to a Las Vegas family law attorney's position on the disposition of military benefits upon divorce. Anonymous commenters have been brought into court, and sought to be deprived of their Constitutional right to anonymity, for comments left on *Las Vegas Review-Journal* online articles. Nevada's own Righthaven LLC filed more than 200 lawsuits in Nevada's courts – and whenever attorneys stepped forward to litigate the issue of "Fair Use," or whether the interests of the First Amendment trumped Righthaven's dubious copyright claims, Righthaven lost *every single time*.[1]

Broadening Nevada's Anti-SLAPP Laws serves multiple public interests. While an increasing number of state and federal lawsuits feature litigants who are *pro se*, or not represented by an attorney, new Anti-SLAPP Laws will encourage access to justice. Because of the proposed fee-

[1] Because the proposed amendments to Nevada's Anti-SLAPP Laws are substantive, rather than procedural, they will apply in the United States District Court for the District of Nevada – where Righthaven filed its actions – as well as Nevada's state courts.

shifting and bond provisions, attorneys will compete to take these cases and vindicate their clients' free speech rights, rather than accept it – and quarantine it – in their pro bono allotment for the year. Most importantly, though, it will memorialize to Nevadans and the nation this State's commitment to truly open debate, free expression, and the sacrosanct principles enshrined in the First Amendment of the United States Constitution and Article I of the Nevada State Constitution.

Best regards,

Marc J. Randazza

SUMMARY – Provides immunity from civil action under certain circumstances. (BDR 3-675)

FISCAL NOTE: Effect on Local Government: No.

Effect on the State: No.

AN ACT relating to civil actions; providing immunity from civil action for certain claims based on the right to petition and the right to free speech under certain circumstances; establishing the burden of proof for a special motion to dismiss; providing for the interlocutory appeal from an order denying a special motion to dismiss; and providing other matters properly relating thereto.

Legislative Counsel's Digest:

Existing law establishes certain provisions to deter frivolous or vexatious lawsuits (Strategic Lawsuits Against Public Participation, commonly known as "SLAPP lawsuits"). (Chapter 387, Statutes of Nevada 1997, p. 1363; NRS 41.635-41.670) A SLAPP lawsuit is characterized as s meritless suit filed primarily to discourage the named defendant's exercise of First Amendment rights. "The hallmark of a SLAPP lawsuit is that it is filed to obtain a financial advantage over one's adversary by increasing litigation costs until the adversary's case is weakened or abandoned." (*Metabolic Research, Inc. v. Ferrell*, 693 F.3d 795, 796 n.1 (9th Cir. 2012))

The Ninth Circuit Court of Appeals recently held that the provisions of NRS concerning such lawsuits only protect communications made directly to a governmental agency. The Ninth

Circuit also held that, as written, these provisions of NRS provide protection from liability but not from trial. That distinction, when coupled with the lack of an express statutory right to an interlocutory appeal, led the court to conclude that these provisions of NRS do not provide for an immediate appeal of an order denying a special motion to dismiss a SLAPP lawsuit. (*Metabolic*, at 802)

Existing law provides that a person who engages in good faith communication in furtherance of the right to petition is immune from civil liability for claims based upon that communication (NRS 41.650), defines certain communications, for purposes of statutory provisions concerning SLAPP lawsuits, as communications made by a person in connection with certain governmental actions, officers, employees or entities (NRS 41.637), and requires, under certain circumstances, an award of reasonable costs and attorney's fees to the person against whom a SLAPP lawsuit was brought if a court grants a special motion to dismiss (NRS 41.670).

Section 1 of this bill fixes the language of NRS 41.635 to accord with the changes proposed to NRS 41.637 to 41.670, inclusive, and incorporates the definition of "political subdivision" as it currently exists in NRS 41.640

Section 2 of this bill encapsulates all of these provisions into one all-encompassing Anti-SLAPP statute. Such a measure will bring Nevada's Anti-SLAPP statute in line with other states and ensure that it serves its intended purpose of providing the public, the judiciary, and the bar with a mechanism for swiftly disposing of and discouraging frivolous suits brought to harass and intimidate defendants for engaging in Constitutionally protected speech. Because of the importance of all the provisions within an Anti-SLAPP statute and how they interact, other states have endeavored to place them all together in one statute, so that important pieces would not go unobserved by judges or litigants. *See* Cal. Civil Procedure Code § 425.16; Rev. Code Wash. §

4.24.525; *see also* Texas Civil Procedure and Remedies Code Ch. 27; D.C. Code Title 16, Ch. 55. By consolidating every operative portion of Nevada's Anti-SLAPP statute within one statute, both the public's access to justice is maximized while the litigation of parties with more resources is maximized, ensuring outcomes that are protective of free speech, economically efficient, and limited in the use of judicial resources.

Nevada's existing Anti-SLAPP statute, Nev. Rev. Ann. § 41.660, provides inadequate remedies and rights to those seeking to exercise their constitutional rights and freedom of speech and petition for the redress of grievances when compared to the Anti-SLAPP statutes in several other states across the country. Adopting a stronger Anti-SLAPP statute, similar to those in Washington and California will infuse Nevada's economy by attracting business to the state and will strengthen the rights of those wishing to express their First Amendment Rights or on other matters of public concern. Furthermore, improving Nevada's Anti-SLAPP statute will combat litigation filed in an effort to chill the valid exercise of First Amendment rights. The following additions to Nevada's Anti-SLAPP statute would provide much-needed modifications to broaden the protections of the current law.

1. Pre-Suit notice prior to the filing of defamation claims (Fla. Stat. 770.01)

Fla. Stat. 770.01 provides that a plaintiff shall provide five days' pre-suit notice before filing an action for defamation. Instituting a similar pre-suit notice requirement in Nevada for all defendants in defamation claims would serve to curtail the number of unnecessary law suits filed, which contribute to a waste of financial and temporal resources within the court. If the statute requires plaintiffs to provide defendants with pre-suit notice, a defendant could mitigate damages suffered by the plaintiff by issuing a clarification or correction, or by simply removing the allegedly defamatory content from public display. Not only would this potentially reduce the

number of lawsuits filed, but it would also begin a dialogue between the two parties, which could lead to a more amicable resolution than litigating the matter in courts.

Furthermore, pre-suit notice encourages less savvy defendants to seek legal counsel to discuss the possible ramifications of the filing of a complaint. The interests of both plaintiff and defendant are best served when all parties have legal representation. When both sides have retained counsel, both the plaintiff and defendant will be able to make more informed legal decisions.

2. Request from defendant for plaintiff to post bond in event of filing of special Anti-SLAPP motion.

California Civil Procedure Code Section 1030 provides defendants in an action in which the plaintiff resides out of state or is a foreign corporation, with the ability to request an order from the court requiring that the plaintiff post a bond to secure an award of attorney's fees and cost that may be awarded in the action or special proceeding. A defendant must include an affidavit in support of the grounds for the motion, the nature and amount of the attorney's fees, and the costs that he expects he will incur.

Including this language in an anti-SLAPP statute would prevent SLAPP plaintiffs from driving up the costs of litigation and then refusing to pay an award or bankrupting themselves to render the award meaningless. This deters a plaintiff from filing a frivolous suit. Furthermore, if a defendant were assured that the plaintiff has the necessary funds to cover an anti-SLAPP special motion to dismiss if it is successful, defendants would be more likely to challenge unfair complaints rather than settle unnecessarily, effectively chilling their free speech rights.

However, such an addition could prove to be cost prohibitive to the plaintiff, which might prevent plaintiff from receiving redress for his grievances. The California courts have addressed

this issue with regard to their statute. In *Bank of America Nat. Trust & Sav. Ass'n v. Superior Court of Fresno County*, the court held that in forma pauperis motions were applicable to Cal. Code Civ. P. § 1030 requests. 255 Cal. App. 2d 575, 578, 63 Cal. Rptr. 366, 368 (App. 5 Dist. 1965); *see also Alshafie v. Lallande*, 89 Cal. Rptr. 3d 788, 171 Cal. App. 4th 421 (App. 2 Dist 2009); *Baltayan v. Estate of Getemyan*, 110 Cal. Rptr. 2d 72, 90 Cal. App. 4th 1427 (App. 2 Dist. 2001). Indigent plaintiffs are not the only ones who could receive relief; California courts also have reduced the amount of the security bond in situations where the plaintiff is of middle-income as well. *Alshafie*, 89 Cal. Rptr. 3d at 800-01.

Based on how the California courts have handled the reduction of the security bond based on the plaintiff's income level, it is unlikely that a bond requirement would prevent plaintiffs from pursuing valid claims in court. However, procedures should be in place to prevent a lack of access to Nevada's courts.

3. Broaden language to include not only the right to petition, but written or spoken acts involving "public participation." Rev. Code Wash. Section 4.24.525.

Washington's anti-SLAPP statute provides remedies for defendants who have made written or oral statements "in a place open to the public or a public forum in connection with an issue of public concern" or "lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern." Rev. Code. Wash. § 4.24.525(2)(d)-(e). California's statute contains similar language. In Nevada, at least one judge has stated that the anti-SLAPP statute not only is limited to defendants who exercise a right in furtherance to petition, but interpreted the statute to only protect those defendants making an appeal directly to a government agency. *Metabolic Research, Inc. v. Ferrell*, 2:09-cv-02453 (D. Nev. 2011).

Courts in both California and Washington have interpreted public forums very widely, even including Internet pages in the interpretation. *See Davis v. Avvo, Inc.*, *2012 WL 1067640* (W.D. Wash. 2012); *Barrett v. Rosenthal*, 40 Cal. 4th 33 (2006). In providing broad protection for defendants, the anti-SLAPP statutes further advance the purposes of these types of laws: to lessen the number of frivolous lawsuits thereby freeing up the courts and to prevent the chilling effect such lawsuits have on freedom of speech.

4. Add Protections for Anonymous Speakers Who May Be Unmasked by Subpoenas Issued Within Nevada's Courts.

California Civil Procedure Code Section 1987.1 allows a defendant whose personal identifying information is sought in connection with that individual's exercise of free speech rights via subpoena to move to quash that subpoena. Such protection is needed in Nevada. Often in SLAPP cases, a plaintiff will bring suit against an anonymous individual, naming him or her as a John or Jane Doe defendant in the lawsuit. Once suit is filed, the litigation's whole purpose is to identify the individual. Indeed, once the plaintiff knows the individual's name, the lawsuit has served its whole purpose. This species of litigation has already arrived in Nevada and targeted comments made on the website for the *Las Vegas Review-Journal* concerning a contentious political campaign. *Brown v. Doe*, Case No. A-12-658911-C (Clark County. Dist. Ct. 2012).

Anonymous speech is a central value to the United Sates Constitution, particularly on issues affecting politics and matters of public concern. *McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995); *see generally The Federalist Papers*. Allowing anonymous speakers to move to quash subpoenas seeking to deprive them of this right ensures that an improved Anti-SLAPP statute will not expose the flanks of free speech and allow Constitutionally protected statements

by known individuals to enjoy its provisions, while requiring individuals speaking anonymously or through pseudonyms to lose their rights to do so before being able to use Anti-SLAPP remedies. Giving an anonymous defendant the ability to file such a motion to quash is necessary in an age of Internet anonymity. Obtaining personally identifying information is often itself the ultimate goal of SLAPP lawsuit, so that a plaintiff may use the courts to unmask a defendant – depriving him or her of the Constitutional right to anonymous speech – and hold him or her up to public scorn for engaging in First Amendment-protected conduct.

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLEY, DO ENACT AS FOLLOWS:

Section 1. NRS 41.635 is hereby amended to read as follows:

41.635 **Definitions.** As used in NRS 41.635 and 41.637 [~~to 41.670~~], inclusive, unless the context otherwise requires, the words and terms defined in NRS 41.637 [~~and 41.640~~] have the meanings ascribed to them in those sections.

(a) "Political Subdivision" has the meaning ascribed to it in NRS 41.0305.

(b) "Personally Identifying Information" includes all of the information a Provider of Internet Service is required to keep confidential, pursuant to NRS 205.498.

Sec. 2. NRS 41.637 is hereby amended to read as follows:

41.637 1. If an action is brought against a person based upon a ~~good faith~~ communication, ***including the making and submitting of any document or statement, involving public***

participation or petition that is protected under the United States Constitution or Nevada Constitution ~~in furtherance of the right to petition~~:

(a) The person against whom the action is brought may file a special motion to dismiss ***under this section***; and

(b) The Attorney General or the chief legal officer or attorney of a political subdivision of this State may defend or otherwise support the person against whom the action is brought. If the Attorney General or the chief legal officer or attorney of a political subdivision has a conflict of interest in, or is otherwise disqualified from, defending or otherwise supporting the person, the Attorney General or the chief legal officer or attorney of a political subdivision may employ special counsel to defend or otherwise support the person.

2. A special motion to dismiss must be filed within 60 days after service of the complaint, which period may be extended by the court for good cause shown.

3. If a special motion to dismiss is filed pursuant to subsection 2, the court shall:

(a) ***Evaluate the motion as one*** ~~Treat the motion as a motion~~ for summary judgment; ***and***

(b) Stay discovery pending:

(1) A ruling by the court ~~on~~ ***denying*** the motion ***in whole or in part***; and

(2) The disposition of any appeal from the ruling on the motion; and

(c) Rule on the motion within 30 days after the motion is filed.

4. If the court dismisses the action pursuant to a special motion to dismiss filed pursuant to subsection 2, the dismissal operates as an adjudication upon the ***dismissed claims'*** merits.

5. This Section applies to any claim, however characterized, that is based on an action involving communication involving public participation or petition. As used in this section, "communication, ***including the making and submitting of any document or statement,***

involving public participation or petition that is protected under the United States Constitution or Nevada Constitution" includes:

(a) any written or oral statement or writing made before a legislative, executive, municipal, administrative, or judicial proceeding, or any other official proceeding authorized by law;

(b) any communication 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;

(c) any communication that is reasonably likely to encourage consideration or review of an issue by a legislative, executive, judicial, or other governmental body;

(d) any communication made in a place open to the public or a public forum in connection with an issue of public interest, or in another governmental or official proceeding; or

(e) any other communication or conduct in furtherance of the exercise of the constitutional right of petition or the right of free speech in connection with a public issue or an issue of public interest under the United States Constitution or Nevada Constitution.

(f) The above are to be construed broadly, and it shall be presumed that speech that is of interest to a significant number of people is speech on a matter of public concern.

6. Before any civil action is brought for defamation or any other cause of action duplicative of defamation, the person or entity bringing such an action shall, at least five days before instituting such action, serve notice in writing on the defendant, specifying the article or broadcast and the specific statements therein which he or she alleges to be tortious. This notice must identify the statements at issue with sufficient particularity to allow a reasonable person to ascertain the specific facts the civil claimant contends are false. The notice shall further explain, with particularity, how the statements may be amended to reflect the truth. Any failure to comply with this subsection shall mandate immediate dismissal of the action,

and an award of the defendant's costs and reasonable attorney's fees incurred in obtaining such a dismissal.

7. Any order granting or denying a special motion to dismiss under this section, whether in whole or in part, shall be immediately appealable.

8. The defendant may (at any time) move the Court for an order requiring the plaintiff to provide an undertaking, which shall be held by the Court, to secure the movant's award of costs and attorney's fees that may be awarded in the special proceeding.

(a) The motion shall be made on the grounds that there is a reasonable possibility that the moving defendant will obtain judgment for costs and reasonable attorney's fees in the action or special proceeding. The motion shall be accompanied by an affidavit in support of the grounds for the motion and by a memorandum of points and authorities. The affidavit shall set forth the nature and amount of the costs and attorney's fees the defendant has incurred and expects to incur by the time the movant obtains a favorable judgment in the action.

(b) If the court determines that the grounds for the motion have been established after conducting a hearing on the motion, the court shall order that the plaintiff file the undertaking in an amount specified in the court's order as security for costs and attorney's fees.

(c) The plaintiff shall file the undertaking not later than 30 days after service of the court's order requiring it or within a greater time allowed by the court upon a showing of good cause. If the plaintiff fails to file the undertaking within the time allowed by the court, the plaintiff's action shall be dismissed without prejudice as to the defendant in whose favor the order requiring the undertaking was made.

(d) If the defendant's motion for an order requiring an undertaking is filed within 30 days after service of summons on the defendant, the court may stall all further proceedings in the action until 10 days after the motion for undertaking is denied or, if granted, until 10 days after the required undertaking has been filed with the court and notice of the same has been served on the moving defendant. The hearing on defendant's motion for an undertaking shall be held within 60 days after the summons and complaint in the action were served on the moving defendant. If the court grants the defendant's motion for an undertaking but the defendant files an objection to the undertaking's sufficiency, the court may in its discretion stay the proceedings not longer than 10 days after a sufficient undertaking has been filed and the defendant has been served with notice of the same.

(e) The court's determinations under this section have no effect on the determination of any issues on the merits of the action or special proceeding and may not be given in evidence nor referred to in the trial of the action or proceeding.

(f) An order granting or denying a motion for an undertaking under this section is not immediately appealable.

9. (a) If a subpoena requires the attendance of a witness or the production of books, documents, electronically stored information, or other things before a court, or at the trial of an issue therein, or at the taking of a deposition, the court, upon motion reasonably made by any person described in subdivision (b), or upon the court's own motion after giving counsel notice and an opportunity to be heard, may make an order quashing the subpoena entirely, modifying it, or directing compliance with it upon those terms or conditions as the court shall declare, including protective orders. In addition, the court may make any other order as may be appropriate to protect the

person from unreasonable or oppressive demands, including unreasonable violations of the right of privacy of the person.

(b) The following persons may make a motion pursuant to subdivision (9)(a):

(1) A party;

(2) A witness; or

(3) A person whose personally identifying information, as defined by NRS 205.498, is sought in connection with an underlying action involving that person's exercise of free speech rights.

(c) Nothing in this section shall require any person to move to quash, modify, or condition any subpoena duces tecum seeking personally identifying information, as defined by NRS 205.498.

(d) If a motion is filed for an order to quash or modify a subpoena from a court for personally identifying information, as defined by NRS 205.498, for use in an action arising from the moving party's anonymous exercise of free speech rights, and the respondent fails to submit evidence that would create a genuine question as to any material fact concerning the validity of the claims asserted against the anonymous party, the court shall award the movant the amount of the reasonable expenses incurred in making the motion, including the movant's costs and reasonable attorney's fees.

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25 March 2013

I write to support Nevada Senate Bill No. 286. The bill sensibly expands protections for free speech by the citizens of Nevada, while allowing meritorious legal claims to proceed unscathed. Moreover, a more speech-protective statute will encourage start-up firms to locate in Nevada, and will shield small businesses from expensive litigation that seeks to silence them, rather than to vindicate any legitimate legal position.

I am a law professor and practicing attorney. My research focuses on free speech concerns, and in particular on censorship and the First Amendment.[1] In addition, I have counseled dozens of start-up firms, and thus am keenly aware of the needs and concerns of today's entrepreneurs.

Existing Nevada law offers the state's citizens and businesses some protection against lawsuits designed to silence those who speak out on matters of public concern.[2] This valuable immunity, however, is limited to communication that relates to the freedom to petition one's government. Political speech is at the heart of American protections for free expression. However, other forms of protected speech are equally important, and may have greater effects on Nevada citizens' daily lives. Consider the Reno resident whose car is unfairly impounded by a local tow operator, or the Las Vegas patient who wants to complain about a bad experience with a chiropractor.[3] If they post a truthful, yet negative, review to an on-line forum such as Yelp or Angie's List, they may face a lawsuit for defamation or trade libel, with enormous potential damages. The sensible answer to such a threat is to remove the offending remarks – no matter how valuable and truthful they may be – and to remain silent in the future. Few of us can afford to hire an attorney to vindicate the truth of a consumer review. Taking a stand is noble, but economically irrational. Yet that outcome leaves us all poorer, and worse off: we will be the next ones victimized by over-aggressive towing, or a poor spinal adjustment. Nevada's current statute offers no protection to such watchdogs, whose speech is vital yet easily chilled. The expansion contemplated by S.B. 286 would shield this socially valuable expression against frivolous lawsuits.

Furthermore, the effects of speech protections, such as anti-SLAPP bills, on small businesses and start-up firms are vitally important, and underappreciated. Start-up companies are idea-rich and resource-poor. Often, they cannot afford legal representation even for core business needs such as drafting employment agreements, protecting their intellectual property portfolios, and forming corporate entities.[4] They certainly lack resources to combat lawsuits from better-funded competitors who seek to silence criticism or comparative advertising. A start-up in the field of

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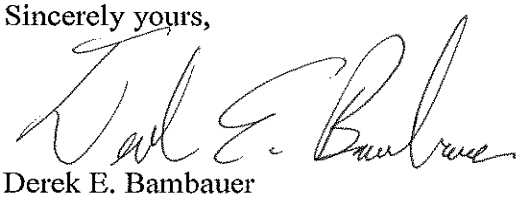
[1] *See, e.g.,* Derek E. Bambauer, *Orwell's Armchair*, 79 University of Chicago Law Review 863 (2012).
[2] Nev. Rev. Stat. § 41.635 et seq.
[3] *See* Dan Frosch, *Venting Online, Consumers Can Find Themselves in Court*, N.Y. Times, June 1, 2010, at A1.
[4] I spent four years working with start-up firms as part of Brooklyn Law School's Brooklyn Law Incubator & Policy (BLIP) clinic. At the University of Arizona, I am working to launch a similar clinic, and consult with Tech Launch Arizona, the university's effort to foster innovation and start-up companies. The BLIP clinic was launched with the express purpose of supporting Brooklyn's thriving "Silicon Alley" tech start-up sector. Many, if not most, Brooklyn start-ups sorely needed legal counsel, but were unable to afford an attorney.

nutrition supplements, for example, may amass evidence that a competitor's products pose a threat to consumers' health.[5] If that start-up uses this evidence in its own advertising, or to alert consumers to potential health risks, it likely faces a lawsuit that threatens to deplete its available capital – even if the evidence to support its position is overwhelming.[6] Faced with such risks, the firm may choose to remain silent – or, indeed, to locate in a state that offers it more comprehensive protection for engaging in truthful, useful communication with the public.[7] Legal protections matter greatly to start-up companies – this explains why Delaware is the state of choice for incorporation, and why California and Washington boast thriving technology industries. By augmenting its existing anti-SLAPP law, Nevada can create an environment in which start-up firms thrive, driving economic growth and leveraging the state's other resources.

In short, passing the amendments contained in S.B. 286 would redound to the benefit of both Nevada's citizens and economy. I urge the adoption of the bill. I would be happy to respond to any questions you might have. My contact information is listed at the top of this letter. Thank you for your consideration,

Sincerely yours,



Derek E. Bambauer

[5] *Cf. Metabolic Research, Inc. v. Ferrell*, 693 F.3d 795 (9th Cir. 2012).
[6] *See* Irina D. Manta, *Bearing Down on Trademark Bullies*, 22 Fordham Intell. Prop. Media & Ent. L.J. 853, 862-63 (2012).
[7] *See generally* Carson Hilary Barylak, Note, *Reducing Uncertainty in Anti-SLAPP Protection*, 71 Ohio. St. L.J. 845 (2012).

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SB 286

Judiciary Committee Hearing

March 28, 2013, 9:00 AM

Room 2149, Legislative Building - 401 S Carson Street

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LARRY JOE DAVIS, JR., an individual,

Plaintiff,

v.

AVVO, INC., a Washington corporation, d/b/a Avvo.com,

Defendants.

CASE NO. C11-1571RSM

ORDER ON SPECIAL MOTION TO STRIKE, PURSUANT TO RCW 4.24.535

This matter is before the Court for consideration of a special motion to strike filed by defendant Avvo, Inc. ("Avvo"). Dkt. # 47. This motion is brought pursuant to Washington's "anti-SLAPP" law, RCW 4.24.525.[1] Plaintiff has opposed the motion. After careful consideration of the record and the parties' memoranda, the Court has determined for the reasons set forth herein that the motion shall be granted.

BACKGROUND

[1] "SLAPP" in the statutory context is an acronym for Strategic Lawsuits Against Public Participation. In passing RCW 4.24.525, the legislature expressed a concern over lawsuits "brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." RCW 4.24.525, Notes, 2010 c 118. The statute provides for the rapid resolution of a special motion, filed by the defendant, to strike the SLAPP.

Plaintiff Larry Joe Davis, Jr., is a Florida attorney, board-certified in Health Law. According to the website of the Florida State Bar Association, board certification is a program by which licensed attorneys may become recognized for special knowledge, skill and proficiency in a designated area of practice.[2] The certification process involves earning a passing grade on an examination, peer review assessment, and satisfaction of the certification area's continuing legal education requirements. A Florida attorney who is board certified may use the designation "Board Certified," "Expert," or "Specialist." *Id*.

Defendant Avvo operates a website that provides profiles of many lawyers, doctors, and dentists in the U.S., including area of practice or specialty, disciplinary history, experience, peer endorsements, and client or patient reviews. The lawyer section of the website is searchable by area of practice and location.[3] The information is gathered from publicly available material, including state bar associations, state courts, and lawyers' and firms' websites. Declaration of Joshua King, Dkt. # 9, Exhibit 16. The profile contains an Avvo numerical rating (zero to ten), calculated mathematically from information in the lawyer's profile, including years in practice, disciplinary actions, professional achievements, and industry recognition. *Id*., Exhibit 25. The rating is intended to guide the public in finding a suitable qualified lawyer. *Id*., Exhibit 3. An attorney cannot change his rating by request to Avvo, but he or she may register on the Avvo website, "claim" his or her profile, and update information regarding work experience, practice areas, and professional achievements, any of which may change the rating. *Id*. Clients may submit reviews, which may also change the rating.

Plaintiff filed this action for libel and violation of two Florida statutes in Florida state court on August 26, 2010. Dkt. # 2. He asserted in that complaint that he first learned of his Avvo profile and rating on August 19, 2010, when a prospective client called him to ask for help with an employment issue involving a hostile environment claim. Complaint, Dkt. # 2, ¶ 9. She told plaintiff she called him because he was the "lowest rated employment lawyer" and she assumed he would be "desperate for

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[2] http://www.floridabar.org/divcom/pi/certsect.nsf/certifications, accessed on March 22, 2012.

[3] http://www.avvo.com/find-a-lawyer?ref=homepage accessed on March 22, 2012.

employment." *Id.*, ¶ 11.

Plaintiff informed the caller that he was not a "low-ranking employment lawyer" but rather a Board Certified health law attorney, and declined to represent her. *Id.*, ¶ 12. After concluding the telephone call, plaintiff visited the Avvo.com website and saw that his practice area was depicted by a "pie chart" which stated "100% employment/labor law." He then went to log on to his profile page and "attempt to correct the misinformation, which included an incorrect business address and blatantly incorrect practice area." *Id.*, ¶ 14. He alleges that after "participating in the Avvo.com website," he saw his rating go from 4.3 to 5.0. *Id.*, ¶ 15. Then, over the next several days, he attempted to "delist" himself from the website entirely, but was unable to do so. *Id.*, ¶ 16. As a result of his efforts, according to plaintiff, his rating dropped to 3.7, accompanied by a "caution" in red letters. *Id.* Plaintiff has provided "screen shots" of other attorneys' profiles, but none of his own to demonstrate these changes. Declaration of Larry Joe Davis, Jr., Dkt. # 20, Exhibits 1, 2, 3. The Court notes that at this time, plaintiff's profile page displays no photograph, and shows a rating of 4.4, a "concern" in red letters, together with the statement, also in red, that "this lawyer has been disciplined by a state licensing authority," together with a link to more information regarding the disciplinary action.[4] Plaintiff's area of practice is still listed on his profile as "100% employment/labor" despite the fact that he has the power to change that entry. There are two very positive five-star client reviews.

Plaintiff filed an amended complaint shortly after filing the original, and served a copy on defendant on September 14, 2010. Dkt. # 3. The amended complaint changed the date that plaintiff learned of his Avvo profile and low rating to August 17, 2010, deleted the causes of action for libel, and added a claim of invasion of privacy/false light. Dkt. # 3. The action was removed to the United States District Court for the Middle District of Florida on October 19, 2010, on the basis of the parties'

[4] http://www.avvo.com/attorneys/33701-fl-larry-davis-1295960.html accessed on March 22, 2012.

diversity.[5] Dkt. # 1.

After defendant filed a motion to dismiss for failure to state a claim pursuant to Fed.R.Civ.Proc. 12(b)(6), plaintiff filed a Second Amended Complaint. Dkt. ## 8, 12. The Second Amended Complaint was stricken by the court for failure to obtain leave of court before filing, as required by Fed.R.Civ.P. 15(a)(2). Dkt. # 14. Defendant then moved pursuant to 28 U.S.C. § 1404(a) to transfer the action to this district pursuant to a forum selection clause on the Avvo.com website, and other factors. Dkt. # 15. Before the court ruled on the motion to transfer, plaintiff sought leave to amend his complaint a third time. Dkt. # 21. The motion was granted, and plaintiff filed his Third Amended Complaint on April 25, 2011. Dkt. # 26. The Third Amended Complaint, which is now the operative complaint in this case, asserts three causes of action under Florida law regarding the alleged misrepresentation of plaintiff's address and practice area, and the use of his photograph in his profile. He does not challenge his rating or the mention of disciplinary action.

After the Third Amended Complaint was filed, defendant filed, in rapid succession, a motion to strike designated paragraphs of the Third Amended Complaint (Dkt. # 30), a motion to dismiss for lack of subject matter jurisdiction and/or failure to state a claim (Dkt. # 31), and a renewed motion to transfer venue to the Western District of Washington (Dkt. # 32). The motion to transfer was granted and the case was transferred to this Court on September 29, 2011. Dkt. ## 43, 44. The Florida district court specifically found that plaintiff, a licensed and board-certified attorney, agreed to the Terms of Use on the Avvo.com website, including the forum selection clause, when he registered and logged in to update his profile. Order, Dkt. # 43, p. 7.

After transfer, defendant did not renew the previously-filed motion to strike and motion to dismiss for lack of subject matter jurisdiction in this Court. Instead, on November 2, 2011, defendant

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[5] Although the amended complaint did not plead a sum certain as damages, defendant met the burden on removal of establishing that the jurisdictional amount of $75,000 has been met by pointing to a settlement demand for $145,000 (with an apology) or $175,000 (without an apology) presented by plaintiff after he filed suit. Notice of Removal, Dkt. # 1. A defendant may use the amount demanded by the plaintiff as settlement as evidence that the amount in controversy exceeds the jurisdictional minimum. *Conn v. Petsmart, Inc.,* 281 F. 3d 837, 840 (9th Cir. 2002). Plaintiff's demand was not clearly excessive in light of the fact that his amended complaint includes requests for actual damages, punitive and exemplary damages, and statutory attorneys fees on four separate claims. Dkt. # 3.

filed the motion to strike the complaint pursuant to RCW 4.24.525 that is currently before the Court for consideration. This Court has jurisdiction over the matter pursuant to 28 U.S.C. § 1332(a)(1).

DISCUSSION

I. Legal Standard

The Washington anti-SLAPP Act is intended to address lawsuits brought primarily to chill the valid exercise of the constitutional rights of free speech and petition for redress. The legislature found that it is in the public interest for citizens to participate in matters of public concern, and to provide information on public issues that affect them without fear of reprisal through abuse of the judicial process. RCW 4.24.525; Senate Bill 6395, Laws of 2010, Ch. 118, § 1.

The law provides, in relevant part, that "[a] party may bring a special motion to strike any claim that is based on an action involving public participation" as defined in the statute. RCW 4.24.525(4)(a). The section applies to "any claim, however characterized, that is based on an action involving public participation and petition." RCW 4.24.525(2). An action involving public participation includes "[a]ny oral statement made . . . in a place open to the public or a public forum in connection with an issue of public concern" and "other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern. . ." RCW 4.24.525(2) (d) and (e).

An anti-SLAPP law provides relief to a defendant which is in the nature of immunity from suit. *Batzel v. Smith*, 333 F. 3d 1018, 1025 (9th Cir. 2003) (addressing California's anti-SLAPP statute.) In passing the law, the Washington legislature noted concern regarding both the chilling effect on the valid exercise of the constitutional right of freedom of speech, and the chilling effect of "the costs associated with defending such suits." RCW 4.24.525, notes 2010 Ch. 118. The statute accordingly provides for an award of attorneys' fees and costs, plus a statutory award of $10,000, to a defendant who prevails on an anti-SLAPP motion. RCW 4.24.525(6)(a)(i), (ii). Conversely, if the Court finds that the anti-SLAPP motion to strike was frivolous or brought solely to cause unnecessary delay, costs, attorneys' fees, and $10,000 shall be awarded to the opposing party. RCW 4.24.525.(6)(b)(i), (ii). The special motion to strike is therefore not without risk to the moving party.

To prevail on the special motion to strike, the defendant bears the initial burden of showing, by a

preponderance of the evidence, that the plaintiff's claim is based on an action involving public participation or petition. If this burden is met, the burden shifts to the plaintiff to establish, by clear and convincing evidence, a probability of prevailing on the claim. If the plaintiff meets this burden, the motion to strike will be denied. RCW 4.24.525.(4)(b).

II. Analysis

The Court has no difficulty finding that the Avvo.com website is "an action involving public participation," in that it provides information to the general public which may be helpful to them in choosing a doctor, dentist, or lawyer. Further, members of the general public may participate in the forum by providing reviews of an individual doctor or lawyer on his or her profile page. The profile pages on the Avvo.com website constitute a "vehicle for discussion of public issues . . . distributed to a large and interested community." *New York Studio, Inc. v. Better Business Bureau of Alaska, Oregon, and Western Washington*, 2011 WL 2414452 at *4 (W.D.Wash. June 13, 2011). Therefore the burden shifts to plaintiff to show, by clear and convincing evidence, a probability of prevailing on his Florida state law claims.

Before turning to plaintiff's claims, the Court must consider his assertion that this motion is untimely. He contends that since the Third Amended Complaint was filed and served on April 25, 2011, the deadline to file this motion was June 26, 2011, pursuant to RCW 4.24.525(5)(a). The cited section states, in relevant part, "The special motion to strike may be filed within sixty days of the service of the most recent complaint, or, in the court's discretion, at any later time upon terms it deems proper." RCW4.24.525(5)(a). The use of the term "may" instead of the mandatory "shall" means that this is not a firm deadline to be applied in all cases. In light of the fact that the action was not transferred to this Court until September 20, 2011, the Court finds that the November 2, 2011 filing is timely.

Plaintiff's Third Amended Complaint asserts three causes of action under Florida law: (1) false advertising, in violation of Fla. Stat. § Section 817.41; (2) unauthorized use of a likeness for a commercial purpose, in violation of Fla. Stat. § 540.08; and (3) violation of the Florida Deceptive and Unfair Trade Practices Act, Fla. Stat. § 501.204 ("FDUTPA"). Third Amended Complaint, Dkt. # 26, pp. 10-12. Defendant asserts, in the first instance, that Washington law, not Florida law, applies to all

of plaintiff's claims, because he specifically agreed to that under the Terms of Use when he registered on the Avvo.com website.

The Terms of Use agreement states, in relevant part, that

> These Site Terms and your use of the Site shall be governed by and construed in accordance with the law of the State of Washington applicable to agreements made and to be entirely performed within the State of Washington (even if your use is outside the State of Washington), without resort to its conflict of law provisions. You agree that with respect to any disputes or claims . . . any action at law or in equity arising out of or relating to the Site or these Site Terms shall be filed only in the state and federal courts located in King County, Washington. . . .

Declaration of Joshua King, Dkt. # 16, ¶¶ 3-9, Exhibit 1. As noted above, the district court in Florida held that plaintiff is bound by the Terms of Use when it enforced the forum selection clause. The court also addressed the enforceability of the choice of law provision, noting that

> Washington and Florida courts review the enforceability of choice of law provisions under a standard similar to that set forth in Section 187 of the Restatement (Second) of Conflict of Laws (*i.e.*, whether a choice of law clause would violate the public policy of the state with the materially greater interest).

Order of Transfer, Dkt. # 46, p. 8 (*citing In re DirecTV Early Cancellation Litigation*, 738 F. Supp. 2d 1062, 1088-90 (C.D.Ca. 2010)). The court found that the Washington Consumer Protection Act, RCW 19.86.020 (WCPA), and the FDUTPA are "substantially similar," and that even if this Court were to apply the WCPA to plaintiff's claims, and "assuming that the WCPA is more restrictive than the FDUCPA," the enforcement of the forum selection clause would not deprive plaintiff of his day in court. *Id*.

This Court applies the choice-of-law principles of the transferor court. *Shannon-Vail Five, Inc., v. Bunch*, 270 F. 3d 1207, 1210 (9th Cir. 2001). Florida law holds that contractual choice of law provisions are presumptively valid. *Gaisser v. Portfolio Recovery Associates, LLC*, 593 F. Supp. 2d 1297, 1300 (S.D.Fla. 2009). "Florida enforces choice-of-law provisions unless the law of the chosen forum contravenes strong public policy." *Mazzoni Farms, Inc., v. E.I. DuPont de Nemours & Co.,* 761 So. 2d 306, 311 (Fla. 2000). Nowhere does plaintiff argue that analysis of his claims under Washington law would contravene strong public policy. He simply contends that "section 501.211 [of

the Florida Statues] is not waivable by any [Terms of Use]." Plaintiff's Response, Dkt. # 6.[6] That assertion is not responsive to the choice of law question. Further, the Florida district court's determination that the WCPA and FDUTPA are substantially similar,[7] and that application of Washington law would not be unfair to plaintiff, constitutes a finding that such application would not contravene strong public policy. This Court therefore finds that the choice-of-law clause is enforceable, and that the WCPA, not the FDUTPA shall apply to plaintiff's claims.[8]

The WCPA's citizen suit provision states that "[a]ny person who is injured in his or her business or property" by a violation of the act may bring a civil suit for injunctive relief, damages, attorney fees and costs, and treble damages. RCW 19.86.090. To prevail on a private WCPA claim, plaintiff must prove (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to the plaintiff's business or property, and (5) causation. *Panag v. Farmers Insurance Co. of Washington* , 166 Wash. 2d 27, 37 (2009) (*citing Hangman Ridge Stables, Inc., v. Safeco Title Insurance Co.,* 105 Wn. 2d 778, 784 (1986). The causation element may be met by demonstrating that the deceptive acts "induced the plaintiff to act or refrain from acting," and the plaintiff's damages were "brought about by such action or failure to act." *Fidelity Mortgage Co. v. Seattle Times Co.*, 131 Wash. App. 462, 468-69 (2005).

In the Third Amended Complaint, plaintiff identifies the deceptive acts or practices as the misrepresentation of his practice area, together with the misappropriation of his image and placement on his profile page. He claims that his listing on the website was "deceptive to the public, to consumers, to

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[6]Section 501.211 provides a private right of action under the FDUTPA to "anyone aggrieved by a violation of this part." Fla.Stat. § 501.211(1).

[7] The court compared Fla.Stat. § 501.204(1), which prohibits "[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce" with RCW 19.86, which prohibits "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Order of Transfer, Dkt. # 43, p. 8.

[8] Treating plaintiff's claims under the WCPA instead of the FDUTPA is not prejudicial to plaintiff in terms of the ruling on this motion to strike. The private right of action under the FDUTPA is tempered by a provision requiring the plaintiff to post a bond to indemnify the defendant for damages, including attorney's fees, in the event the action is found to be frivolous, lacking in legal or factual merit, or brought for the purpose of harassment. Fla.Stat. 501.211(3).

other lawyers, and specifically to the potential client referenced herein." Third Amended Complaint, Dkt. # 26, ¶ 43. He asserts that this misrepresentation of his practice area is an attempt by Avvo.com to "coerce lawyers by illegal and tortious conduct, on an epidemic scale, to correct mislistings" and is "an actionable trade practice." *Id.*, ¶ 41.

As noted by the Florida district court, both the WCPA and the FDUTPA require that the deceptive act occur in trade or commerce. This Court has previously held that Avvo.com does not engage in "trade" or "commerce." *John Henry Browne v. Avvo, Inc.*, 525 F. Supp. 2d 1249, 1254 (W.D.Wash. 2007).

> "Trade" and "commerce" are defined as "the sale of assets or services. . . . Avvo collects data from public sources, attorneys, and references, rates attorneys (where appropriate), and provides both the underlying data and the ratings to consumers free of charge. No assets or services are sold to people who visit the site in the hopes of finding a lawyer and no charge is levied against attorneys or references who choose to provide information. It is hard to imagine how an information clearinghouse and/or ratings service could be considered "commerce". . . . Instead, plaintiffs argue that Avvo's offer to sell advertising space to attorneys transforms all of defendants' activities into trade or commerce. The advertising program is separate and distinct from the attorney profiles that are the subject of plaintiffs' complaint.

Id. The Court ruled that "Avvo's publication of information and ratings based on available data is not 'trade or commerce' and cannot form the basis of a CPA claim." *Id.*

Plaintiff seeks to distance his claim from this result by asserting that "[i]n the *Browne* opinion, this Court stated at 1254 that the placement of paid advertising in a free listing of brokerage rates would make such list commercial speech." Plaintiff's Response, Dkt. # 50, p. 8 (*citing Fidelity Mortgage Corp. v. Seattle times Co.*, 131 Wash. App. at 470. This statement mischaracterizes the ruling in *Browne*. Referring to *Fidelity Mortgage*, the Court stated that "the court found that a newspaper's publication of mortgage rates from various lenders was not, in the absence of payment from the lenders, trade or commerce. On the other hand, the same rate chart could be considered trade or commerce if the newspaper accepted an advertising fee in exchange for including a lender in the chart." *Browne*, 525 F. Supp. 2d at 1254. The Court thus distinguished a hypothetical situation where a newspaper accepted a fee for "including a lender in the chart" from the Avvo.com website where the free attorney profiles and the advertising images on the right side of the webpage are "separate and distinct."

Plaintiff thus cannot assert a claim under the WCPA for the alleged misrepresentation of his practice area or the use of his image, as these are part of his profile which under *Browne* is not "trade or commerce." However, in his response to the motion to strike, he clarifies that his claim concerns a different "deceptive act or practice" that he contends is related to Avvo's business model. This argument arises from his allegation in the Third Amended Complaint at ¶ 41, noted above, that the misrepresentation of his practice area is an intentional act by Avvo to induce him to register on the website to correct the misrepresentation.[9] "This profile-based content-based ad space is on information and belief, one of two primary revenue generators for Defendants, the other being the Avvo Pro membership (to stop the targeted ads, of course.)" Plaintiff's Response, Dkt. # 50, p. 9. Plaintiff thus contends that lawyers are induced to apply for "Pro" membership to prevent competitor's ads from appearing on their profile pages. He states, "That is, in fact, apparently one of the primary selling points of the Avvo Pro membership." *Id.,* 8. The Court accepts this as plaintiff's statement of the deceptive act or practice which forms the basis of his WCPA claim.

Plaintiff has presented no evidence, let alone clear and convincing evidence, to demonstrate that there is any probablily of prevailing on his WCPA claim. He points to no evidence in the record to support the conclusory allegations regarding Avvo's advertisements. Indeed, he has provided no evidence at all; he has merely "verified" the allegations set forth in his Third Amended Complaint. Affidavit of Larry Joe Davis, Dkt. # 51. A complaint is not evidence. Plaintiff has submitted no separate declaration of facts within his personal knowledge which support his claims, as contemplated under RCW 4.24.525(4)(c) (In determining whether a party has established by clear and convincing evidence a probability of prevailing on a claim, "the court shall consider the pleadings and supporting and opposing affidavits stating the facts.") Instead of presenting an affidavit, plaintiff asserts in his response that "[i]f one were to search on Avvo for a particular well-known lawyer, such as a well-known Board Certified

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[9] This allegation of an intentional act to "coerce" lawyers contradicts the pleading at ¶ 38 that the mistake is simply the result of careless programming. "Avvo.com's computer program was not designed properly, and in a rush to list and rate '90% of lawyers in the United States' allowed the program to run rampant making reckless mistakes, as was the case here and with the other Board Certified lawyers mentioned herein." Third Amended Complaint, Dkt. # 26, ¶ 38.

Health Lawyer, when one is directed to that lawyer's page, one would likely see an advertisement for a competing lawyer, as Plaintiff did in August 2010, which competing lawyer has paid Avvo to have that ad placed on the listed lawyer's page." Plaintiff's Response, Dkt. # 50, p. 9. These speculations as to what "one would likely see," are not evidence. Nor has plaintiff alleged how this allegedly deceptive act of Avvo induced him to act or refrain from acting in some manner, so as to establish causation for his loss. *Fidelity Mortgage Co.,* 131 Wash. App. at 468. Finally, he has not alleged any actual damages caused by the deceptive act.

In his complaint, plaintiff pleads in general terms that "Defendant's actions have damaged Plaintiff individually, as well as many other lawyers in Florida, and Defendant's actions have misled consumers in Florida." Third Amended Complaint, Dkt. # 26, ¶ 51. He requests "actual damages" in addition to declaratory and injunctive relief, but nowhere in the complaint does he state what monetary loss he actually suffered. While plaintiff purports to represent the interests of other Florida attorneys and the general public in this matter, he may only request monetary damages for his own losses.

In his response to the motion to strike, he clarifies that he was "directly damaged by the time wasted on the phone with a potential client that had been misled by the Avvo.com site." Plaintiff's Response, Dkt. # 50, p. 11. He estimates his loss at one-half hour of his time, which he bills at $350 an hour, for a total of $175. He asserts there were other calls, so his damages are "not de minimus or speculative, especially on a massive scale." *Id*. The problem, however, is not that his loss is de minimus, but that it does not flow from the alleged deceptive act. According to the allegations of the complaint, the prospective client called him, and wasted his time, solely because of his profile; she erroneously thought he was a "low-ranking" attorney who practiced "100% employment law." Third Amended Complaint, Dkt. # 26, ¶ 22. Under *Browne*, information on the profile page cannot serve as the basis for a WCPA claim. Plaintiff is fully aware of this, as he seeks to distinguish his consumer fraud claim and escape the *Browne* bar by defining the alleged deceptive act as arising from the advertisements placed on the profile page. Yet he has alleged no damages flowing from that deceptive act. Indeed, it would be contrary to the allegations of the complaint for him to do so, as he alleges that the prospective client called him in spite of the advertisements of other attorneys on his page, not

because of them.

Plaintiff has failed to produce any evidence that would demonstrate a probability of prevailing on his WCPA claim. Nor has he brought forth any evidence to support his false advertising and misuse of his likeness claims, or argued any elements of these torts under Washington law. Plaintiff was put on notice by the Order of Transfer that he is bound by the Terms of Use, and as an experienced attorney he should have anticipated that this Court would find him bound by the choice of law provisions therein. Yet he chose to oppose the motion to strike solely under Florida law, and failed to come forward with any evidence to support his claims even under Florida law. As plaintiff has not produced clear and convincing evidence to demonstrate a probability of prevailing on any of his claims, the motion to strike under RCW 4.24.525 shall be granted as to all claims.

CONCLUSION

Defendant has met the burden under RCW 4.24.525(4)(b) of demonstrating that plaintiff's claims are based on an action involving public participation or petition in an issue of public concern. The burden therefore shifts to plaintiff to show, by clear and convincing evidence, a probability of prevailing on his claim. Plaintiff has failed to produce or point to such evidence. The special motion to strike (Dkt. # 47) is accordingly GRANTED as to all claims, and this action is DISMISSED.

Pursuant to RCW 4.24.525(6)(a)(I) and (ii), defendant as the prevailing party is entitled to costs of litigation and reasonable attorney's fees incurred in connection with each successful motion, together with a statutory award of ten thousand dollars. Defendant shall accordingly make application to the Court for reasonable attorney's fees incurred in bringing the motion to transfer venue (Dkt. # 32) and this motion (Dkt. # 47). Such application shall be filed within three weeks of the date of this Order, and shall be noted on the Court's calendar for the third Friday thereafter so plaintiff may have an opportunity to respond.

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Judgment shall be entered after the Court has determined the amount of reasonable attorney's fees and shall include such amount.

Dated this 28 day of March 2012.

RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE

JUSTICE COURT, LAS VEGAS TOWNSHIP

CLARK COUNTY, NEVADA

FILED

IN THE ADMINISTRATIVE MATTER REGARDING CIVIL CASE FILINGS

ORDER # 11-03

WHEREAS, Rule 6.5(b) of the Justice Court Rules for the Las Vegas Township (JCRLV) requires the Chief Judge to "[a]ssure quality and continuity of services necessary to the operation of the court" and to "[s]upervise the court's calendar"; and

WHEREAS, during the last few months of last year, the Court was faced with a heightened backlog of civil cases to be processed due to significant staff shortages and budgetary constraints, along with a difficult conversion to a new case management system; and

WHEREAS, the backlog was so severe that former Chief Judge Ann Zimmerman previously authorized the temporary closure of the Civil Customer Service Counter in order for staff to focus on eliminating that backlog; and

WHEREAS, it has come to the Court's attention that many civil cases during the applicable time period were not processed with sufficient time for attorneys to be able to comply with the dictates of JCRCP 4(i); and

WHEREAS, JCRCP 4(i) declares that if service of the summons and complaint is not made upon a defendant "within 120 days after the filing of the complaint," the action must be dismissed as to that defendant without prejudice upon the court's own initiative; and

WHEREAS, the rule further contemplates that a party may file a motion to enlarge the time for service, based upon a showing of good cause why such service was not made within the 120-day period; and

WHEREAS, the rule declares that "[u]pon a showing of good cause, the court shall extend the time for service and set a reasonable date by which service should be made"; and

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WHEREAS, the Court believe that all affected cases during the applicable time period should be granted an extension of time for service based upon the "good cause" related to the prior backlog in the Civil Division; therefore,

IT IS HEREBY ORDERED that, for all civil cases filed during the period of **July 1, 2010, through December 31, 2010,** plaintiffs will be entitled to an extension of time to serve the summons and complaint, without having to file a motion to request that extension of time; and

IT IS HEREBY ORDERED that the civil cases governed by this Order shall be those cases set forth at Exhibit "A," which is a lengthy separate document that is on file with the Las Vegas Justice Court Clerks' Office and available for public inspection; and

IT IS HEREBY ORDERED that the extension of time granted by this Order shall remain in effect until **June 15, 2011;** and

IT IS FURTHER ORDERED that if a civil case was filed during the period of July 1, 2010, through December 31, 2010, and that case was subsequently dismissed for failure to comply with JCRCP 4(i), this Order may be cited as a basis for a Motion to Set Aside the Dismissal; and

IT IS FURTHER ORDERED that all civil cases encompassed by this Order may be subject to future dismissal under JCRCP 4(i) if service of the summons and complaint is not made within the extension of time granted by this Order; and

IT IS FURTHER ORDERED that this Order shall be effective immediately and shall remain in effect unless amended or rescinded by a subsequent administrative Order.

Dated this 2nd **day of** March **, 2011.**

KAREN BENNETT-HARON

CHIEF JUDGE OF THE LAS VEGAS JUSTICE COURT

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LEGAL DEFENSE TRUST TRAINING BULLETIN

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JUNE 2007 (2 OF 2)

CALIFORNIA ANTI-SLAPP STATUTE APPLIES TO ROUTINE ADMINISTRATIVE MANDAMUS PETITIONS

An Analysis Of The Holding And Effect Of Vergos v. McNeal

By Michael P. Stone
and Marc J. Berger

A dramatic example of legislative intentions gone astray can be derived in a line of recent California appellate decisions culminating in the case of *Vergos v. McNeal* (2007) 146 Cal. App. 4th 1387. Based on *Vergos* and a few other recent cases, it now appears that nearly all petitions for administrative mandamus are subject to the anti-SLAPP motion procedure, with no limiting principle whatsoever. The case law developments that led to the *Vergos* holding stand as a monument to the futility of legislation as a remedy for power imbalances among the economic strata of society.

The anti-SLAPP statute was enacted in 1992 to deter the type of litigation for which its acronym stands: "Strategic lawsuits against public participation." This acronym referred to a growing tendency for powerful land development interests to bring defamation actions against environmental activists to deter the activists from exercising their legal rights to challenge large-scale development plans. It was widely perceived that these powerful real estate interests were using their financial resources to impose intolerable litigation costs on activists, so as to intimidate them from participating in the public proceedings where the developers' plans were under consideration.

To accomplish the purpose of the statute, the legislature authorized a "Special Motion to Strike" any complaint or cause of action that seeks to impose liability for statements made or

actions taken in an exercise of constitutionally-protected speech or the First Amendment right to petition the government for redress of grievances. The Special Motion to Strike is filed as the defendant's first responsive pleading. If the motion shows that the complaint seeks to impose liability for a statement made or action taken in an exercise of the right of free speech or petition, then the complaint or cause of action will be immediately stricken, with a mandatory award of attorney fees in favor of the defendant, unless in opposition the plaintiff demonstrates a probability of prevailing on the merits of the claim.

This statute was thought to be an effective deterrent against the lawsuits it targeted, because in those suits, developers were bringing claims against activists without a goal of prevailing on the merits, but for the collateral purpose of discouraging political opposition by forcing the opponent to incur intolerable litigation expenses. So, imposing a requirement of showing minimal merit acted as a precaution against suits that have financial intimidation as their only goal, while shifting responsibility for attorney fees would deprive the developers of the greatest single benefit they otherwise receive from the tactic of bringing litigation for the sole purpose of financial intimidation.

While the legislature primarily intended to attach consequences to the tactics of powerful developers and other corporate interests, the statute as drafted contained no limitation of the classes of plaintiffs who could be subject to an anti-SLAPP motion, and no limit on the size or power of the defendants who could bring the motion. Instead, the Special Motion to Strike could be filed by any defendant who could establish that the conduct on which the alleged liability is based is protected by the First Amendment rights of free speech and petition. And, there is no statutory requirement governing the size or power of the plaintiffs against whom the motion can be filed. Any defendant whose alleged liability arose from constitutionally protected speech or petitioning, no matter how powerful, could bring an anti-SLAPP motion against any plaintiff, no matter how weak and powerless the plaintiff might be.

The anti-SLAPP statute, originally designed as a tool to protect weak interests from being intimidated by powerful interests, has now itself become a tool by which powerful institutions and interests can in some cases intimidate economically weak and relatively powerless individuals. Combined with a

concurrent trend in federal law, which has eliminated constitutional protection for the work-related speech of public employees, while creating a doctrine of "free speech" protection for the government itself, the new interpretations of the anti-SLAPP statute have vastly eroded the ability of public employees to obtain hearing and evidentiary review of disciplinary sanctions imposed on them by their employers. The new interpretation rendered in the *Vergos* opinion will apparently make all actions for administrative mandamus subject to a Special Motion to Strike. This would vastly erode the ability of public employees to obtain hearing and evidentiary review of disciplinary sanctions imposed on them by their employers. It would seem to similarly affect administrative mandamus petitions seeking to challenge governmental decisions to revoke or suspend professional licenses. It may subject a private employee's action for wrongful termination to a Special Motion to Strike, if the private employer claims that the act of terminating the employee was an exercise of free speech.

In *Vergos,* counsel for the Regents of the University of California devised the idea of using the anti-SLAPP statute to protect employers from administrative mandamus. Exploiting a few recent precedents that treat the government as a "person" for First Amendment purposes, the Regents persuaded the Court of Appeal to recognize that the act of terminating or disciplining a public employee for cause is an exercise of free speech by the government, and consequently, an employee who cannot make a preliminary showing of a probability of prevailing on the merits of the claim can be required to pay the employer's attorney fees.

I. *VERGOS v. McNEAL* HOLDS THAT THE ANTI-SLAPP STATUTE PROTECTS A HEARING OFFICER SUED FOR DENYING A GRIEVANCE.

In *Vergos*, the plaintiff brought an action against Julie McNeal, the Director of Operations and Maintenance at University of California at Davis, for sex harassment and failure to prevent sex harassment. Defendants also included the harasser and the Regents, but the Court of Appeal only reviewed the denial of McNeal's anti-SLAPP motion.

Plaintiff Randy Vergos was an inspector, planner and estimator, working under Allen Tollefson, who worked under McNeal. Vergos filed an internal grievance, alleging sex harassment against Tollefson. McNeal, acting as hearing officer for Vergos' grievance, denied the grievance, and wrote to Tollefson that it was more likely that Vergos' allegations did not occur. McNeal refused to take any action

to protect McNeal from Tollefson. 146 Cal. App. 4th at 1390-1391.

McNeal was named as an individual defendant in Vergos' cause of action based on 42 USC § 1983. The pleading alleged that McNeal, acting as agent for the Regents and under color of state law, denied Vergos' grievance, thus violating Vergos' right to be free of discrimination and harassment, and that the Regents did not properly train McNeal in acting as a hearing officer to decide grievances. *Id.* at 1391-1392.

McNeal filed an anti-SLAPP motion challenging the § 1983 claim, alleging that the Complaint arose from her activities of hearing, processing and deciding plaintiff's grievances, in furtherance of her own First Amendment right of petition and free speech. *Id.* at 1392. McNeal's anti-SLAPP motion alleged that she permissibly delegated the investigation of Vergos' sex harassment claims, received a report that the claims were unsubstantiated, had no reason to believe the investigator was biased, was not biased herself, and communicated the results of the investigation to Vergos, who then failed to appeal the denial through available further steps of the grievance process. *Id.* at 1392-1393.

The trial court denied the anti-SLAPP motion on the grounds the claim was based on McNeal's hearing, processing and deciding of Vergos' grievance, and was "not based on the content of what Defendant stated in any proceeding or the exercise of the right to petition...." *Id.* at 1394.

The Court of Appeal reversed and remanded with instructions to grant the anti-SLAPP motion and award attorney fees to McNeal. The appellate court agreed with McNeal that her "statements and communicative conduct in handling plaintiff's grievances ... are protected" by the anti-SLAPP statute, "because they (1) were connected with an issue under review by an official proceeding authorized by law; and (2) furthered the right to petition of plaintiff and similarly situated employees." *Id.*

The court reasoned that *Code of Civil Procedure*, § 425.16(e)(2) authorized an anti-SLAPP motion where the action arises from "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." *Id.* at 1395, italics omitted. Also taking into account sub § (e)(1), authorizing an anti-SLAPP motion where the action arises from "any written or oral

statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law," the appellate court held that neither § (e)(1) nor (e)(2) "require the defendant to show a public issue or issue of public interest." *Id.* at 1395, citing *Briggs v. Eden Council* (1999) 19 Cal. 4th 1106, 1116-1117, 1123. The court stated that for communications made in official proceedings, "it is the context or setting itself that makes the issue a public issue." *Id.*

The plaintiff argued that an action does not "arise" from petitioning or speech activity merely because it follows such activity, and that here, he was suing McNeal for aiding and abetting harassment. *Id.* at 1396. But the court observed that plaintiff's own pleading complained of McNeal's hearing, processing and deciding of plaintiff's grievances. *Id.* Noting that the trial court had denied the motion on the basis that the claim against McNeal was based on McNeal's conduct, not the content of her statements, the appellate court disagreed, since "hearing, processing and deciding of the grievances ... are meaningless without a communication of the adverse results." *Id.* at 1397.

II. *SAN RAMON v. CONTRA COSTA COUNTY:* GOVERNMENT ACTION IS NOT PROTECTED BY SLAPP IF IT DOES NOT IMPLICATE FREE SPEECH AND PETITION

The appellate court distinguished *San Ramon v. Contra Costa County Employees' Retirement Assn.* (2004) 125 Cal. App. 4th 343, which held that an action seeking judicial review of the decision of a public entity is not subject to an anti-SLAPP motion merely because the decision is taken by a vote after discussion at a public meeting. The court in *San Ramon* observed that the public entity's action (of increasing required contributions to a pension fund) was not in itself an exercise of the right of free speech or petition.

The court in *Vergos* noted that plaintiffs relied on *San Ramon* because it "recognized that government bodies may invoke § 425.16 where appropriate, just like any private litigant, and its holding was based on the conclusion that the Board's act [i.e. the change in pension contributions] did not implicate free speech or the right to petition." *Id.* at 1063. The court in *Vergos* rejected plaintiff's argument because *San Ramon* disavowed deciding any issue concerning suits against individuals. *Id.*

The foregoing observation in *Vergos* means (1) the court appears to agree that government bodies may invoke the anti-SLAPP statute the

same as individuals; and (2) an individual acting on behalf of the government is entitled to invoke the anti-SLAPP statute. The court concluded, "We agree with McNeal that a narrow reading of the statute in plaintiff's favor could result in public employees' reluctance to assume the role of hearing officer in such cases, and thus thwart the petitioning activities of employees with grievances." *Id.*

Finally, the court also agreed with defendant "that she acted in furtherance of the right to petition within the meaning of § 425.16 even though it was not her own right to petition at stake." *Id.* The court elaborated that the anti-SLAPP statute "does not require that a defendant moving to strike ... demonstrate that its protected statements or writings were made on its own behalf (rather than, for example, on behalf of its clients or the general public)." *Id.*, citation omitted.

The court specifically declined to recognize an exception to the anti-SLAPP statute and reasoned that "Hearing officers in official proceedings deserve the protection of the anti-SLAPP statute." *Id.*

The *San Ramon* opinion dodges both of the broader propositions' implications of extending the anti-SLAPP statute to protect the government. The court noted that amicus briefs had argued that the government itself has no First Amendment free speech rights, but since the case before it required only a ruling that the particular act of increasing pension contributions did not implicate free speech, the court was not reaching the larger question posed, as to whether the First Amendment protects the government itself. The opinion also acknowledges that dicta in *Mission Oaks Ranch, Ltd. v. County of Santa Barbara* (1998) 65 Cal. App. 4th 713, in finding the civil damages action before it to be a SLAPP suit, had noted that a petition for administrative mandamus would be the "proper" remedy, thus implying that such a petition would not be a SLAPP suit. But contrary to that court's view, the fact that administrative mandamus is the proper remedy does not exempt it from the anti-SLAPP statute, since it is well-established that an administrative mandamus petition can be found subject to the anti-SLAPP statute. See, e.g., *Moraga-Orinda Fire Protection Dist. v. Weir* (2004) 115 Cal. App. 4th 477.

III. THE GOVERNMENT IS NOW RECOGNIZED AS A "PERSON" FOR FIRST AMENDMENT PURPOSES.

The interpretation of the anti-SLAPP statute found in *Vergos* thus has its roots in *Mission Oaks*, *Moraga-Orinda*, and *Schroeder v. Irvine*

City Council (2002) 97 Cal. App. 4th 174. *Mission Oaks* recognizes in passing that administrative mandamus is the proper remedy to challenge a denial of a land development permit, 65 Cal. App. 4th at 730, but does not say that this exempts a petition from the reach of the anti-SLAPP statute. *Schroeder*, ironically, recognizes that "SLAPP suits are brought to obtain an economic advantage over the defendant, not to vindicate a legally cognizable right of the plaintiff." 97 Cal. App. 4th at 182. Yet the court resoundingly endorsed the government's right to invoke the anti-SLAPP statute, rejected an argument by amicus curiae that the government has no First Amendment rights, and held that a government official's act of voting is an act of free speech. *Id.* at 192, fn. 3.

Moraga-Orinda acknowledges that the anti-SLAPP statute was intended to apply to large corporations that can provoke prolonged litigation, not to an individual's relatively simple mandamus petition. But the court held that no such limitation appears on the face of the statute, and legislative history is irrelevant because the statute is unambiguous, and in any event, the history shows the statute is to be broadly applied. 115 Cal. App. 4th at 482 and fn. 4.

The newly-broadened judicial interpretation of the anti-SLAPP statute now imposes a major risk on any employee contemplating whether to seek judicial review of termination or other employment discipline. Can the employee avoid the anti-SLAPP statute by refraining from suing for damages, and limiting the remedy to reinstatement? No, because SLAPP has already been applied to petitions for civil harassment, which do not seek damages. *Thomas v. Quintero* (2005) 126 Cal. App. 4th 635, 642.

Can the employee avoid the anti-SLAPP statute by filing the mandamus petition against the governmental body only, without naming any officials? No, because the *San Ramon* and *Vergos* decisions hold that the government itself has a constitutional right of petition, which it would be exercising every time it takes disciplinary action against an employee.

The *Vergos* decision, by granting the government a constitutional freedom of speech and petition, has now extended the anti-SLAPP statute to the point where it applies to every petition for administrative mandamus, and probably to every suit that challenges a government decision. In that sense, *Vergos* takes another step in the readjustment of the balance of power between individuals and

government that was recently signaled by the United States Supreme Court in *Garcetti v. Ceballos* (2006) 126 S.Ct. 1951. The *Ceballos* decision took away an individual's constitutional protection for job-related speech, by recognizing it as speech of the government, in which the individual has no interest. *Ceballos* tells individual government employees they must say only what the employer wants them to say, or be terminated and replaced with someone who will. Decisions such as *Vergos* complete the transfer of power by recognizing that the constitutional freedom of speech, which previously protected the employee making the communication, now fully protects the government entity that dictates the content of what its employees may express in their job-related communications.

Thus the *Vergos* decision protects a hearing officer from liability for a decision against the employee, but *Ceballos* leaves the hearing officer with no protection against the employer for making a decision in favor of the employee. Under this scheme, it seems unlikely that any hearing officer would dare decide a case contrary to a governmental employer's interests. And of course, *San Ramon* protects not only the hearing officer, but also the governmental employer itself, in an administrative mandamus action.

IV. ROUTINE ADMINISTRATIVE MANDAMUS PETITIONS ARE NOW SUBJECT TO THE ANTI-SLAPP STATUTE.

It therefore seems that in view of the *San Ramon* and *Vergos* decisions, all employers served with petitions for administrative mandamus challenging employment decisions, are entitled to file an anti-SLAPP motion on the basis of § 425.16(e)(1), as a "written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law;" and (2) as a "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." The employee must then make a preliminary showing of likelihood of prevailing on the merits, or the petition is summarily stricken with an award of attorney fees to the employer.

It is not entirely certain that *Vergos* will trigger a flood of anti-SLAPP motions to counter administrative mandamus petitions. The rule is a windfall that public employers do not really need, and as a practical matter, the government will not often be in a position to be able to execute a judgment for attorney fees against a terminated employee.

From the perspective of judicial economy, an anti-SLAPP motion to challenge a petition for administrative mandamus is quite wasteful, requiring the judge to rule on the same evidence twice: first under the probability of prevailing standard, then under the applicable substantive standard, be it independent judgment or substantial evidence. Where the matter is to be decided by the judge sitting without a jury (*Code of Civil Procedure*, § 1094.5), the preliminary showing of probability to prevail on the merits is equal to the final showing: the court merely predicts what the court will do, then does it.

There are actually at least two procedural advantages an employer would receive from filing an anti-SLAPP motion to strike a mandamus petition. First, if the governmental entity is able to drag its feet in preparing the hearing transcripts, so they are not available in time for the anti-SLAPP motion to be heard, the court can strike the petition on the basis that plaintiff failed to show a probability of prevailing, that the anti-SLAPP statute places the burden on plaintiff to immediately demonstrate the requisite probability of prevailing, and the court is not required to go beyond the pleadings and any declarations then available to make its ruling (CCP §§ 425.16(b)(2) and 425.16(g)). This may sound draconian, but no more so than the underlying rule of *Vergos* itself.

But even assuming the hearing transcript is available, an anti-SLAPP motion unilaterally gives the employer a free dress rehearsal for its defense, which the employee is incidentally forced to finance. If the employer prevails on the motion, the case is over and the employee owes attorney fees. But if the employee survives the motion under the "probability" standard, the ruling will educate the employer as to where it needs to improve its arguments. The anti-SLAPP motion thus gives the employer a second chance to present its legal arguments, a luxury the employee never receives.

It is difficult to predict how widespread the use of anti-SLAPP motions will be against mandamus petitions. Some governmental bodies will not want to bother chasing their fired employees for attorney fees. Others will want to use the tactic for its intimidating effect. When this happens, the anti-SLAPP regime will have come full circle, as a weapon for the government to intimidate individuals who seek to use the courts to question its decisions.

That the government itself has a right to freedom of speech is a perverse twist of

constitutional construction. It does not follow from treating the government as a fictitious "person" for some purposes, that the government itself has a right to claim the benefit of the constitutional freedom of speech. It is the government's raw power to silence an individual that makes it necessary, and even possible, to recognize a freedom of speech. The constitutional freedom of speech specifically means a protection against being silenced by the government. It means the government is restricted from prohibiting, punishing, or imposing burdens on, expressive communication of individuals. The only effect of recognizing a freedom of speech is to restrict the government from doing something it has the raw power to do. It is because of this raw governmental power to silence individuals that the body politic has deemed a constitutional protection necessary and appropriate. Governmental speech does not need this constitutional protection, which would amount to protection from itself. The anomaly of the outcome that flows from the recognition of a governmental right of free speech is compounded by treating the termination of an employee as an act of communication. It is true that the termination is communicated to the employee. But the termination is not effected by telling the employee about it, the termination is effected by no longer paying the employee or accepting a tender of work performance. Even if the First Amendment may protect an employer's statement that the employee is fired, it should not protect the official conduct involved in separating the employee from the position.

To put it simply: the employer has a constitutional right to tell the employee, "You're fired," but that statement does not fire the employee any more than a murderer can be executed by telling him, "You're dead."

Stay safe!

Michael P. Stone is the firm's founding partner and principal shareholder. He has practiced almost exclusively in police law and litigation for 27 years, following 13 years as a police officer, supervisor and police attorney.

Marc J. Berger is the firm's senior law and motion and writs and appeals specialist. He has been associated with Michael P. Stone since 1986.

REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS

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Anti-SLAPP saves the day

State laws protect journalists from unwieldy attorney fees

Feature *Page Number: 24*

Cristina Abello

From the Fall 2009 issue of *The News Media & The Law*, page 24.

Freelance journalist Susan Paterno's *American Journalism Review* story about Wendy McCaw's purchase of the *Santa Barbara News-Press* — and the subsequent wave of defections amongst the paper's seasoned editors and writers — mentioned several lawsuits McCaw had filed or threatened to file against her former and current employees and other publications like the *Santa Barbara Independent* and *Vanity Fair*.

What Paterno didn't know was that she would soon be the target of one.

"I was kind of surprised because it had been through so many layers of lawyers — my brother, a contracts attorney, couldn't believe it," said Paterno, a professor at California's Chapman University, recalling the day she received word of the suit. "From the very beginning I always knew she had nothing to sue me about. There was nothing libelous in the story."

Though McCaw's company, Ampersand Publishing, sued Paterno on multiple claims, it was mainly for allegedly libelous statements in the article. But thanks to California's law against Strategic Lawsuits Against Public Participation, or anti-SLAPP law, Paterno was able to obtain a prompt dismissal of the lawsuit last summer.

Anti-SLAPP statutes are meant to protect people from lawsuits of questionable merit that are often filed to intimidate speakers into refraining from criticizing a person, company, or project. Fighting these suits can be a time-consuming and expensive enterprise. Paterno thinks the anti-SLAPP statute saved her from mortgaging her house to pay legal bills, because it allowed her to recoup most of her attorney fees after the suit's dismissal.

"The law allowed me to avoid what could have been millions of dollars in legal fees," Paterno said. "I was blessed that *AJR* was amazing and they picked up every penny of this horrible, frivolous, revenge-driven lawsuit when it was going through the courts."

Paterno isn't the only journalist who has used anti-SLAPP laws to have lawsuits over their reporting dismissed. In April, the *Wareham Observer* in Massachusetts successfully used the state's anti-SLAPP law to dismiss a town police chief's defamation suit after the paper published articles and commentary critical of the chief's official duties.

According to Samantha J. Brown, the legislative director of the Federal Anti-SLAPP Project — a coalition of advocates who push for a federal law to supplement existing state laws — the attorney fees provision is the most important part of any anti-SLAPP legislation.

"The fee provision is what allows someone to even consider going to court in cases where they wouldn't have an attorney and otherwise would silence themselves immediately," Brown said.

Generally, anti-SLAPP laws are meant to protect the rights of freedom of speech and to petition the government for redress guaranteed by the First Amendment, and state-level statutes protect those rights to varying degrees.

States that have crafted them most broadly, including California, Illinois and Louisiana, apply the statutes to a wide variety of activities that qualify as petitioning. Louisiana's *Lake Charles American Press*, for example, was able to dismiss a suit that arose from its reporting on sales of contaminated fuel. In Illinois, anti-SLAPP laws can be invoked if a lawsuit arises from "any act or acts in furtherance of . . . rights of petition, speech, association, or to otherwise participate in

government."

By contrast, New York's anti-SLAPP law is narrower and applies only to suits by a plaintiff who is a "public applicant or permittee" seeking "a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body." The case must also show "action involving public petition and participation." New York's statute was used by a judge to dismiss former Democratic Rep. Richard Ottinger's libel suit against an anonymous commenter on a newspaper Web site. The commenter criticized both Ottinger and his wife after they were accused of bribery and filing fraudulent documents with a zoning board to get approval for a waterfront house.

Some advocates believe that more work must be done to expand the reach of anti-SLAPP legislation — including implementation of a federal law.

"Twenty-eight states have anti-SLAPP laws, of course, that means that 22 do not, and those protections that do exist vary widely," said Brown, the federal project's legislative director. "First Amendment rights are guaranteed to everyone, and they shouldn't vary according to where you speak out or where you are sued."

As for Paterno, she said she was happy that her case was quickly resolved and hoped it could serve as a reminder that trial judges should dismiss SLAPP suits as swiftly as possible.

"Hopefully in the future, the laws will allow other journalists, nonprofits, activists, and protestors to maybe avoid what I had to go through," Paterno said.

The News Media and The Law, Fall 2009

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Fighting for Free Speech

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Measuring the Impact of Anti-SLAPP Legislation on Monitoring and Enforcement

Posted by Evan Mascagni in Recent SLAPP News | 0 comments

Nov 09, 11

The B.E. Journal of Economic Analysis & Policy published an article measuring the impact of anti-SLAPP legislation on regulator monitoring and enforcement, using US data on monitoring and enforcement activity under the Clean Air Act from 1978-2005.

The main findings: "We find strong evidence that anti-SLAPP laws are associated with increases in regulator monitoring and enforcement activity under the Clean Air Act. In fact, we find that state inspections increase by almost 50% after a state passes anti-SLAPP legislation and that the ratio of findings of noncompliance to inspections more than doubles in the presence of anti-SLAPP legislation." (p. 1.)

The article concludes that "Anti-SLAPP laws drive real changes in regulator behavior in environmental enforcement, even in settings with low citizen involvement in the form of civil suits" and that anti-SLAPP legislation "is good for air quality." (p. 14.) It also discusses plans for future related research.

You can download the full article by Bevin Ashenmiller (Occidental College) and Catherine Shelley Norman (Johns Hopkins University) here:
http://www.bepress.com/bejeap/vol11/iss1/art67/

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Las Vegas Sun

Nevada judges struggle to keep up with backlog

Tuesday, Feb. 17, 2004 | 11:38 a.m.

CARSON CITY -- District Court judges in Clark County lost a little ground last year in their battle to keep up with a backlog of cases.

The 33 District Court judges decided 78,064 cases in the 2003 fiscal year, which ended June 30. That was 840 fewer cases than the previous year.

Still they managed to stay ahead of the 77,136 new cases, up 14 percent from the previous year.

"We're busy. We're trying to stay on top of this," Chief District Judge Michael Douglas said. He said the public, the Nevada Supreme Court and the Legislature want the judiciary to be accountable and that's what the judges in Clark County are striving for.

The numbers were part of an annual report on the state's judiciary released today that said that District Court judges statewide disposed of 105,154 cases last fiscal year, an increase of 8,809 from fiscal 2002. The report measured rulings on nontraffic cases.

Even though Clark County courts lost some ground, they outpaced their counterparts in Washoe County per capita by 61 percent, the study showed.

The 78,064 cases, an average of 2,366 per judge, was 61 percent more than the 17,609 in Washoe County, or 1,467 cases on average for each of the 12 judges.

"If they had more filing, they would have disposed of more cases," Douglas said of Washoe County judges.

In Washoe County the 17,609 cases disposed of compared with 8,892 in the previous year or nearly doubled. Ron Longtin, administrator for the court in Washoe County, said the judges disposed of a big backlog.

The report shows Nevada has fewer District Court judges per 100,000 population than seven other Western states. While California has 4.3 judges in what is called Superior Court, per 100,000 population, there are just 2.7 in Nevada.

But the report also shows there are 1,501 cases filed per Superior Court judge in California, compared to the 1,375 for District Court judges in Nevada.

The Nevada Supreme Court, according to the report, decided 1,889 cases last fiscal year, down from the 1,906 in the prior fiscal year. It was the lowest number of ruling in the last four years. It breaks down to an average of 269 decisions per justice.

But the backlog of cases also declined to 1,426, the lowest number in the last four years. The report said Nevada has more cases filed per justice, at 258, than most other appellate courts, based on figures from the National Center for State Courts.

The study noted that Nevada is one of 11 states that does not have an intermediate court of appeals, something the Nevada Supreme Court has been pushing. The 2003 Legislature approved a proposed constitutional amendment to allow creation of an intermediate court of appeals. It would have to be approved by the 2005 Legislature and then placed on the 2006 ballot for ratification by the voters.

Justice Deborah Agosti, who was chief justice when the annual report was finalized, said the courts in Nevada "are productive, proactive and constantly striving to improve the effective delivery of justice to our citizens."

Ron Titus, chief of the administrative office of the court, said computerized case management systems in many courts have improved the ability to track and report caseloads.

Titus reported there were 114,540 new cases filed last fiscal year in the district courts, more than 8,000 from fiscal 2002. Criminal filings actually decreased from 12,191 in 2002 to 12,001 in fiscal 2003. New civil suits increased from 24,143 to 28,077; family court cases rose from 43,885 to 52,258 and juvenile nontraffic cases inched up to 22,2043 from 22,148.

The report said there were 182,671 new nontraffic cases filed in the justice courts in the state. It said 48,228 were disposed of. But the number of decisions did not include the Las Vegas Justice Court, where there were 104,889 new cases but there was no report available on the number of decisions made.

In addition there were 416,505 traffic and parking violations filed with 353,548 cases disposed of in justice courts.

There were 314,159 cases filed in the municipal courts in Nevada, with decisions made in 301,193.

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Anti-SLAPP Statutes Spread Across the Nation

Media Law Bulletin

November 2011
By: James J.S. Holmes

Is it in the public interest for individuals, organizations and businesses to participate in our governmental process? To speak out about and investigate matters of public concern? To provide information to public entities and other citizens on public issues that affect them without fear of reprisal through abuse of the judicial process? Retaliatory lawsuits filed against one who exercises his or her free speech rights not only threaten the defendant with financial liability, litigation costs, destruction of a business, loss of a home, and other personal losses, but also seriously impact our government, interstate commerce, and individual rights by significantly chilling public participation in public debate, governmental issues and voluntary calls to action.

These lawsuits, called strategic lawsuits against public participation (SLAPP), are becoming more and more common with the increased access to comments, reviews, calls to action and other statements made online by individuals exercising their right to free speech. As a result, many states, including most recently Texas, have sought out the opportunity to pass laws that would prevent SLAPP lawsuits from going forward.

The irony of encroaching on a democratic exchange of ideas at a time when the ease to publish is at an all-time high, is what motivated us to try to get an anti-SLAPP statute passed in one of the most conservative states in the nation – Texas. California has long been the model for anti-SLAPP statutes – having a broad law that has been on the books since 1993. Many jurisdictions, including Illinois, Indiana, Louisiana, Washington and the District of Columbia, have followed California's lead and have recently adopted anti-SLAPP laws cover statements made outside the governmental setting. Still, there are many states that have narrow anti-SLAPP laws and many more that have no protection at all against SLAPP suits. In addition, there is currently no protection at the federal level against being retaliated against for exercising one's free speech rights. We believe, though, that every state in the Union can and should have an anti-SLAPP law. As demonstrated below, Texas can serve as a role model for other jurisdictions.

After more than two years of working to bring together a vast coalition

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of supporters for the legislation, on June 17, 2011, the Texas Citizen Participation Act (also known as the Texas Anti-SLAPP statute) was signed into law by Gov. Rick Perry and went into effect immediately. The law is being heralded as one of the strongest anti-SLAPP statutes in the nation and parts of it are being considered for replication in the federal bill and other state proposals. The key provisions in the law codified at Texas Civil Practice & Remedies Code, Chapter 27 are:

- The statute allows a judge to dismiss frivolous lawsuits filed against one who speaks out about a "matter of public concern" within the first 60 days. "Matter of public concern" is defined expansively in the statute.

- The anti-SLAPP motion is supported by affidavits explaining to the court that the lawsuit is based on, relates to, or is in response to one's exercise of his or her right to free speech, right to petition or right of association.

- The burden of proof is initially on the party who files the anti-SLAPP motion to establish (by a preponderance of the evidence) that the lawsuit was filed in response to the exercise of his or her First Amendment rights. Then the burden shifts to the plaintiff to establish (by clear and specific evidence) a prima facie case for each essential element of the claim.

- The statute creates a stay of discovery in a lawsuit while an anti-SLAPP motion is pending and/or appealed. The court has discretion to order discovery pertaining to the motion if it feels it is necessary.

- That statute provides for mandatory fee shifting when a party wins an anti-SLAPP motion so that the person or entity wrongfully filing a lawsuit must pay the defense costs. There is a discretionary fee award if the court finds that the anti-SLAPP motion was frivolous or brought solely for the purpose of delaying the proceedings.

- The statute provides an immediate right to an expedited appeal if the anti-SLAPP motion is denied.

- The statute applies to lawsuits or "legal actions" (which includes claims and counterclaims that implicate First Amendment rights) filed on or after June 17, 2011.

- The exemptions contained in the statute are for enforcement actions brought by the state or law enforcement, for commercial speech and for wrongful death and bodily injury lawsuits.

This law has already been used to dismiss frivolous lawsuits in Texas and to award fees to the party who was the subject of the SLAPP suit. The goal is to chill meritless lawsuits, not discussion on matters of public concern.

On the federal front, the Public Participation Project is tirelessly working to get a federal anti-SLAPP law on the books so that an individual's rights are protected the same whether they are sued in federal or state court. Sen. Jon Kyl (R-Ariz.) has been leading the effort to draft a bipartisan bill in the Senate. In the House, the bill will be heard by the House Judiciary Committee, chaired by Rep. Lamar Smith (R-Texas). The current draft of the federal bill includes many of the attractive provisions of the state statutes, including a stay of discovery while the anti-SLAPP motion is pending, the right to an immediate interlocutory appeal, and the mandatory shifting of attorney's fees and costs when one prevails on an anti-SLAPP motion. Interestingly, it prohibits amendment of the claim subject to the anti-SLAPP motion after a motion has been filed–likely in an effort to prevent one from trying to plead around the motion. Finally, and perhaps most significantly, it also provides for the right to remove any state SLAPP suit to federal court so that individuals who are not fortunate enough to have a state anti-SLAPP statute can still get the same protection of their First Amendment rights wherever they are sued.

The coalition of supporters for anti-SLAPP legislation at both the state and the federal level have included open government groups, media organizations, trade associations, citizens rights groups (such as ACLU, Public Citizen), consumer organizations (such as Consumers Union), watchdog and government accountability organizations (such as Texas Watch), public interest law firms (such as the Institute for Public Justice), business watchdog organizations (such as the Better Business Bureaus) and electronic communication providers (such as Yelp!) that have been on the defensive end of many SLAPP suits simply for posting people's opinions or their evaluations of businesses. This strong bipartisan coalition has piqued the interest of lawmakers from both sides of the aisle and their members have provided countless examples of SLAPP victims among the constituents of those voting on anti-SLAPP legislation.

We are hopeful that what we were able to accomplish in Texas will help other states in expanding their laws and will assist in getting a federal anti-SLAPP statute passed so that a party cannot forum-shop in an effort to trample one's First Amendment rights. Anti-SLAPP legislation has a broad-based appeal because it protects the little guy, promotes judicial economy, provides for tort reform and advances the First Amendment rights of all citizens.

A Uniform Act Limiting Strategic Litigation Against Public Participation: Getting It Passed
Society Of Professional Journalists Baker and Hostetler LLP
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Introduction | SLAPPs: A Statement of the Problem | Building A Broad Coalition | A Uniform Act Limiting Strategic Litigation Against Public Participation

Fifteen years have passed since the first anti-SLAPP statute was passed in Washington State, and as of spring 2004, 21 states have some type of anti-SLAPP legislation in place. These facts will both benefit and hinder us as we bring our Model Act out into the world. On one hand, we are able to learn from the experiences of others in drafting and passing these statutes, and we have years of anti-SLAPP success stories to draw upon when making our cases. On the other hand, opponents of the legislation will be well equipped to highlight so-called "abuse" of these statutes – which may include, in their views, large media entities using anti-SLAPP motions to fight defamation lawsuits.

In light of this latter point, it is crucial that the journalism community thoughtfully considers the role it will assume in pushing for the future enactment of anti-SLAPP legislation. Without a doubt, media entities and press organizations, as among the more well-heeled and well-respected advocates of these statutes, must use their influence with the public and the government to gain recognition and support of the legislation. However, to the extent it is still possible given the countless examples of anti-SLAPP statutes benefiting the media, these groups need to downplay any personal interest in the legislation and focus on its capacity for empowering the "little guy" and the First Amendment in general.

As we keep our goals and roles in mind, we can also benefit from these tips, which several anti-SLAPP experts – including California Anti-SLAPP Project director Mark Goldowitz and Tom Newton, counsel for the California Newspaper Publishers Association – have offered.

Enlist An Influential Government Supporter. Particularly in governments that are very pro-business or otherwise disinclined to support anti-SLAPP legislation, such legislation is likely to stall without the push of at least one powerful government leader who is strongly invested in its success. In California, Senator Bill Lockyer, a democrat from Alameda County and then-head of the state Judiciary Committee, was inspired by Pring's and Penelope Canan's seminal article on SLAPPs and made it a mission of sorts to enact an anti-SLAPP law in California. A similar role was played by democratic Senator James J. Cox in Louisiana. In Washington State, then-Governor Booth Gardner and his attorney general, Kenneth Eikenberry, pushed for introduction of legislation.

In those cases, the lawmakers initiated the legislation, but we can try to jump-start the efforts in other states by honing in on effective champions for our cause. In the state legislatures, members of the judiciary committees are likely candidates, especially those who have an intellectual bent or have shown themselves to be strong supporters of First Amendment interests. Senator Lockyer was one such man, a former schoolteacher who strongly believed in freedom of thought. Another approach might be to pinpoint some powerful examples of citizens being victimized by SLAPPs (see "Tell A Good Story" below) and target those citizens' representatives, or other legislators who might be particularly affected by their stories.

On the executive front, if it is not possible to engage the governor or another powerful official

directly, it might be fruitful to bring the issue to a potentially interested agency or even a citizen advisory group that has access to agency officials. In Oregon, the idea for an anti-SLAPP statute originated with the citizen involvement advisory committee to the Department of Land Conservation and Development. The committee made a recommendation to the Land Conservation and Development Commission, the Department's public policy decision-making body, and the Commission directed an investigation and appropriate action. Ultimately, the Department drafted a proposal for the legislation and sought sponsors.

Enunciate The Problem. Both in enlisting government support and building a coalition (see "Build A Coalition" below), it is important that we effectively explain what SLAPPs are and why something must be done. Attached as an appendix is a sample "Statement of the Problem," adapted from one prepared by the Communications and Public Affairs Program of the Oregon Department of Land Conservation and Development. It will be most effective if we personalize our "Statements," bearing in mind each state's unique composition and challenges.

Build A Coalition. The single most important lobbying strategy, cited by all the experts, was building the broadest possible coalition to push for passage of the legislation. Media, environmental and civil rights groups are the most frequent supporters of anti-SLAPP legislation, but groups defending the rights of women and the elderly are also potentially strong advocates, as are municipalities and neighborhood and civic associations. Appendix B, which lists the supporters of the California statute, shows the great variety of groups that are sympathetic to anti-SLAPP legislation.

Several states found it useful to develop more formal coalitions, providing organizational structure to harness the power of the myriad supporters. The California Anti-SLAPP Project began as such a coalition and has continued as the lead proponent of improvements to the California statute. New Mexico also had a formal coalition, the NoSLAPP Alliance, which coordinated the statewide media and lobbying campaign.

Finally, in addition to recognizing potential allies, it is important for anti-SLAPP proponents to recognize their likely opponents. Developers and building industry associations are the No. 1 opponents of anti-SLAPP legislation, not surprising given that the quintessential SLAPP involves a developer suing a citizen for his criticism of a development project. Representatives of business, including chambers of commerce, also tend to oppose anti-SLAPP legislation, as did the Trial Lawyers Association in California, though there are certainly arguments as to why anti-SLAPP legislation would benefit its constituency.

Tell A Meaningful Story. Politicians are politicians, and they will be most likely to get behind legislation that makes them look compassionate. Therefore, it is crucial to set off on the lobbying trail with some good stories about SLAPP victims, stories that will outrage lawmakers in their injustice and present them with possible "poster children" for the new legislation. Even more effective is to enlist the victims themselves to tell their own stories.

In California, Senator Lockyer was swayed by the story of Alan LaPointe, a Contra Costa County man who led community opposition to a proposed waste-burning plant. LaPointe spoke against the plant at district meetings and before a grand jury, and was the lead plaintiff in a taxpayer's action filed in 1987 based on an allegedly improper use of public funds for feasibility studies for the proposed plant. The sanitation district cross-complained against LaPointe personally for interference with prospective economic advantage.

In Washington State, the anti-SLAPP legislation was named "The Brenda Hill Bill" after a woman who reported her subdivision developer to the state for failure to pay its tax bill. The developer filed foreclosure proceedings on Hill's home and sued her for defamation, seeking $100,000. Her story swayed both the governor and the legislator who brought the bill, Holly Myers.

In a related matter, point out specific examples of how the current system is insufficient. In New York, legislators passed the anti-SLAPP statute out of frustration over how the legal system was addressing SLAPPs, which were common especially in the real estate context. For example, a developer sued nine Suffolk County homeowner groups and sixteen individuals after they had testified against town approval of a proposed housing development. The developer alleged various tort claims and sought more than $11 million in damages. More than three years later, the case was finally dismissed on appeal.

Channel Your Power Effectively. Media and journalism groups are essential participants in

Anti-SLAPP: Protect Free Speech
Official Secrets Act bill
FOI Groups
Annual FOI Reports
FOI Committee Roster

FOI FYI: SPJ's FOI Committee Blog
– North Carolina paper Cherokee Scout withdraws request for gun records, grovels for forgiveness (http://blogs.spjnetwork.org/foi/2013/02/26/north-carolina-paper-cherokee-scout-withdraws-request-for-gun-records-grovels-for-forgiveness/)
– University of Wyoming will make presidential finalists public, despite new law (http://blogs.spjnetwork.org/foi/2013/02/23/university-of-wyoming-will-make-presidential-finalists-public-despite-new-law/)
– Utah city makes 'confidential' settlement in Taser death suit (http://blogs.spjnetwork.org/foi/2013/01/07/utah-city-makes-confidential-settlement-in-taser-death-suit/)

FOI Committee

This committee is the watchdog of press freedoms across the nation. It relies upon a network of volunteers in each state organized under Project Sunshine. These SPJ members are on the front lines for assaults to the First Amendment and when lawmakers attempt to restrict the public's access to documents and the government's business. The committee often is called upon to intervene in instances where the media is restricted.

Freedom of Information Committee Chair

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E-mail
Bio (click to expand)

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the anti-SLAPP movement, says Goldowitz, because they are a commonly SLAPPed group with a relatively large bank of resources and a significant amount of influence. However, it is crucial that these groups know when and how to use their power. Because of their resources and contacts, media groups should probably play a key role in coalition-building, but the media would probably do best to step back and let their allies tell their own SLAPP stories. The tale of a poor woman fighting a big developer will almost always have more resonance than the travails of a large newspaper facing a baseless libel suit – even by the same developer.

The exception to the hands-off approach should be in running editorials and op-ed pieces. Newspapers and other media have an unmatched ability to reach large numbers of people, and such outreach is crucial to a successful anti-SLAPP campaign. For example, in California, more than two dozen newspapers published editorials in favor of the anti-SLAPP legislation. Op-ed pieces written by coalition allies or SLAPP victims are also powerful. The key is to emphasize the First Amendment benefits of anti-SLAPP legislation while downplaying the possibility that it could be exploited by the media itself.

Play The Politics. Even in situations fairly conducive to the passage of anti-SLAPP legislation, the political stars have to align. In California, two situations having nothing to do with SLAPPs boosted the anti-SLAPP effort immeasurably. First, on the second attempt to pass the legislation, it was merged with another bill that made permanent liability protections for volunteer officers and directors of non-profit organizations. Support for the bill more than doubled, with organizations such as the Red Cross, the United Way, and dozens of local chambers of commerce joining. Increased pressure from all sides contributed to Governor Pete Wilson's decision to sign the bill in 1992 on its third attempt.

Second, when the democrats took control of both houses of the California legislature in 1997, certain anti-SLAPP allies, such as the ACLU and environmental groups, saw a boost in their lobbying influence. This contributed in part to the California coalition's ability to push through an amendment to the anti-SLAPP statute clarifying that its provisions should be interpreted broadly.

Certainly we as political outsiders are limited in the amount of maneuvering we can achieve – and politicians are limited ethically in the steps they can take. But it is always worth using our imaginations and keeping an eye out for situations that may improve the climate for passage of anti-SLAPP legislation.

Be Patient. It can take time to pass anti-SLAPP legislation. In California and Pennsylvania, it took three tries to generate enough momentum and support to achieve success. A first attempt can be effective, even if it doesn't lead to a law, if it gets the issue on the radar screens of lawmakers and citizens. Sometimes, we might have to wait until one political party makes an exit, or the right sponsor comes along.

Be Willing to Compromise. A little bit of give-and-take is essential in the legislative process. In California, in exchange for Governor Wilson's signature on the anti-SLAPP bill, Senator Lockyer agreed to introduce remedial legislation to make mandatory a permissive provision for awarding attorney's fees and costs to a plaintiff who prevailed on a motion to strike. (The remedial legislation has not passed.) In New Mexico, the bill was on the verge of dying in the Senate when a last-minute compromise was brokered which, among other things, changed the definition of what speech would be immunized.

As in New Mexico or Pennsylvania – where the statute was greatly watered down before passage – the results of compromise may be harsh. But keep in mind that where passage of the desired language does not seem possible, it might be better to get some kind of statute on the books. Once that happens, some of the opposing pressure may lift and it may be easier to pass amendments that will bring the statute in line with our goals.

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Appendix A
SLAPPs: A Statement of the Problem

What is a SLAPP Suit?

The essence of a SLAPP suit is the transformation of a debate over public policy – including such local issues as zoning, environmental preservation, school curriculum, or consumer protection – into a private dispute. A SLAPP suit shifts a political dispute into the courtroom, where the party speaking out on the issue must defend his or her actions. Although SLAPP suits may arise in many different contexts, they share a number of features:

1. The conduct of the targets that are sued is generally constitutionally protected speech intended to advance a view on an issue of public concern. In most cases, a SLAPP suit is filed in retaliation for public participation in a political dispute. The plaintiff is attempting to intimidate a political opponent and, if possible, prevent further public participation on the issue by the person or organization.

2. Targets typically are individuals or groups that are advancing social or political interests of some significance and not acting solely for personal profit or commercial advantage.

3. The filers are individuals or groups who believe their current or future commercial interests may be negatively affected by the targets' actions. Though developers and other commercial entities are the most common SLAPP plaintiffs, they are not the only ones. For example, in Oklahoma, a group supporting tort reform was the subject of a class action libel suit filed by trial lawyers, and in California, county officials filed a $42 million SLAPP against a local citizen because of his opposition to a proposed incinerator project.

4. The actions tend to be based on one or more of the following torts: defamation (libel or slander); business torts (interference with contract, business relationships or economic advantage, or restraint of trade); misuse of process (abuse of process or malicious prosecution); civil rights violations (due process, takings, or equal protection); or conspiracy to commit one or more of the above acts.

5. Damages sought are often in the millions of dollars. According to a study by the Denver Political Litigation Project, the average demand was for $9.1 million. See Penelope Canan and George Pring, SLAPPs: Getting Sued for Speaking Out 217 (Philadelphia: Temple University Press, 1996).

6. Almost all SLAPP suits are eventually dismissed or decided in favor of the defendants. Canan and Pring reported that targets win dismissals at the very first trial court appearance in about two-thirds of the cases. Id. at 218. By all accounts, the number of SLAPP suits has increased during the past 30 years. Examples of SLAPP suits from around the country reveal the extent of the practice:

— In Rhode Island, a woman filed comments on proposed groundwater rules, raising concerns about possible contamination from a local landfill. The landfill operators sued her for defamation and tortious interference with prospective business contracts, seeking both compensatory and punitive damages.

— In Pennsylvania, a couple wrote letters to their United States Senator, state health officials, and CBS News complaining about conditions at a local nursing home. The state investigated and eventually revoked the nursing home's license. The nursing home then sued the couple, the Senator, and a state health department official.

— In Minnesota, a retired United States Fish and Wildlife Service employee mobilized his neighbors against a proposed condominium development on a small lake. After the rezoning request was rejected, the developer sued him, alleging he had made false statements that damaged the developer's business reputation.

— In Texas, a woman confined to her home by illness spoke out publicly against a nearby landfill. In response, the landfill owners filed a $5 million defamation suit against the woman and her husband.

— In California, a group of small cotton farmers bought newspaper advertising opposing a proposed ballot measure supported by the nation's largest cotton agribusiness. The corporation sued the farmers for libel, requesting $2.5 million in damages.

— In California, a $63 million lawsuit was filed by a developer who claimed that the Beverly Hills League of Women Voters had unlawfully stymied his 10-acre project.

— In Washington, The Nature Conservancy was sued for $2.79 million by seaweed farm developers after it had inventoried potential natural areas in San Juan County, identified lands that should be preserved (including the plaintiffs'), and turned the study over to the county as a recommendation.

Isn't Action Involving Public Participation And Petition Already Protected By The Constitution? Why Is A Special Anti-SLAPP Provision Needed?

Two constitutional doctrines, both founded on the First Amendment, protect the sort of speech and conduct that is targeted by SLAPPs. The first, the New York Times v. Sullivan doctrine, provides that a person cannot be found liable for a false statement about a public figure on a matter of public concern unless the statement was made with "actual malice," that is, with knowledge that it was false or with reckless disregard for its truth or falsity. The second, the Noerr-Pennington doctrine, provides that petitioning activity is shielded from liability as long as it is genuinely aimed at procuring favorable government action.

Under both these doctrines, a defendant seeking to promptly dispose of a lawsuit files a motion to dismiss, in which the defendant argues that the plaintiff's allegations in the complaint do not state a viable claim. The burden of persuasion lies with the defendant, and the facts alleged are presumed to be true, though later inquiries will be intensely fact-specific. For those reasons, and because the right to sue is itself constitutionally protected, a judge generally will not dismiss a lawsuit at this stage. Most often, the judge will allow the plaintiff to proceed with discovery, including depositions during which the plaintiff's attorney may question the defendant's knowledge, beliefs, and motives.

The problem with the current legal framework is that it takes too long to get SLAPP suits dismissed. According to Dr. Pring, the average SLAPP suit proceeds for 40 months – more than three years. During this time, the suit inflicts massive emotional and financial harm on the defendant, and often the defendant withdraws completely from action involving public participation and petition. By the time the SLAPP suit is dismissed, the plaintiff has thus achieved its goals of retaliation and silencing protected speech.

What Will Anti-SLAPP Legislation Do?

Essentially, anti-SLAPP legislation identifies the speech and conduct that should be protected – defined as "action involving public participation and petition" – and provides a procedure for speedy review of lawsuits that are filed as a result of such protected action. In particular, the proposed legislation permits a suspecting SLAPP victim to file a special motion to strike, which must be heard within 60 days. At the hearing, the SLAPP must be dismissed unless the filer establishes a probability of prevailing. The proposed legislation also states that discovery will be stayed pending a decision on the motion to strike. A prevailing victim is entitled to his attorney's fees and costs, and a court may issue other sanctions to deter similar conduct in the future by the filer or others similarly situated.

The proposed legislation also features protections for those who file legitimate suits and find themselves the subject of special motions to strike. The court will not dismiss a suit if the filer produces substantial evidence to support a prima facie case. Furthermore, the filer is entitled to his attorney's fees and costs if the court finds that the motion to strike was frivolous or filed in bad faith.

Although arguments can be made against anti-SLAPP legislation, such statutes represent a legislative decision that, even though citizen communications may at times be self-interested or incorrect, public participation and petition are essential to our democratic process and must be protected from the threat of SLAPP suits.

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Appendix B
Building A Broad Coalition: Anti-SLAPP Proponents In California
American Civil Liberties Union
American Lung Association of California
Bar Association of San Francisco
California Association of Nonprofits
California Association of Professional Liability Insurers
California Association of Zoos and Aquariums
California Common Cause (good government group)
California First Amendment Coalition
California First Amendment Project (predecessor of CASP)

California League of United Latin American Citizens
California Legislative Council For Older Americans
California Newspaper Publishers Association
California School Employees Association
California Thoracic Society
Center for Law in the Public Interest
City and County of Los Angeles
City of Napa
City of San Diego
City of San Francisco
City of San Mateo
Complete Equity Markets, Inc. (professional insurance company)
Concerned Citizens for Environmental Health
Consumers Union
Friends of the River (statewide river conservation organization)
Golden State Manufactured-Home Owners League
Greenlining Coalition (multi-ethnic community leaders)
Land Utilization Alliance
Neighborhood and civic associations
Planning and Conservation League (California environmental org.)
Public Advocates (public-interest law firm)
Queen's Bench (women's lawyers association in San Francisco)
Sierra Club, Ventana Chapter
Women Lawyers of Alameda County

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A Uniform Act Limiting Strategic Litigation Against Public Participation

PREFATORY NOTE

The past 30 years have witnessed the proliferation of Strategic Lawsuits against Public Participation ("SLAPPs") as a powerful mechanism for stifling free expression. SLAPPs defy simple definition. They are initiated by corporations, companies, government officials, and individuals, and they target both radical activists and typical citizens. They occur in every state, at every level in and outside of government, and address public issues from zoning to the environment to politics to education. They are cloaked as claims for defamation, nuisance, invasion of privacy, and interference with contract, to name a few. For all the diversity of SLAPPs, however, their unifying features make them a dangerous force: They are brought not in pursuit of justice, but rather to ensnare their targets in costly litigation that distracts them from the controversy at hand, and to deter them and others from engaging in their rights of speech and petition on issues of public concern.

To limit the detrimental effects of SLAPPs, 21 states have enacted laws that authorize special and/or expedited procedures for addressing such suits, and ten others are considering or have previously considered similar legislation. Though grouped under the "anti-SLAPP" moniker, these statutes and bills differ widely in scope, form, and the weight they accord First Amendment rights vis a vis the constitutional right to a trial by jury. Some "anti-SLAPP" statutes are triggered by any claim that implicates free speech on a public issue, while others apply only to speech in specific settings or concerning specific subjects. Some statutes provide for special motions to dismiss, while others employ traditional summary procedures. The burden of proof placed on the responding party, whether discovery is stayed pending consideration, and the availability of attorney's fees and damages all vary from state to state. Perhaps as a result of the confusion these variations engender, anti-SLAPP measures in many states are grossly under-utilized.

The Uniform Act Limiting Strategic Litigation Against Public Participation seeks to remedy these flaws by enunciating a clear process through which SLAPPs can be challenged and their merits evaluated in an expedited manner. The Act sets out the situations in which a special motion to strike may be brought, a uniform timeframe and other procedures for evaluating the special motion, and a uniform process for setting and distributing attorney's fees and other damages. In so doing, the Act ensures that parties operating in more than one state will face consistent and thoughtful adjudication of disputes implicating the rights of speech and petition.

Because often conflicting constitutional considerations bear on anti-SLAPP statutes, the Act is in many respect an exercise in balance. The triggering "action involving public participation and petition" is defined so that the special motion to strike may be employed against all true SLAPPs without becoming a blunt instrument for every person who is sued in connection with the exercise of his or her rights of free speech or petition. To avoid due process concerns, the responding party's burden of proof is not overly onerous, yet steep enough to weed out truly baseless suits. Finally, to reduce the possibility that the specter of an anti-SLAPP motion will deter the filing of valid lawsuits, the fee-shifting structure is intended to ensure proper compensation without imposing purely punitive measures. In these ways and more, the Act serves both the citizens' interests in free speech and petition and their rights to due process.

SECTION 1. FINDINGS AND PURPOSES

(a) FINDINGS. The Legislature finds and declares that

(1) there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances;

(2) such lawsuits, called "Strategic Lawsuits Against Public Participation" or "SLAPPs," are typically dismissed as groundless or unconstitutional, but often not before the defendants are put to great expense, harassment, and interruption of their productive activities.

(3) the costs associated with defending such suits can deter individuals and entities from fully exercising their constitutional rights to petition the government and to speak out on public issues;

(4) it is in the public interest for citizens to participate in matters of public concern and provide information to public entities and other citizens on public issues that affect them without fear of reprisal through abuse of the judicial process;

(5) an expedited judicial review would avoid the potential for abuse in these cases.

(b) PURPOSES. The purposes of this Act are

(1) to strike a balance between the rights of persons to file lawsuits and to trial by jury and the rights of persons to participate in matters of public concern;

(2) to establish an efficient, uniform, and comprehensive method for speedy adjudication of SLAPPs;

(3) to provide for attorney's fees, costs, and additional relief where appropriate.

Comment

The findings bring to light the costs of baseless SLAPPs – their harassing and disruptive effect and financial burdens on those forced to defend against them, and the danger that such lawsuits will deter individuals and entities from speaking out on public issues and exercising their constitutional right to petition the government. The stated purposes make clear that that drafters also recognize important interests opposing the speedy disposal of lawsuits, particularly the right of an individual to due process and evaluation of his or her claim by a jury of peers. Thus, the primary intent of the Act is not to do away with SLAPPs, but to limit their detrimental effects on the First Amendment without infringing on citizens' due process and jury trial rights.

Though a statement of findings and purposes is not required in many states (only about half of the anti-SLAPP laws in effect have them), several states have put such statements to good use. They can be invaluable in helping courts interpret the reach of the statute. This has been particularly evident in California, the epicenter of anti-SLAPP litigation. For example, in 1999, the United States Court of Appeals for the Ninth Circuit found the legislative findings crucial to its holding that the statute may properly be applied in federal court. See United States ex rel. Newsham v. Lockheed Missiles and Space Co., 190 F.3d 963, 972-73 (9th Cir. 1999). If the statute were strictly procedural, the court noted, choice-of-law considerations would likely deem it inapplicable in federal court. However, because of California's "important, substantive state interests furthered by anti-SLAPP statute," which are enunciated in Cal. Civ. Proc. Code 425.16(a), the court held that the anti-SLAPP statute should be applied in conjunction with the Federal Rules of Civil Procedure. Id.

The Supreme Court of California also has deemed the legislative findings useful in determining many of the most important questions that have arisen from application of the anti-SLAPP

statute. In Briggs v. Eden Council for Hope and Opportunity, the Court examined whether a party moving to strike a cause of action arising from a statement made before, or in connection with an issue under consideration by, a legally authorized official proceeding was required to demonstrate separately that the statement concerned an issue of public significance. 969 P.2d 564, 565 (Cal. 1999). The court found that the 425.16(a) findings evinced an intent broadly to protect petition-related activity; to require separate proof of the public significance of the issue in such cases would result in the exclusion of much direct petition activity from the statute's protections, contrary to the clear legislative intent. Id. at 573-74. In Equilon Enterprises, LLC v. Consumer Cause, Inc., the same court found that requiring a moving party to demonstrate that the action was brought with an "intent to chill" speech would contravene the legislative intent by lessening the statute's effectiveness in encouraging public participation in matters of public significance. 52 P.2d 685, 689 (Cal. 2002).

The benefits of statements of findings and purposes have been seen outside California as well. In Hawks v. Hinely, an appellate court in Georgia cited the General Assembly's stated findings in holding that statements made in a petition itself – not just statements concerning the petition – trigger the safeguards of the anti-SLAPP statute. 556 S.E.2d 547, 550 (Ga. App. 2001). In Globe Waste Recycling, Inc. v. Mallette, the Supreme Court of Rhode Island found that legislative intent, as recorded in the statute, indicated that statements for which immunity is claimed need not necessarily be made before a legislative, judicial, or administrative body under the terms of the statute. 762 A.2d 1208, 1213 (R.I. 2000). Finally, in Kauzlarich v. Yarbrough, an appellate court in Washington held that the legislative findings indicated that the Superior Court Administration is an "agency," and thus communications to that entity trigger the immunity protection and other benefits of the anti-SLAPP statute. 20 P.3d 946 (Wash. App. 2001).

SECTION 2. DEFINITIONS

As used in this Act,

(a) "Claim" includes any lawsuit, cause of action, claim, cross-claim, counterclaim, or other judicial pleading or filing requesting relief;

(b) "Government" includes a branch, department, agency, instrumentality, official, employee, agent, or other person acting under color of law of the United States, a state, or subdivision of a state or other public authority;

(c) "Moving party" means a person on whose behalf the motion described in Section 4 is filed seeking dismissal of a claim;

(d) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or any other legal or commercial entity.

(e) "Responding party" means a person against whom the motion described in Section 4 is filed.

Comment

Most SLAPPs present themselves as primary causes of action, with the moving party as the defendant to the original SLAPP suit and the responding party as the plaintiff. However, "claim," "moving party," and "responding party" are defined so the protections of the statute extend to other, less common situations. For example, the moving party may be a plaintiff in the underlying action if the SLAPP claim is a counter-claim. See, e.g., Simmons v. Allstate Ins. Co., 92 Cal. App. 4th 1068 (Cal. Ct. App. 2001); Wilcox v. Superior Court, 27 Cal. App. 4th 809 (Cal. Ct. App. 1994). Alternatively, the moving and responding parties may be co-defendants or co-plaintiffs in the underlying action if the SLAPP claim is a cross-claim.

Similarly, while the quintessential SLAPPs are brought by corporate entities against individuals, the definition of "person" in the Act is not so limited. A "person" eligible to be a moving or responding party under the Act may be an individual or a wide range of corporate or other entities. Thus, the evaluation of a SLAPP claim is properly focused on the substance of the claim rather than peripheral matters such as the status of the parties. With the same purpose in mind, "government" is defined broadly to ensure that action in furtherance of the right of petition is not construed to include only interaction with administrative agencies.

SECTION 3. SCOPE; EXCLUSION

(a) SCOPE. This Act applies to any claim, however characterized, that is based on an action involving public participation and petition. As used in this Act, an "action involving public participation and petition" includes

(1) any oral statement made, or written statement or other document submitted, in a legislative, executive, or judicial proceeding or other proceeding authorized by law;

(2) any oral statement made, or written statement or other document submitted, in connection with an issue under consideration or review by a legislative, executive, or judicial proceeding or other proceeding authorized by law;

(3) any oral statement made, or written statement or other document submitted, that is reasonably likely to encourage, or to enlist public participation in an effort to effect, consideration or review of an issue in a legislative, executive, or judicial proceeding or other proceeding authorized by law;

(4) any oral statement made, or written statement or other document submitted, in a place open to the public or a public forum in connection with an issue of public concern; or

(5) any other conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern, or in furtherance of the exercise of the constitutional right of petition.

(b) EXCLUSION. This Act shall not apply to any action brought by the attorney general, district attorney, or city attorney, acting as a public prosecutor, to enforce laws aimed at public protection.

Comment

This section is the core of the statute, defining what First Amendment activities will trigger the protections stated herein. First, the claim must be "based on" an action involving public participation and petition. The existing California statute uses the terminology "arising from," but in response to confusion over that language, the California Supreme Court has held that "the critical point is whether the plaintiff's cause of action itself was based on an act in furtherance of the defendant's right of petition or free speech." City of Cotati v. Cashman, 52 P.3d 695 (Cal. 2002). The use of "based on" in this Act is designed to omit that confusion and clarify that there must be a real – not simply temporal – connection between the action involving public participation and petition and the legal claim that follows.

The term "action involving public participation and petition" is modeled after the defining language in the existing New York and Delaware anti-SLAPP statutes and is designed to reinforce the model statute's main focus: to protect the public's right to participate in the democratic process through expression of their views and opinions. This terminology is also designed to avoid the confusion engendered by the existing California statute – which is triggered by a cause of action arising from an "act in furtherance of person's right of petition or free speech . . . in connection with a public issue" – over whether the statute only applies to activity addressing a matter of public concern. As discussed below, this statute is not so limited.

The first three subsections contain no requirement that the statements made relate to a matter of public concern. This is consistent with the California Supreme Court's holding in Briggs v. Eden Council for Hope and Opportunity, 969 P.2d 564 (Cal. 1999). In that case, two owners of residential rental properties sued a nonprofit corporation over statements made by employees of the defendant in connection with the defendant's assistance of a tenant in pursuing an investigation of the plaintiffs by the Department of Housing and Urban Development. The California Supreme Court held that the section "broadly encompasses participation in official proceedings, generally, whether or not such participation remains strictly focused on Ôpublic' issues." Id. at 571.

Subsection (4) is drawn from the existing California statute and its progeny and offers protection for statements made in a place open to the public or a public forum in connection with an issue of public concern. The statute does not attempt to define "a place open to the public" or "a public forum," out of concern that such a definition would be unintentionally restrictive. This provision clearly encompasses those spaces historically considered public forums – such as parks, streets, and sidewalks Ð but on the fringes, there has been more confusion. In particular, courts have disagreed on whether a publication of the media constitutes a public forum, such that a lawsuit stemming from a media publication would be subject to an anti- SLAPP motion. Compare Zhao v. Wong, 48 Cal. App. 4th 1114 (Cal. Ct. App. 1996) (holding

private newspaper publishing falls outside concept of public forum), and Lafayette Morehouse, Inc. v. Chronicle Publishing Co., 37 Cal. App. 4th 855 (Cal. Ct. App. 1995) (same), with Baxter v. Scott, 845 So. 2d 225 (La. Ct. App. 2003) (holding professor's website is public forum), Seelig v. Infinity Broadcasting Corp., 97 Cal.App.4th 798 (Cal. Ct. App. 2002) (holding radio talk show is public forum), M.G. v. Time Warner, 89 Cal.App.4th 623 (Cal. Ct. App. 2001) (holding magazine is public forum), and Damon v. Ocean Hills Journalism Club, 85 Cal.App.4th 468 (Cal. Ct. App. 2000) (holding residential community newsletter is public forum). Courts are encouraged to consider this and related issues with an eye toward the purposes of the statute and the intent that it be construed broadly (see Section 8 below).

Finally, Subsection (5) is designed to capture any expressions of the First Amendment right of free speech on matters of public concern and right of petition that might not fall under the other categories. This includes all such conduct, such as symbolic speech, that might not be considered an oral or written statement or other document. This provision resembles the corresponding provision in the existing California statute, which covers "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." See Cal. Code Civ. Proc. ¤ 425.16(e)(4). However, this provision has been modified to make clear that conduct falling within the right to petition the government need not implicate a matter of public concern. This broad provision has been held to include speech published in the media, and is intended to do so here. See M.G. v. Time Warner, 89 Cal.App.4th at 629.

It is likely that most situations which the proposed statute is designed to address will be addressed by the five subdivisions discussed above. However, as written, the list is not exclusive. A court has jurisdiction to find that the protections of this Act are triggered by a claim based on actions that do not fall within these subdivisions, if the court deems that the claim has the effect of chilling the valid exercise of freedom of speech or petition and that application of the Act would not unduly hinder the constitutional rights of the claimant.

Subsection (b) provides that enforcement actions by the government will not be subject to anti-SLAPP motions. This exclusion is intended to ensure that the statute's protections do not hinder the government's ability to enforce consumer protection laws. In People v. Health Laboratories of North America, 87 Cal. App. 4th 442 (Cal. Ct. App. 2001), the Court of Appeals of California upheld a similar provision in the California statute against an equal protection challenge. The court noted that the exclusion is consistent with the purposes of the statute, as a public prosecutor is not motivated by retaliation or personal advantage, and it held that the provision is rationally related to the legitimate state interest of ensuring the government may pursue actions to enforce its laws uniformly. The language from the existing California statute has been modified to make clear that the exception does not apply only to civil enforcement actions initiated in the name of the people of the state.

SECTION 4. SPECIAL MOTION TO STRIKE; BURDEN OF PROOF

(a) A party may bring a special motion to strike any claim that is based on an action involving public participation and petition, as defined in Section 3.

(b) A party bringing a special motion to strike under this Act has the initial burden of making a prima facie showing that the claim against which the motion is based on an action involving public participation and petition. If the moving party meets this burden, the burden shifts to the responding party to establish a probability of prevailing on the claim by presenting substantial evidence to support a prima facie case. If the responding party meets this burden, the court shall deny the motion.

(c) In making a determination under subsection (b), the court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(d) If the court determines that the responding party has established a probability of prevailing on the claim,

(1) the fact that the determination has been made and the substance of the determination may not be admitted into evidence at any later stage of the case; and

(2) the determination does not affect the burden of proof or standard of proof that is applied in the proceeding.

(e) The Attorney General's office or any government body to which the moving party's acts were directed may intervene to defend or otherwise support the moving party.

Comment

Section 4 sets out the expedited process through which "a claim that is based on an action involving public participation and petition" may be evaluated. Subsection (a) states that a party subject to such a claim may file a special motion to strike that claim. Many existing anti-SLAPP statutes provide for adjudication through motions to dismiss or motions for summary judgment. This Act mimics the existing California statute in choosing terminology that makes clear that this Motion is governed by special procedures that distinguish it from other dispositive motions.

Subsection (b) delineates the allocation of the burden between the moving and responding parties. The moving party first must make a prima facie showing that the claim is based on an action involving public participation and petition, as defined in Section 3. The moving party need not show that the action was brought with the intent to chill First Amendment expression or has such a chilling effect, though such a showing might be necessary if the action does not fit into one of the five specified categories in Section 3.

If the moving party carries its burden, the responding party must establish a probability of prevailing on its claim. This standard is higher than the standard of review for a traditional motion to dismiss; in addition to stating a legally sufficient claim, the responding party must demonstrate that the claim is supported by a prima facie showing of facts that, if true, would support a favorable judgment. See Briggs v. Eden Council for Hope and Opportunity, 969 P.2d 564 (Cal. 1999); Matson v. Dvorak, 40 Cal. App. 4th 539 (Cal. Ct. App. 1995). In so doing, the responding party should point to competent, admissible evidence.

In evaluating whether the responding party has put forth facts establishing a probability of prevailing, the court shall also consider defenses put forth by the moving party. As Subsection (c) makes clear, at all stages in this examination the court must consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

Existing and proposed state statutes that allocate a similar burden of proof to the responding party have faced constitutional challenges. In New Hampshire in 1994, a senate bill modeled on the existing California statute was presented to the state Supreme Court, which found that it was inconsistent with the state's constitution. See Opinion of the New Hampshire Supreme Court on an Anti-SLAPP Bill, 641 A.2d 1012 (1994). The court found that the statute's provision for court consideration of the pleadings and affidavits denied a plaintiff who is entitled to a jury trial the corresponding right to have all factual issues resolved by a jury. In the face of similar concerns, the Rhode Island General Assembly amended its statute in 1995 to do away with the "special motion to dismiss" provision and its "preponderance of the evidence" standard. See Hometown Properties, Inc. v. Fleming, 680 A.2d 56 (R.I. 1996).

The opinion of the New Hampshire Supreme Court evinces a misunderstanding of a court's role in evaluating a motion to strike and response. The court does not weigh the parties' evidence at this preliminary stage, but rather determines whether the responding party has passed a certain threshold by pointing to the existence of evidence that creates a legitimate issue of material fact. See Lafayette Morehouse, Inc. v. Chronicle Publishing Co., 37 Cal. App. 4th 855 (Cal. Ct. App. 1995); Dixon v. Superior Court, 30 Cal. App. 4th 733 (Cal. Ct. App. 1994); see also Lee v. Pennington, 830 So. 2d 1037 (La. Ct. App. 2002) ("The only purpose of [the state statute] is to act as a procedural screen for meritless suits, which is a question of law for the court to determine at every stage of a legal proceeding."). The court's analysis is not unlike that which it would undertake in examination of a summary judgment motion. Furthermore, the court may permit a responding party to conduct discovery after the filing of a special motion to strike if the responding party needs such discovery to establish its burden under the Act. See Section 5, infra.

Subsection (d) provides that if a responding party is successful in defeating a special motion to strike, its case should proceed as if no motion had occurred. The evaluation of a special motion to strike is based on the examination of evidence, the veracity of which is assumed at this preliminary stage but has not been established. Thus, the survival of a motion to strike is not a reflection of the validity of the underlying claim, and evidence of the survival of a motion to strike is inadmissible as proof of the strength of the claim. Likewise, the special motion to strike should in no way alter the burden of proof as to the underlying claim.

A variation of subsection (e) is included in almost every existing anti-SLAPP statute and

provides that the attorney general's office or the government body to which the moving party's acts were directed may intervene to defend or otherwise support the moving party. Many of the most troubling SLAPPs are brought by a powerful party against a relatively powerless individual or group. Though the government's role is purely discretionary, this provision is designed to grant more targets of SLAPPs the resources needed to fight baseless lawsuits.

SECTION 5. REQUIRED PROCEDURES

(a) The special motion to strike may be filed within 60 days of the service of the most recent complaint or, in the court's discretion, at any later time upon terms it deems proper. A hearing shall be held on the motion not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.

(b) All discovery and any pending hearings or motions in the action shall be stayed upon the filing of a special motion to strike under Section 3. The stay of discovery shall remain in effect until the entry of the order ruling on the motion. Notwithstanding the stay imposed by this subsection, the court, on motion and for good cause shown, may order that specified discovery or other hearings or motions be conducted.

(c) Any party shall have a right of expedited appeal from a trial court order on the special motion or from a trial court's failure to rule on the motion in a timely fashion.

Comment

The procedures set out in Section 5 are designed to facilitate speedy adjudication of anti-SLAPP motions, one of the main goals of this Act. Subsection (a) states that unless the court deems it proper to appoint a later deadline, a special motion to strike must be filed within 60 days of service of the most recent amended complaint – or the original complaint, if it has not been amended. The motion must be heard by the court within 30 days of service of the motion to the opposing party, unless the docket conditions of the court require a later hearing. The court may not delay the hearing date merely for the convenience of one or both parties.

Subsection (b) provides for a stay of discovery and all other pending motions from the time a special motion to strike is filed until the entry of the order ruling on the motion. This stay is designed to mitigate the effects of SLAPP suits brought for the purpose of tying up the SLAPP victim's time and financial resources. However, it is also understood that in some situations the party opposing the special motion to strike will need discovery in order to adequately frame its response to the motion, and restricting discovery in these situations might raise constitutional concerns. In addition, there will be times when a stay on all other pending motions will be impractical.

Thus, the court is permitted, on motion and for good cause shown, to permit limited discovery and/or the hearing of other motions. Relevant considerations for the judge when evaluating "good cause" include whether the responding party has reasonably identified material held or known by the moving party that would permit it to demonstrate a prima facie case, see Lafayette Morehouse Inc. v. Chronicle Publishing Co., 37 Cal. App. 4th 855, 868 (Cal. Ct. App. 1995), and whether the materials sought are available elsewhere, see Schroeder v. City Council of City of Irvine, 97 Cal. App. 4th 172 (Cal. Ct. App. 2002). The requirement for a timely motion is intended to be enforced; responding parties will not be permitted to raise the issue for the first time on appeal or when seeking reconsideration. See Evans v. Unkow, 38 Cal. App. 4th 1490 (Cal. Ct. App. 1995).

Subsection (c) makes clear that an order granting or denying a special motion to strike is immediately appealable. This provision is modeled after the 1999 amendment to the existing California statute that was intended to give the moving party -- the party the statute was designed to protect Ð- the same ability as the responding party to challenge an adverse trial court ruling. Originally, the California statute permitted the responding party to appeal the grant of a motion to strike, while the moving party could only challenge the denial through petition for a writ in the court of appeals, a process that is disfavored and rarely successful.

SECTION 6. ATTORNEY'S FEES, COSTS, AND OTHER RELIEF

(a) The court shall award a moving party who prevails on a special motion to strike made under Section 3, without regard to any limits under state law:

(1) costs of litigation and any reasonable attorney's fees incurred in connection with the motion; and

(2) such additional relief, including sanctions upon the responding party and its attorneys or law firms, as the court determines shall be necessary to deter repetition of the conduct and comparable conduct by others similarly situated.

(b) If the court finds that the special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award reasonable attorney's fees and costs to the responding party.

Comment

The attorney's fee provisions are a central feature of the Uniform Act, designed to create the proper incentives for both parties considering lawsuits arising out of the First Amendment activities of another, and parties pondering how to respond to such lawsuits. Subsection (a) sets out the costs, fees, and other relief recoverable by a moving party who succeeds on a special motion to strike under this statute. It provides that a prevailing movant is entitled to recover reasonable attorney's fees and costs, and that the court should issue such other relief, including sanctions against the responding party or its attorneys, as the court deems necessary to deter the responding party and others from similar suits in the future. Subsection (b) counterbalances (a) by providing mandatory fee-shifting to the responding party if the court finds that the special motion to strike is frivolous or brought with intent to delay.

Nearly every state anti-SLAPP statute includes a section providing for mandatory or discretionary fee-shifting for the benefit of a prevailing movant. The main purpose of such provisions is to discourage the bringing of baseless SLAPPs by "plac[ing] the financial burden of defending against so-called SLAPP actions on the party abusing the judicial system." Poulard v. Lauth, 793 N.E.2d 1120, 1124 (Ind. Ct. App. 2003); see also Ketchum v. Moses, 17 P.3d 735, 745 (Cal. 2001). Another important purpose of such provisions is to encourage private representation of parties defending against SLAPPs, even where the party might not be able to afford fees. See id. Thus, fees are recoverable even if the prevailing defendant is represented on a pro bono basis, see Rosenaur v. Scherer, 88 Cal. App. 4th 260, 287 (Cal. Ct. App. 2001).

By "reasonable attorney's fees," the statute refers to those fees that will adequately compensate the defendant for the expense of responding to a baseless lawsuit. See Robertson v. Rodriguez, 36 Cal. App. 4th 347, 362 (Cal. Ct. App. 1995). The statute permits the use of the lodestar method for calculating reasonable fees. The lodestar method provides for a baseline fee for comparable legal services in the community that may be adjusted by the court based on factors including (1) the novelty and difficulty of the questions involved; (2) the skill displayed by the attorneys; (3) the extent to which the nature of the litigation precluded other employment of the attorneys; and (4) the contingent nature of the fee award. See Ketchum, 17 P.3d at 741. Even if the lodestar method is not followed strictly, the court may take those and other factors – such as a responding party's bad-faith tactics – into account in determining "reasonable" fees.

Much confusion has arisen in the application of California's anti-SLAPP statute over what constitutes a "prevailing" defendant or moving party, particularly where the responding party voluntarily dismisses the underlying case prior to a court's ruling on the special motion to strike. The authors of this statute agree with the majority of California courts that proper disposition of these situations requires the court to make a determination of the merits of the motion to strike. See Pfeiffer Venice Properties v. Bernard, 107 Cal. App. 4th 761, 768 (Cal. Ct. App. 2002); Liu v. Moore, 69 Cal. App. 4th 745, 755 (Cal. Ct. App. 1999). If the court finds that the moving party would have succeeded on its motion to strike, it shall award the moving party reasonable attorney's fees and costs. This interpretation does not provide a disincentive for responding parties to dismiss baseless lawsuits, because if the responding party timely dismisses, the moving party will likely have incurred less in fees and costs than it would have if the responding party pursued its lawsuit to a ruling on the motion to strike.

One California court has held that where the responding party voluntarily dismisses prior to a ruling on the special motion to strike, the responding party could prove it prevailed by showing "it actually dismissed because it had substantially achieved its goals through a settlement or other means, because the [moving party] was insolvent, or for other reasons unrelated to the probability of success on the merits." Coltrain v. Shewalter, 66 Cal. App. 4th 94, 107 (Cal. Ct. App. 1998). This analysis is flawed because it places impoverished moving parties in the position of having to fight baseless SLAPP suits out of their own pockets because the responding party

can at any time dismiss the SLAPP on the grounds that the moving party is insolvent and thereby avoid paying attorney's fees.

Another question that has arisen in the interpretation of the California statute is how the fee award is to be assessed if the moving party's victory is partial or limited in comparison to the litigation as a whole. In such cases, the prevailing movant is entitled to a fee award reduced by the court to reflect the partial or limited victory. See ComputerXpress, Inc. v. Jackson, 93 Cal. App. 4th 993, 1019 (Cal. Ct. App. 2001). Finally, the government, if it prevails on a special motion to strike, is entitled to recover its fees and costs just as a private party would. See Schroeder v. City Council of City of Irvine, 99 Cal. App. 4th 174, 197 (Cal. Ct. App. 2002).

Subsection (a)(2), which gives the court discretion to apply additional sanctions upon the responding party, is modeled after a provision in Guam's anti-SLAPP statute. Several state statutes (though notably not California's) provide for additional sanctions beyond fees and costs in various circumstances, with most requiring a showing that the responding party brought its lawsuit with the intent to harass. See, e.g., 10 Delaware Code ¤ 8138(a)(2); Minnesota Statutes ¤ 554.04(2)(b). Such intent-based provisions are ineffective because they place a heavy burden of proof on moving parties when, in fact, most SLAPP lawsuits by definition are brought with an intent to harass. The provision in this Act lifts the heavy burden from the moving party but at the same time makes clear that additional relief is not to be applied in every case Ð only when the court finds that an extra penalty would serve the purposes of the Act.

Just as subsection (a) is designed to deter the filing of baseless SLAPPs, subsection (b) is intended to deter parties who find themselves on the receiving end of valid lawsuits from filing special motions to strike that have no chance of success and show some evidence of bad faith on the part of the movant. The court should grant reasonable attorney's fees to the responding party when, for example, the moving party cannot in good faith maintain that the underlying conduct constitutes "action involving public participation and petition." See Moore v. Shaw, 116 Cal. App. 4th 182, 200 (Cal. Ct. App. 2004).

As a final matter, a moving party who prevails on a special motion to strike under this Act will recover attorney's fees and costs related to a successful appeal on the issue. Dove Audio, Inc. v. Rosenfeld, Meyer & Susman, 47 Cal. App. 4th 777, 785 (Cal. Ct. App. 1996); Church of Scientology v. Wollersheim, 42 Cal. App. 4th 628, 659 (Cal. Ct. App. 1996). In addition, a moving party may recover reasonable fees in connection with an appeal even when the responding party does not pursue the appeal to a final determination. Wilkerson v. Sullivan, 99 Cal. App. 4th 443, 448 (Cal. Ct. App. 2002).

SECTION 7. RELATIONSHIP TO OTHER LAWS

Nothing in this Act shall limit or preclude any rights the moving party may have under any other constitutional, statutory, case or common law, or rule provisions.

SECTION 8. UNIFORMITY OF APPLICATION AND CONSTRUCTION

This Act shall be applied and construed liberally to effectuate its general purpose to make uniform the law with respect to the subject of this Act among States enacting it.

SECTION 9. SEVERABILITY OF PROVISIONS

If any provision of this Act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 10. SHORT TITLE

This Act may be cited as the Uniform Act Limiting Strategic Litigation Against Public Participation.

SECTION 11. EFFECTIVE DATE

This Act takes effect ..... .

[Top]

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The Anti-SLAPP Statute: A New Defense For Developers?

By Daniel P. Dain (http://pview.findlaw.com/view/2521885_1) of Goodwin Procter LLP (http://pview.findlaw.com/view/2625194_1)

A little noticed Superior Court decision in December may have broad implications for developers of real estate. In dismissing a lawsuit filed by members of the community against a real estate developer in Pierce v. Mulhern, [1] the Superior Court recognized apparently for the first time in Massachusetts that real estate developers are afforded the protections of the Massachusetts anti-SLAPP statute. [2] As the realities of real estate development in the Commonwealth mandate active public engagement by developers, through hearings with governmental agencies or meetings with community groups, the decision in Pierce largely shields such activity from direct legal action.

"SLAPP" is an acronym for "strategic litigation against public participation," and the law is meant to protect those who participate in a public process from retaliatory litigation, typically alleging causes of action such as defamation or tortious interference with contractual relations/prospective business opportunity, that itself may be meritless, but the defense against which may be very costly. The anti-SLAPP law has historically been the domain of those petitioning against, not proponents of, development. Indeed, the Supreme Judicial Court, in the leading case interpreting the anti-SLAPP statute, wrote, "The typical mischief that the legislature intended to remedy was lawsuits directed at individual citizens of modest means for speaking publicly against development projects." [3] The Supreme Judicial Court identified a single case as the "impetus" for the introduction of the anti-SLAPP legislation in 1994 in Massachusetts. In that case, a developer sued 15 citizens of Rehoboth who, ostensibly concerned with the protection of wetlands, had signed a petition against a permit for the construction of six single-family residences. The suit was eventually dismissed, but not before the 15 citizens had incurred thousands of dollars in legal fees defending against the action.

The anti-SLAPP law works this way: The target of a SLAPP suit files a "special motion to dismiss." The movant must show that the claims in the suit are solely "based on" the exercise of the "right of petition under the constitution of the United States or of the commonwealth." [4] The statute defines "petitioning activity" broadly to include just about any public statement concerning an issue pending before a governmental body. If the initial showing is made, then the burden shifts to the party who brought the suit to establish (1) that the petitioning activity "was devoid of any reasonable factual support or any arguable basis in law"; and (2) that the petitioning activity caused actual injury to the party who brought the lawsuit. [5] This burden shifting imposes a high hurdle: to prove, without the benefit of discovery, the total lack of merit of the petitioning activity. Failure to meet this burden subjects the party who brought the lawsuit to paying the target's legal fees and costs. [6]

In the recent Superior Court case, Pierce, members of the community appealed a special permit issued by the Winchester Zoning Board of Appeals to the developer of a proposed assisted living facility. The Superior Court vacated the special permit on procedural grounds and remanded the matter back to the Zoning Board of Appeals. The developer, however, rather than returning to the ZBA to try to secure another special permit that the members of the community likely would just appeal again, asked the ZBA to sponsor Warrant Articles for Town Meeting to amend the Town's by-laws in such a way that a special permit would not be necessary to proceed with the proposed facility. The members of community filed a contempt complaint against the developer, its principals and attorney, the ZBA and the Town, alleging that the failure to return to the ZBA for a new special permit violated the remand order.

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ADDENDUM000108

The developer filed a special motion to dismiss under the anti-SLAPP statute arguing that the contempt complaint was based solely on the petitioning activity to the Town Meeting. The members of the community filed an opposition brief arguing that the developer was trying to turn the anti-SLAPP statute on its head, that the "intention" of the statute was to "protect the rights of individual members of the public," not big developers.

The Superior Court disagreed with this concern, finding nothing in the statute to limit its protections only to private citizens. [7] The court found that the developer had made its initial showing that the contempt complaint was based solely on the petitioning activity. With the burden then shifted to the members of the community, the court found that they had not established the lack of a factual or legal basis for the petitioning activity. The court observed that "As a result of what [the developer] perceived as ambiguities in the Town's zoning bylaws, the [developer] sought to clarify or change those bylaws through proposed Warrant Articles that would accommodate the Project." [8] The Superior Court dismissed the lawsuit.

To get projects built in the Commonwealth, developers are compelled to participate in a variety of public forums. The Superior Court's decision in Pierce protects developers from direct attacks against that public participation.

Footnotes

1. Civil Action No. 2001-2825-C.
2. M.G.L. c. 231, § 59H.
3. Duracraft Corp. v. Holmes Products Corp., 427 Mass. 156, 161 (1998).
4. M.G.L. c. 231, § 59H; Duracraft, 427 Mass. at 165.
5. M.G.L. c. 231, § 59H.
6. Id.
7. Memorandum and Order at 5.
8. Id. at 7.

Public Participation Project
Fighting for Free Speech
www.anti-slapp.org

Why Anti-SLAPP Laws are Valuable to the Business Community

"Every dollar spent defending against a groundless lawsuit is a dollar that won't be spent on research and development, capital investment, worker training or job creation."
-Sherman "Tiger" Joyce, President – American Tort Reform Association

Strategic Lawsuits Against Public Participation (SLAPPs) are meritless lawsuits brought not to vindicate legal rights, but to harass, intimidate and silence those who engage in public participation. Such lawsuits use the justice system as a weapon, and waste time and resources on frivolous, meritless claims.

SLAPPs are most commonly brought as malicious prosecution, defamation, and interference with business claims, but businesses also face SLAPPs in the guise of trademark and copyright infringement, anti-trust violations and allegations of conspiracy.

Federal anti-SLAPP legislation would be valuable to the business community because it:

-Provides a procedure for expedited dismissal of SLAPPS to quickly rid the courts of meritless lawsuits;
-Prohibits or limits discovery in a SLAPP, thus reducing litigation costs;
-Provides for attorney's fees and costs for a defendant who successfully has the case dismissed, which deters the bringing of SLAPPs;
-Eliminates the current incentive to forum shop for a jurisdiction with no anti-SLAPP law by providing a uniform level of protection across jurisdictions, while leaving intact state protections.

Examples of SLAPPs targeting the business community:

-In its termination form after firing an employee in 2002, Wells Fargo noted that it was firing the employee for "violation of company policies by misrepresenting information in the sale of annuities, not being properly registered and firm procedures regarding annuity applications." The employee sued Wells Fargo for, among other things, defamation and intentional interference with prospective business relations based on the comments in the termination form. Wells Fargo brought an anti-SLAPP motion and was ultimately successful in the Court of Appeals, allowing them to recover attorneys' fees incurred in defending against the claim. *Fontani v. Wells Fargo Investments, LLC*, 129 Cal. App. 4th 719 (2005).

-Recent anti-SLAPP decisions in California serve to protect businesses against liability arising from certain hiring and firing actions. Business' ability to obtain accurate employment- screening information was strengthened in *Mendoza v. ADP Screening and Selection Services, Inc*. (2010) 182 Cal. App. 4th 1644, which held that background reports on potential employees are constitutionally protected activity within the meaning of the anti-SLAPP law. Similarly, in a 2009 wrongful termination suit that also included claims of defamation, an employer's statements to a regulatory agency regarding the reason for an employee's termination were properly subject to an anti-SLAPP motion. *Dible v. Haight Ashbury Free Clinics, Inc*., 170 Cal. App. 4th 843.

-Calibra Pictures, the production company behind the movie *Iron Cross*, sued Variety magazine over a negative review of the movie. Because Variety had previously enticed Calibra to spend substantial amounts of money to advertise the movie with it, Calibra sued Variety for, among other claims, breach of contract and fraud. Variety filed an anti-SLAPP motion and it was granted, allowing Variety to recover its attorneys' fees. The CA Court of Appeal held that the lawsuit arose from an exercise of free speech and that there was no evidence that Variety waived its rights to publish the review.

THE WALL STREET JOURNAL.
WSJ.com

JUNE 1, 2010, 9:48 AM ET

Online Venters Rejoice: Federal Anti-SLAPP Law Taking Shape

That airline lose your luggage (again)? A rental-truck outfit overcharge you unjustifiably? That bedbug exterminator spray everywhere except where the bedbugs roam?

In a fit of pique, you might be inclined to take your complaints online, to create an "Acme BugsAway Stinks!" group on Facebook or maybe even film your own Howard Beale-like tirade and put it up on YouTube.

If you do, know that a complaint from the object of your ire might soon be on its way. And maybe a lawsuit.

The NYT on Tuesday has a story on the trend of companies fighting back against consumers who vent online, mostly in the form of defamation suits.

According to the story, those who vent online may often be protected by the First Amendment. But the Constitution doesn't always carry the day — the threat of a suit is often enough to get angry consumers to pull down their remarks.

Many states have what are called anti-SLAPP laws — laws that ban these types of suits. (SLAPP stands for "Strategic Lawsuit Against Public Participation.) Congress is thinking about passing its own.

The bill, in the House Subcommittee on Courts and Competition Policy, would, according to the NYT, enable a defendant who believes he is being sued for speaking out or petitioning on a public matter to seek to have the suit dismissed.

Under the proposed law, if a case is dismissed for being a SLAPP suit, the plaintiff would have to pay the other side's legal fees.

"Just as petition and free speech rights are so important that they require specific constitutional protections, they are also important enough to justify uniform national protections against Slapps," said Mark Goldowitz, director of the California Anti-Slapp Project, which helped draft the bill.

MINUTES OF THE
SENATE COMMITTEE ON JUDICIARY

Seventy-Seventh Session
April 5, 2013

The Senate Committee on Judiciary was called to order by Chair Tick Segerblom at 8:03 a.m. on Friday, April 5, 2013, in Room 2149 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to Room 4412 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Tick Segerblom, Chair
Senator Ruben J. Kihuen, Vice Chair
Senator Aaron D. Ford
Senator Justin C. Jones
Senator Greg Brower
Senator Scott Hammond
Senator Mark Hutchison

GUEST LEGISLATORS PRESENT:

Senator Donald G. Gustavson, Senatorial District No. 14
Senator David R. Parks, Senatorial District No. 7
Senator Michael Roberson, Senatorial District No. 20
Assemblyman John Ellison, Assembly District No. 33

STAFF MEMBERS PRESENT:

Mindy Martini, Policy Analyst
Nick Anthony, Counsel
Caitlin Brady, Committee Secretary

OTHERS PRESENT:

Rocky Cochran, Cochair, Coalition for Fairness in Construction; President, Southern Nevada Home Builders Association

Senator Hutchison:
It would be status quo. Correct?

Chair Segerblom:
Correct. I will close the work session on S.B. 226.

SENATOR JONES MOVED TO AMEND AND DO PASS AS AMENDED S.B. 226.

SENATOR FORD SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

* * * * *

Chair Segerblom:
I am opening the work session on S.B. 286.

SENATE BILL 286: Provides immunity from civil action under certain circumstances. (BDR 3-675)

Ms. Martini:
Senate Bill 286 defines the right to free speech in direct connection with an issue of public concern to be in a place open to the public or in a public forum. A person who engages in such communication is immune from any civil action for claims based upon that communication. Senator Jones submitted a proposed amendment provided in the work session document (Exhibit R). The proposed amendment provides revisions and indicates the reason for each.

Senator Jones:
A few issues raised by District Judge Elizabeth Gonzalez of the Eighth Judicial District regard section 3, subsection 3, paragraph (f). The proposed amendment changes it from "7 days after the motion is filed" to "7 judicial days after the motion is served upon the plaintiff or plaintiffs." This will ensure sufficient time for notice to the opposing party. The other changes affect section 4, subsection 1, paragraph (b), and section 4, subsection 2, paragraph (b), concerning the $10,000 penalty awarded in addition to attorney's fees. The amended language makes the award discretionary and in an amount "up to $10,000."

Senator Hutchison:
Was it a mandatory fee and now it is discretionary up to $10,000?

Senator Jones:
The attorney's fees are separate. The $10,000 is on top of attorney's fees.

Chair Segerblom:
I view it as being similar to NRCP 11.

Senator Hutchison:
Is there anything mandatory now?

Senator Jones:
No, it is all discretionary.

Senator Hutchison:
I was concerned with the mandates. I am comfortable giving the courts discretion.

Chair Segerblom:
I will close the work session on S.B. 286.

SENATOR FORD MOVED TO AMEND AND DO PASS AS AMENDED S.B. 286.

SENATOR KIHUEN SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

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