SLAPP DOWN: THE USE (AND ABUSE) OF ANTI-SLAPP MOTIONS TO STRIKE

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I. INTRODUCTION

An older man retires (or is pushed out of the job, depending on whom you ask) after years of forecasting the weather on a major TV network. A man over forty with broadcast experience, as well as degrees in Geosciences and Broadcast Meteorology, applies for the position. The network gives the job to the young woman (with no such degrees) who had been the weather reporter at its sister station, thus creating a vacancy at that second station. The man applies for the position at the sister station, which the network gives to another young, attractive woman. The man sues on the bases of age and sex discrimination. The network counters by filing an anti-SLAPP motion, claiming that the man's case — an employment discrimination case — constitutes a Strategic Lawsuit Against Public Participation, or SLAPP suit. In other words, a multi-billion dollar corporation files an anti-SLAPP motion to prevent one individual's discrimination case from allegedly interfering with its (the corporation's) free speech rights. Recent U.S. Supreme Court decisions have found in favor of expanding

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corporations' rights, a trend seemingly followed by lower courts' rulings on anti-SLAPP motions to strike.[1] Based on its legislative history, the original intent of the anti-SLAPP motion was to encourage public participation. The anti-SLAPP motion to dismiss was designed to allow people to speak out against wrongdoings without being afraid that the defendant would engage in expensive legal maneuvers and machinations, solely for the purpose of wearing down (and possibly bankrupting) the plaintiff. How is it that a giant corporation could use such a tool against one individual?

Section I of this paper will discuss what is an anti-Strategic Lawsuit Against Public Participation motion to strike and the legislative history behind it. Section II will examine the application of anti-SLAPP motions to early cases, and then note how that application evolved in later cases. The recent case of *Hunter v. CBS, Inc.* will serve to illustrate in Section III how far anti-SLAPP suits have evolved, and finally, Section IV will critique that evolution and make suggestions for reining in the misuse of anti-SLAPP motions.

II. ANTI-SLAPP SUITS: LEGISLATIVE HISTORY

After struggling for several years to get legislation passed that would address the proliferation of SLAPP suits (Strategic Lawsuits Against Public Participation), then- California state senator Bill Lockyer finally succeeded. In 1992, the California Legislature enacted S.B. 1264 (Lockyer), later codified as California Civil Code Section 425.16, after vetoes by Governors George Deukmejian and Pete Wilson, though Wilson ultimately signed a later version that included a five-year sunset provision and required the award of attorney's fees to a prevailing plaintiff if the court finds that "the motion was frivolous or solely intended to cause unnecessary delay."[2] In doing so, the

[1] *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 342 (2010); Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2768 (2014). Discussion of these cases is beyond the scope of this article.

[2] *An Act to Amend Section 425.16 of the Code of Civil Procedure, Relating to Actions: Hearing on S.B. 9 Before the Assemb. Comm. on Judiciary*, 1993 Leg., 2 (Cal. 1993) [hereinafter *Hearing*] (statement of Sen. William Lockyer, author), *available at* http://www.leginfo.ca.gov/pub/93-94/bill/sen/sb_0001-0050/sb_9_cfa_930714_102859_asm_comm.

California Legislature noted the "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."[3] Section 425.16 (the anti-SLAPP suit statute) was intended to encourage participation in public interest matters and avoid the chilling of such participation through "abuse of the judicial process."[4] It was also meant "to provide for the early dismissal of unmeritorious claims filed to interfere with the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances."[5]

Courts apply a two-part test in anti-SLAPP suits. First, the motion must be brought by defendants against plaintiffs whose acts are "arising from" any act taken "in furtherance of" their rights of petition or free speech under the U.S. or California Constitution.[6] That exercise must involve a public issue or matter of public interest, such as a consumer group filing a notice of intent to sue an oil company for private enforcement of the state's Safe Drinking Water and Toxic Enforcement Act.[7] In order to meet its burden, the defendant must show that the statement or conduct on which the lawsuit is based falls into one of four categories enumerated in Section 425.16(e).[8] The first three categories involve a written or oral statement (1) made before a legislative, executive or judicial proceeding, or any other authorized official proceeding,[9] or (2) made in connection with an issue being considered or reviewed by a legislative, executive or judicial body, or any other

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[3] CAL. CIV. PROC. CODE § 425.16(a) (West 2015).

[4] *Id.*

[5] Club Members for an Honest Election v. Sierra Club, 196 P.3d 1094, 1098 (Cal. 2008) (internal citation omitted).

[6] CAL. CIV. PROC. CODE § 425.16(b)(1).

[7] *See* Equilon Enters. v. Consumer Cause, Inc., 52 P.3d 685, 687-89 (Cal. 2002).

[8] Martin v. Inland Empire Utils. Agency, 130 Cal. Rptr. 3d 410, 422 (Ct. App. 2011).

[9] CAL. CIV. PROC. CODE § 425.16(e)(1).

authorized official proceeding,[10] or (3) made in a place open to the public or a public forum connected to an issue of public interest.[11] The final category refers to any other conduct in furtherance of the constitutional rights of free speech and petition in connection with a public issue or an issue of public interest.[12] Once the first part of the test is met, the courts will grant the special motion to strike unless plaintiffs, in the second part of the test, can show a probability of prevailing on the merits.[13] A plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts" to win the case in order to meet the second part of the test.[14] If the first part is not met, the court must deny the motion and does not move on to the second part at all.[15]

Filing an anti-SLAPP motion stays all discovery proceedings in most cases,[16] which can cause significant delays in a case moving forward. If the motion to strike is successful, the court awards attorney's fees to the party bringing the motion.[17] Only if the court finds that the motion was used to delay the proceedings, or that it is frivolous will costs be awarded to the party opposing the motion at the court's discretion, pursuant to California Civil Code Section 128.5.[18] Once an anti-SLAPP motion has been granted or denied, it is automatically appealable under California Civil Code Section 904.1,[19] which causes even more delays.

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[10] *Id.* § 425.16(e)(2).

[11] *Id.* § 425.16(e)(3).

[12] *Id.* § 425.16(e)(4).

[13] *Id.* § 425.16(b)(1).

[14] Wilson v. Parker, Covert & Chidester, 50 P.3d 733, 739 (Cal. 2002) (internal quotations and citations omitted).

[15] Tuszynska v. Cunningham, 131 Cal. Rptr. 3d 63, 69 (Ct. App. 2011).

[16] CAL. CIV. PROC. CODE § 425.16(g).

[17] *Id.* § 425.16(c)(1).

[18] *Id.*

[19] *Id.* § 425.16(i).

In 1993, S.B. 9 amended Section 425.16 to make attorney's fees and costs by prevailing defendants on the special motion mandatory instead of permissive. The legislature remarked that the typical SLAPP suit is:

> brought by a well-heeled plaintiff against a less well-financed defendant for the purpose of intimidating and, ultimately, silencing the defendant. For example, the proponent of a controversial development may file a SLAPP suit against the most vocal private citizen who opposes the project. The obvious intent of the SLAPP suit is to discourage the citizen from 'speaking,' including statements made by the citizen at, and in, public forums, such as city council hearings and 'letters-to-the-editors.'[20]

While it did not change the substance of Section 425.16, a 1997 amendment did add a phrase to the preamble that provided an instrument for defendants in cases far removed from public participation to use against plaintiffs. By noting that the statute "shall be construed broadly,"[21] the legislature opened the door for defendants to use anti-SLAPP suits in cases only tangentially related to free speech and public participation. More recent interpretations of Section 425.16 by courts have allowed defendants to hide behind anti-SLAPP suits as a way to avoid employment discrimination lawsuits, an outcome not contemplated in the legislative history.[22]

[20] *Hearing, supra* note 2.

[21] 1997 Cal. Legis. Serv. 271 (West) (current version at CAL. CIV. PROC. CODE § 425.16 (West 2015)).

[22] *See* CAL. CIV. PROC. CODE § 425.16.

III. THE EVOLUTION OF ANTI-SLAPP SUITS

A. EARLY USE OF ANTI-SLAPP SUITS

In one of the first cases to apply Section 425.16, the California Court of Appeal in *Wilcox v. Superior Court* took the opportunity to provide context for its enactment. [23] While SLAPP suits may involve any number of business torts, the paradigmatic SLAPP suits involve large corporations, such as land developers, who file suit as a means to quell the environmental or political objections of community activists so that the developers may achieve their goals.[24] Unlike a standard lawsuit, the plaintiff's primary goal in a SLAPP suit is not to win, but to cause economic hardship on the defendant.[25] In fact, the court in *Wilcox* commented that SLAPP suits frequently lack merit, but that plaintiffs are not concerned if that is the case.[26] The plaintiff, for instance, does not expect to win. The plaintiff wishes "to tie up the defendant's resources for a sufficient length of time to accomplish plaintiff's underlying objective."[27] So while the community activist group is embroiled in costly litigation, defending its position on a corporation's poor environmental record, the corporation is free to continue its disputed practices with impunity.

One feature of SLAPP suits is "that they are generally meritless suits brought by large private interests to deter common citizens from exercising their political or legal rights or to punish them for doing so."[28] Because winning the lawsuit is not the plaintiff's primary objective, defending against SLAPP suits poses unique challenges. Where malicious prosecution or abuse of process suits might act as deterrents in other types of cases, they are impotent in SLAPP cases because the SLAPP plaintiff simply

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[23] Wilcox v. Superior Court, 33 Cal. Rptr. 2d 446 (Ct. App. 1994).

[24] *Id.* at 449.

[25] *Id.* at 450.

[26] *Id.*

[27] *Id.*

[28] *Id.*

considers any penalties assessed the cost of doing business.[29] In response to the difficulties faced by defendants in SLAPP suits (particularly lengthy litigation that drains the defendant SLAPPee's resources and ultimately allows the plaintiff SLAPPer to achieve its goals), the California Legislature enacted Section 425.16.[30] In examining the two-prong test required in order to successfully bring an anti-SLAPP motion under Section 425.16, the court in *Wilcox* determined as follows: first, the defendant (in the SLAPP suit) must show that the plaintiff's suit arose from the defendant's protected activity[31] (e.g., the plaintiff land developer brought the SLAPP suit in response to defendant environmental group's public objection to the developer destroying a protected species' habitat); second, the plaintiff must establish a reasonable (as opposed to substantial) probability of prevailing.[32] Unlike in a motion for nonsuit, which does not permit a court to consider conflicting evidence, but only evidence that is favorable to the plaintiff,[33] a motion to strike under Section 425.16 states that "the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based."[34]

Dixon v. Superior Court[35] illustrates the typical — and arguably appropriate — use of anti-SLAPP legislation. Keith Dixon, an archaeologist and California State University, Long Beach (CSULB) professor emeritus of anthropology, wrote a critique of a surveyor's report, finding it flawed.[36] Despite his concerns, CSULB proceeded with the proposed project and continued to use the surveyor (SRS) for additional work.[37] A

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[29] *Wilcox,* 33 Cal. Rptr. 2d at 450.

[30] *Id.* at 450-51.

[31] *Id.* at 452.

[32] *Id.* at 454.

[33] *Id.* at 457.

[34] CAL. CIV. PROC. CODE § 425.16(b)(2).

[35] Dixon v. Superior Court, 36 Cal. Rptr. 2d 687 (Ct. App. 1994).

[36] *Id.* at 690.

[37] *Id.* at 691.

number of years later, CSULB commissioned a study on the environmental impact of a new development.[38] Dixon objected to that report's findings as well, and renewed his concerns about SRS and the fact that it refused to correct previous errors.[39] As a result of Dixon's criticisms of SRS, CSULB asked SRS not to bid on the new project.[40] In response, SRS filed a lawsuit against Dixon, seeking over half a million dollars in damages for a variety of claims, including interference with contractual relations.[41] Characterizing SRS's lawsuit as a SLAPP suit, Dixon moved to strike the complaint under Section 425.16, claiming that his statements to CSULB were made solely for the purpose of participating in the California Environmental Quality Act (CEQA) public comment period about CSULB's proposed project.[42] The trial court denied the motion.[43] SRS countered that Dixon's comments were not part of the official CEQA public comment process and therefore not entitled to protection.[44] SRS also argued that Dixon's comments were not entitled to protection because they were made with malice.[45] The Court of Appeal rejected both arguments, finding not only that Dixon's comments were made in connection with a matter of public concern,[46] but that Dixon's motivation in making them was irrelevant, and therefore malice was not at issue in the case.[47] The appellate court then turned to the question of SRS's probability of prevailing at trial, finding that it could not because Dixon's comments were entitled to absolute

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[38] *Id.*

[39] *Id.* at 691-92.

[40] *Id.* at 692.

[41] *Dixon*, 36 Cal. Rptr. 2d at 692.

[42] *Id.* at 692.

[43] *Id.*

[44] *Id.* at 693.

[45] *Id.*

[46] *Id.* at 694-95.

[47] *Dixon*, 36 Cal. Rptr. 2d at 695-96.

immunity.[48] The Court of Appeal directed the trial court to issue a new order, granting Dixon's motion and dismissing the complaint against him.[49]

Another early case also demonstrates how an anti-SLAPP suit can effectively respond to an unfounded lawsuit. In *Lafayette Morehouse, Inc. v. Chronicle Publishing Co.*, More University attempted to penalize the *San Francisco Chronicle* and its reporters for investigating and publishing reports surrounding the alternative university's questionable use of its property.[50] The articles referred to the unusual nature of the university by describing it as a "sensuality school" offering a "unique course in carnal knowledge,"[51] and related how it had allowed homeless people to take up residence on its site.[52] This led to public hearings to determine if More had violated local health laws or other governmental regulations by refusing to comply with zoning laws or cease the challenged activity of permitting homeless people to live in tents on its site.[53] The Chronicle responded to More's libel lawsuit by filing a Section 425.16 motion to strike, which the trial court granted because More could not prove the articles were false.[54] More appealed when the trial court denied its motion to reconsider; the court found that the school failed to show both that the content of the articles was false and that there was any actual malice on the part of the Chronicle.[55] Concluding that Section 425.16 properly applied to a media defendant, the appellate court looked at the plain language of the statute and determined that its reference to "freedom of speech," as in the furtherance of free speech in

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[48] *Id.* at 697.

[49] *Id.*

[50] Lafayette Morehouse, Inc. v. Chronicle Publ'g Co., 44 Cal. Rptr. 2d 46, 48-49 (Ct. App. 1995).

[51] *Id.* at 49.

[52] *Id.* at 48.

[53] *Id.*

[54] *Id.* at 50.

[55] *Id.*

connection with a public issue,[56] included "freedom of the press," and upheld the trial court's application of the anti-SLAPP suit in this case.[57]

Next, the appellate court addressed More's constitutional challenges to the statute.[58] Citing the Legislature's clear statement of intent — that participation in public interest matters should be encouraged—the court noted that Section 425.16 accomplished this goal by evaluating complaints resulting from the exercise of free speech rights early on.[59] Finding a rational relationship between the statute and the Legislature's stated goal, the court concluded that the statute did not violate More's equal protection rights.[60]

More also argued that the language of the statute obligated the trial court to weigh the evidence, thereby violating its right to a jury trial, because a plaintiff's complaint may be subject to a motion to strike unless the plaintiff can show a probability of prevailing on the merits.[61] In order to determine that probability, the statute directs the court to "consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based."[62] Were a trial court to weigh evidence and decide factual disputes in a motion to strike, it would violate the jury clause of the California Constitution.[63] Classifying Section 425.16 as one of several California statutes that allows courts to dispose of particular meritless causes of action, the appellate court in *Morehouse* agreed with the approach set forth by other appellate courts when considering this type of statute.[64] Proper construing of the

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[56] CAL. CIV. PROC. CODE § 425.16(e).

[57] *Morehouse*, 44 Cal. Rptr. 2d at 51-52.

[58] *Id.* at 52.

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] CAL. CIV. PROC. CODE § 425.16(b)(2).

[63] CAL. CONST. art I, § 16.

[64] *Morehouse*, 44 Cal. Rptr. 2d at 53.

statute only requires courts to determine if the plaintiff has presented sufficient evidence for a prima facie case, which would not violate the right to a jury trial.[65] After dismissing More's constitutional arguments, the appellate court found that More did not meet its burden of showing a probability of prevailing on the merits (finding that each of the allegedly libelous statements was true) and upheld the trial court's granting of the Chronicle's anti-SLAPP suit.[66]

Equilon Enterprises, LLC v. Consumer Cause, Inc. not only exemplifies the typical big corporation versus consumer group scenario contemplated by the legislature when it passed Section 425.16,[67] it also settles the question of whether or not the anti-SLAPP motion must include proof of intent to chill protected speech.[68] After the consumer group Consumer Cause served notice of its intent to sue for alleged clean water violations under Proposition 65,[69] Equilon responded by seeking an injunction to prevent Consumer Cause from proceeding with a Proposition 65 enforcement action.[70] Consumer Cause then brought an anti-SLAPP motion to strike, which the trial court granted, and the Court of Appeal affirmed.[71] The California Supreme Court granted review to settle the question that had divided the Courts of Appeal: whether or not a defendant who makes a Section 425.16 motion to strike must prove that the plaintiff brought the SLAPP suit in order to chill defendant's constitutional rights to free speech and petition.[72] Equilon

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[65] *Id.*

[66] *Id.* at 55.

[67] SLAPP suits are typically brought by a wealthy plaintiff "against a less well-financed defendant for the purpose of intimidating and ultimately, silencing the defendant. For example, the proponent of a controversial development may file a SLAPP suit against the most vocal private citizen who opposes the project." *Hearing*, *supra* note 2.

[68] *Equilon Enters., LLC v. Consumer Cause, Inc.*, 52 P.3d 685, 687 (Cal. 2002).

[69] *See* CAL. HEALTH & SAFETY CODE § 25249.7(d) (West 2015).

[70] *Equilon*, 52 P.3d at 687-88.

[71] *Id.* at 688.

[72] *Id.*

argued that Section 425.16 should only apply when a plaintiff files a SLAPP motion with the intent to chill speech, an interpretation the court declined to follow.[73] Referencing the 1997 amendment broadening the statute's application, the court determined that including an intent-to-chill requirement would undermine the legislature's express purpose of encouraging public participation and free speech.[74] Concluding that the legislature stated its intent unequivocally in Section 425.16, the court rejected Equilon's request to add an additional requirement not contemplated by the legislature.[75] Instead, the court affirmed the Court of Appeal's decision, finding that Equilon's action against Consumer Cause arose from Consumer Cause's exercise of its constitutional rights to free speech and petition through the Proposition 65 intent-to-sue notices.[76]

Navellier v. Sletten[77] gave the California Supreme Court the opportunity to expand on its interpretation of anti-SLAPP suits. The plaintiffs sued Sletten in federal court for breach of fiduciary duties related to his management of an investment fund.[78] The parties settled, and as part of the settlement, Sletten signed a general release, though he later asserted that it was unenforceable.[79] After a series of federal proceedings, plaintiffs filed a state action that accused Sletten of: (1) fraud for misrepresenting his intention to be bound by the release, thus causing plaintiffs to incur additional litigation costs in federal court; and (2) breach of contract for filing counterclaims in the federal action.[80] Sletten responded by filing an anti-SLAPP motion, which the trial court denied, and the Court of Appeal

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[73] *Id.* at 689.

[74] *Id.*

[75] *Id.*

[76] *Equilon*, 52 P.3d at 694.

[77] Navellier v. Sletten (*Navellier I*), 52 P.3d 703 (Cal. 2002).

[78] *Id.* at 706.

[79] *Id.* at 707.

[80] *Id.*

affirmed.[81] The appellate court stated that the action did not meet the "arising from" an act "in furtherance of" the right of free speech or petition because its primary purpose was not to chill speech or petition rights, and was not an abuse of the judicial process.[82] The California Supreme Court reversed, noting that Sletten did not have to show either that plaintiffs intended to chill Sletten's speech, or that plaintiffs' action actually had a chilling effect on his free speech rights.[83] "In the anti-SLAPP context, the critical consideration is whether the cause of action is *based on* the defendant's protected free speech or petitioning activity."[84] The California Supreme Court found that the plaintiffs' breach of contract action was based on Sletten's filing of counterclaims, and those counterclaims involved a "written or oral statement . . . made in connection with an issue under consideration or review by a . . . judicial body."[85] For defendants to meet their burden under the first prong of the test, they must show that it is their "*activity* that gives rise to his or her asserted liability — and whether that activity constitutes protected speech or petitioning."[86]

The court declined to narrow how the statute was applied by excluding particular causes of action, stating that to do so "would contravene the Legislature's express command that Section 425.16 'shall be construed broadly.'"[87] The court also disagreed with plaintiffs' argument that because the preamble referenced lawsuits that chill the "valid exercise" of free speech and petition rights, there is a separate "proof-of-validity requirement" contained in Section 425.16.[88] Instead, the court placed any determination of the validity of the defendants'

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[81] *Id.*

[82] *Id.*

[83] *Navellier I*, 52 P.3d at 708.

[84] *Id.* at 709.

[85] *Id.* (quoting CAL. CIV. PROC. CODE §425.16 (e)(2)).

[86] *Id.* at 710-11.

[87] *Id.* at 711 (quoting CAL. CIV. PROC. CODE § 425.16(a)).

[88] *Id.* at 712.

underlying action squarely in the second part of the test, as part of the plaintiffs' burden to establish the probability of prevailing on the merits of the case.[89] Dismissing plaintiffs' claim that defendants must prove that their actions are protected under the First Amendment as a matter of law, the court noted that to do so would effectively eliminate the need for the second prong of the test, where the plaintiff must show a likelihood of success.[90] Therefore, because the plaintiffs filed suit based on Sletten's exercise of his free speech and petition rights, the court determined that the first prong of the two-part test had been met, and remanded the case back to the Court of Appeal to consider if the plaintiffs were likely to prevail on the merits.[91]

While the majority found that Sletten's suit itself met the first prong under Section 425.16, the dissent argued that because the underlying breach of contract and fraud claims brought by Navellier did not arise from Sletten's suit, the case was not a SLAPP suit.[92] Therefore, because Navellier's claims were based on the underlying dispute and not Sletten's suit, they did not fall under SLAPP law.[93] Or in the alternative, if Sletten's suit met the requirements of a statement made to a judicial body, then so should have Navellier's suit, thus transforming Sletten's counterclaims into a SLAPP suit as well.[94]

Shortly after the California Court of Appeal ruled that the plaintiffs in *Navellier* could not show a probability of prevailing, and reversed the order denying the motion to strike,[95] it decided a case that centered on news reporting. The court found that there was no question that reporting the news qualifies as speech, subject both to First Amendment protections and to Section 425.16 motions, so long as the report concerns a matter

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[89] *Navellier I*, 52 P.3d at 712.

[90] *Id.* 713.

[91] *Id.*

[92] *Id.* (Brown, J., dissenting).

[93] *Id.* at 714.

[94] *Id.* at 715-16.

[95] Navellier v. Sletten (*Navellier II*), 131 Cal. Rptr. 2d 201, 212 (Ct. App. 2003).

of public interest or a public issue.[96] In *Lieberman v. KCOP Television, Inc.*, a doctor sued KCOP after it aired an investigative report that included secret recordings of him improperly prescribing controlled substances.[97] KCOP brought a Section 425.16 motion to strike, which the Superior Court denied, and KCOP appealed.[98] On appeal, the court had to determine that KCOP's action of broadcasting a news report that contained information gleaned from secretly recording Lieberman constituted an act in furtherance of its free speech rights.[99] While previous courts had not resolved the question of whether or not news gathering was an act "in furtherance of" the media's right to free speech, the court in *Lieberman* decided that it was, with limitations.[100] Differentiating between lawful and unlawful activities, the court agreed that unlawful newsgathering should not be afforded the same constitutional protection as news reporting.[101] "The right to speak and publish does not carry with it the unrestrained right to gather information."[102] Regardless, the court found that whether or not KCOP's secret recordings were lawful, they were in furtherance of its right to free speech, and therefore met the first prong of the two-part test.[103] An act is in furtherance of a right if it helps to advance that right or assists the exercise of that right.[104] Thus Lieberman's complaint could be classified as a SLAPP suit, and the court next had to decide if Lieberman demonstrated a

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[96] Lieberman v. KCOP Television, Inc., 1 Cal. Rptr. 3d 536, 541 (Ct. App. 2003).

[97] *Id.* at 538.

[98] *Id.* at 539-40.

[99] *Id.* at 541-42

[100] *Id.* at 542.

[101] *Id.*

[102] *Lieberman*, 1 Cal. Rptr. 3d at 542 (quoting Zemel v. Rusk, 381 U.S. 1, 17 (1965)).

[103] *Id.*

[104] *Id.*

reasonable probability of prevailing at trial.[105] Finding that he did, the Court of Appeal affirmed the trial court's denial of KCOP's SLAPP motion.[106]

B. FURTHER REFINEMENT OF ANTI-SLAPP SUITS

In a trio of cases decided in 2011, the California Court of Appeal solidified its position on various aspects of Section 425.16. In *Tamkin v. CBS Broadcasting, Inc.*,[107] the court reiterated the two-part test used to decide if a lawsuit should be treated as a SLAPP suit. First, the party bringing the anti-SLAPP motion (the defendant in the underlying action) must show that the lawsuit arose from an act in furtherance of free speech or petition rights, that is, protected activity.[108] "An act is in furtherance of the right of free speech if the act helps to advance that right or assists in the exercise of that right."[109] The burden then shifts to the plaintiff in the underlying action to show a probability of prevailing.[110] Only if both parts of the test are met — the action arises from free speech or petition rights and the plaintiff has little chance of winning the case — will the underlying action be stricken as a SLAPP suit.[111] If a party appeals the denial of an anti-SLAPP motion, the court must independently determine if each part of the test in the anti-SLAPP statute has been met.[112] In *Tamkin*, plaintiffs in the underlying action brought defamation and invasion of privacy claims when defendants (TV writer and network) used plaintiffs' names as placeholders in a leaked early draft of a television script that portrayed them in an unfavorable light.[113] The court

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[105] *Id.*

[106] *Id.* at 544-545.

[107] Tamkin v. CBS Broad., Inc.,122 Cal. Rptr. 3d 264 (2011).

[108] *Id.* at 270.

[109] *Id.* at 271.

[110] *Id.* at 270.

[111] *Id.* at 270-71.

[112] *Id.* at 271.

found that the underlying tort actions were based on the defendants' acts of using the plaintiffs' names, circulating the script for production purposes and approving casting descriptions sent to talent agents, all of which furthered their free speech rights.[114] "The creation of a television show is an exercise of free speech."[115]

Next, the court examined whether the acts were connected to a public issue or matter of public interest.[116] While the legislature in the preamble of Section 425.16 directed that the statute should be construed broadly, it did not define public interest.[117] The court took the phrase at face value and stated that an issue is of public interest if the public is interested in that issue, and that it did not have to be of any great significance.[118] Using that definition, the court concluded that the creation and broadcasting of the TV episode was of public interest because the public was interested in that TV show.[119] Setting the bar so low when classifying something as an issue of public interest, if it simply interests the public, helped lay the groundwork so that later cases could more easily meet this requirement. The defendants' acts arose from protected activities because using the plaintiffs' names in early drafts of the scripts and distributing those early drafts for production purposes aided the defendants in exercising their free speech rights of creating a TV show.[120] Because the court decided that creating the show was a matter of public interest, the first part of the test was met.[121]

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[113] *Tamkin*, 122 Cal. Rptr. 3d at 268.

[114] *Id.* at 271.

[115] *Id.*

[116] *Id.*

[117] *Id.* (citing CAL. CIV. PROC. CODE § 425.16(a)).

[118] *Id.* at 271-72.

[119] *Tamkin*, 122 Cal. Rptr. 3d at 272.

[120] *Id.*

[121] *Id.*

When examining whether or not the second part of the test has been met, the court may consider pleadings and affidavits but does "not weigh credibility or determine the weight of the evidence."[122] Ultimately, the court concluded that because the Tamkins failed to meet the second prong of the test—they were not likely to prevail on their defamation and invasion of privacy claims—the anti-SLAPP motion should have been granted and reversed the trial court's denial of the motion.[123]

The critical factor in an anti-SLAPP suit is whether or not the plaintiff's lawsuit is based on an act that was in furtherance of an act of free speech or petition related to a public issue. "By its terms, this . . . includes not merely actual exercises of free speech rights but also conduct that furthers such rights."[124] The underlying act must fit one of the four categories noted in Section 425.16.[125] In *Martin v. Inland Empire Utilities Agency*, an African-American plaintiff brought a retaliation and race discrimination claim in violation of California's Fair Employment and Housing Act (FEHA) against defendants when the plaintiff refused to discipline another African-American employee, wrongfully, at their request.[126] Defendants responded with an anti-SLAPP suit, claiming that the thrust of the case related to discussion of plaintiff's performance at a board meeting, which was protected activity under Section 425.16.[127] However, the appellate court determined that the underlying claim did not arise from any protected activity of the defendants that occurred during the board meeting.[128] Quoting from the plaintiff's opposition to defendants' anti-SLAPP motion, the court found that instead, "[t]he actual heart and soul of this case

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[122] *Id.* at 273.

[123] *Id.* at 276-77.

[124] Hilton v. Hallmark Cards, Inc., 599 F.3d 894, 903 (9th Cir. 2009).

[125] Martin v. Inland Empire Utils. Agency, 130 Cal. Rptr. 3d 410, 422 (Ct. App. 2011).

[126] *Id.* at 416-417.

[127] *Id.* at 417-418.

[128] *Id.* at 422.

stems from retaliation" and the plaintiff's FEHA claims.[129] Approving the lower court's finding that the case centered on retaliation and not defamation, the appellate court also agreed that "'if this kind of suit could be considered a SLAPP, then [employers] could discriminate . . . with impunity knowing any subsequent suit for . . . discrimination would be subject to a motion to strike and dismissal.'"[130] Because the defendants did not meet their burden in the first part of the test, requiring the plaintiff's cause of action to arise from defendants' free speech or petition rights related to a public issue, the court did not proceed to the second part of the test.[131]

The appellate court's interpretation of what constituted a SLAPP suit became even more expansive when it continued to distinguish between a defendant's conduct and a defendant's motive behind that conduct. *Tuszynska v. Cunningham* involved a sex discrimination case brought under FEHA and the Unruh Civil Rights Act;[132] where the only female attorney on a panel that provided legal services through a pre-paid plan brought suit against the panel's administrators for assigning cases to less experienced male attorneys instead of to her.[133] Defendants brought an anti-SLAPP motion, which the trial court denied.[134] Concluding that plaintiff's claims were based on the administrators' conduct of not assigning cases to her because she is a woman, and not based on petitioning activities protected under Section 425.16, the trial court did not reach the second prong of the anti-SLAPP analysis.[135]

The appellate court reversed, finding that the trial court mistakenly conflated the "defendants' alleged injury-producing

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[129] *Id.* at 418.

[130] *Id.* at 423 (quoting Dep't of Fair Emp't & Hous. v. 1105 Alta Loma Apartments, L.L.C., 65 Cal. Rptr. 3d 469, 480 (Ct. App. 2007)).

[131] *Martin*, 130 Cal. Rptr. 3d at 422-423.

[132] Tuszynska v. Cunningham, 131 Cal. Rptr. 3d 63, 66 (Ct. App. 2011) (citing Unruh Civil Rights Act, CAL. CIV. CODE § 51(a) (West 2015)).

[133] *Id.* at 66-67.

[134] *Id.* at 68.

[135] *Id.*

conduct — their failure to assign new cases to plaintiff . . . — with the unlawful, gender-based discriminatory *motive* plaintiff was ascribing to defendants' conduct — that plaintiff was not receiving new assignments or continued funding *because* she was a woman."[136] The court stated that the anti-SLAPP statute "applies to claims 'based on' or 'arising from' statements or writings made in connection with protected speech or petitioning activities, regardless of any motive the defendant may have had in undertaking its activities, or the motive the plaintiff may be ascribing to the defendant's activities."[137] The court went on to explain that plaintiff was suing the defendants

> for gender discrimination, specifically because she claims they did not assign case work to her and refused to continue funding case work previously assigned to her *because* she is a woman. Her gender discrimination claims are thus based squarely on defendants' attorney selection and litigation funding decisions themselves, and, concomitantly, communications defendants made in connection with making those decisions. Whether defendants had a gender-based discriminatory motive in not assigning new cases to plaintiff or in defunding her existing cases is a question that is entirely separate and distinct from whether, under the anti-SLAPP statute, plaintiff's gender discrimination claims are *based on* defendants' selection and funding decisions. Courts must be careful not to conflate such separate and distinct questions.[138]

Because the plaintiff would have no basis for her discrimination claims without the defendants' decisions regarding attorney selection and funding, the court concluded that those decisions

[136] *Id.* at 71.

[137] *Id.*

[138] *Tuszynska*, 131 Cal. Rptr. 3d at 71 (emphasis in original).

constituted the primary issue underlying her claims.[139] Therefore, the first prong of the anti-SLAPP inquiry was met because the discrimination action arose from the defendants' protected petitioning activities of attorney selection and funding decisions.[140] The court remanded the case back to the trial court to determine the second prong, if the plaintiff had met her burden of showing a probability of prevailing on the merits.[141] Unlinking conduct and motive further weakened the purpose of anti-SLAPP motions and made them more enticing tools to use against plaintiffs. By separating intent from action, the court seemed to contradict Section 425.16's purpose. The Legislature's reference to "lawsuits brought *primarily to chill* the valid exercise of the constitutional rights of freedom of speech and petition"[142] seems to imply that a plaintiff's intent in bringing the lawsuit should be considered.

In another discrimination case, two African-American men suing ABC, along with a number of other defendants involved in producing the reality TV shows, *The Bachelor* and *The Bachelorette*.[143] The plaintiffs claimed race discrimination in violation of 42 U.S.C. § 1981 when they were not chosen to be the "Bachelor" for the 2011 season.[144] They based their claim on the fact that not only were all the Bachelors and Bachelorettes white, but so were almost all the contestants on both shows across twenty-four combined seasons.[145] The District Court considered the tension between the right not to be discriminated against based on race when forming contracts and the First Amendment right of free speech.[146] The court concluded that the First Amendment would beat out anti-discrimination laws in

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[139] *Id.* at 73.

[140] *Id.*

[141] *Id.* at 74.

[142] CAL. CIV. PROC. CODE § 425.16(a) (emphasis added).

[143] Claybrooks v. Am. Broad. Cos., 898 F. Supp. 2d 986 (M.D. Tenn. 2012).

[144] *Id.* at 988-90.

[145] *Id.*

[146] *Id.* at 992.

this context.[147] "[C]asting decisions are part and parcel of the creative process behind a television program — including the [s]hows at issue here — thereby meriting First Amendment protection against the application of anti-discrimination statutes to that process."[148] The primary issue the court considered centered on creative content, and the right of the shows' producers to control that content by exercising their First Amendment rights undisturbed by non-discrimination laws.[149] Agreeing with the defendants' argument that "casting decisions are a necessary component of any entertainment show's creative content," the court stated that producers of TV shows, plays or movies "could not effectuate their creative vision . . . without signing cast members."[150] Because signing cast members contributed to the end product, which indisputably constituted First Amendment protected speech, "regulating the casting process necessarily regulates the end product.[151] In this respect, casting and the resulting work of entertainment are inseparable and must *both* be protected to ensure that the producers' freedom of speech is not abridged."[152] Having determined that the casting process could not be extricated from the resulting work of entertainment and its creative content, the court found that the First Amendment forbade any regulation of the shows' content.[153]

Doe v. Gangland Productions[154] illustrated that it is possible for a party to meet both parts of the test as set forth in Section 425.16, despite the fact that frequently if a defendant succeeds in meeting the first prong, the plaintiff fails on the second one. *Doe* also illustrated that an anti-SLAPP motion

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147 *Id.* at 993.

148 *Id.*

149 *Claybrooks*, 898 F. Supp. 2d at 996.

150 *Id.* at 999.

151 *Id.*

152 *Id.*

153 *Id.*

154 Doe v. Gangland Prods. Inc., 730 F.3d 946 (9th Cir. 2013).

may be brought even when the underlying act is wrongful.[155] A former prison gang member (Doe) sued when his identity was revealed in a broadcast of the show *Gangland*, a documentary television series on gangs.[156] When defendants appealed the District Court's denial of its anti-SLAPP motion, the Ninth Circuit Court of Appeals found that the lower court had erred when it concluded that the thrust of plaintiff's complaint involved the revealing of his identity when the show aired.[157] "The [D]istrict [C]ourt incorrectly concluded that under the anti-SLAPP statute, a lawful broadcast is in furtherance of Defendants' right of free speech, but an unlawful broadcast is not."[158] Basing a lawsuit on unlawful activity will not exempt it from an anti-SLAPP analysis.[159]

Rather than evaluating whether or not the defendant's actions were lawful or unlawful, "any 'claimed illegitimacy of the defendant's acts is an issue which the plaintiff must raise *and* support'" in the second prong of the test, when the plaintiff must show a probability of prevailing on the merits.[160] Unless a defendant's activity is illegal as a matter of law, "California courts consistently hold that defendants may satisfy their burden to show that they were engaged in conduct in furtherance of their right of free speech under the anti-SLAPP statute, even when their conduct was allegedly unlawful."[161]

The Ninth Circuit Court of Appeals found that Gangland Productions met its burden of showing that Doe's lawsuit arose from Gangland's conduct in furtherance of its free speech rights, and also found that Gangland's conduct of airing a show about a particular act of gang violence (the one which disclosed the

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[155] *Id.* at 954.

[156] *Id.* at 950.

[157] *Id.* at 954.

[158] *Id.*

[159] Jarrow Formulas v. LaMarche, 3 Cal. Rptr. 3d 636, 646 (Ct. App. 2003).

[160] Navellier v. Sletten (*Navellier I*), 52 P.3d 703, 712 (Cal. 2002) (quoting Paul for Council v. Hanyecz, 102 Cal. Rptr. 2d 864, 871-72 (Ct. App. 2001)).

[161] *Doe*, 730 F.3d at 954.

plaintiff's identity) was related to a matter of public interest.[162] Proceeding to the second part of the analysis, the court determined that Doe had showed a probability of prevailing on four of his six claims, and remanded the case back to District Court.[163]

IV. *HUNTER V. CBS BROADCASTING INC.*

Upon learning that long-time weather anchor Johnny Mountain would be leaving KCBS, Kyle Hunter contacted station management to express interest in the position.[164] Despite being a professional meteorologist with degrees in Geosciences and Broadcast Meteorology along with experience in several Southern California television markets, KCBS did not contact Mr. Hunter for an interview.[165] Instead, the station hired Jackie Johnson to fill Mr. Mountain's position.[166] Because Ms. Johnson had been the on-air weather anchor at KCAL 9 (which is owned by CBS), her shift to KCBS left a vacancy at KCAL 9, which was ultimately filled by Evelyn Taft, another young, attractive woman.[167] Mr. Hunter sued CBS for employment discrimination, alleging that CBS discriminated against him on the bases of sex and age in violation of California's Fair Employment and Housing Act (FEHA).[168] Hunter based his claims on CBS's actions of filling two meteorologist positions with young, attractive women instead of hiring, or even considering him, for either of the positions.[169] In

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[162] *Id.* at 955.

[163] *Id.* at 963.

[164] Brief for Respondent Hunter, Hunter v. CBS Broad., Inc., 165 Cal. Rptr. 3d 123 (Ct. App. 2013) (No. B244832), 2013 WL 3381017, at *7.

[165] *Id.*

[166] Hunter v. CBS Broad., Inc., 165 Cal. Rptr. 3d 123 (Ct. App. 2013), *cert. denied*, (Feb. 26, 2014).

[167] *Id.*

[168] *Id.*; *see also* Fair Employment and Housing Act, CAL. GOV'T CODE § 12940 (2014).

[169] *Hunter*, 165 Cal. Rptr. 3d at 126.

response, CBS brought an anti-SLAPP suit against Mr. Hunter, alleging that the hiring of a weather anchor qualified as an act in furtherance of its free speech rights.[170] Denying the motion, the trial court found that Hunter's claims arose from CBS's discriminatory employment practices, and not from its hiring decision.[171] At the trial court hearing on its Section 425.16 motion, CBS posited that choosing whom to represent the station on the air was "an act in furtherance of free speech."[172] In contrast, Hunter argued that the underlying act was CBS's hiring policy, which he said excluded males, and that the policy did not constitute protected First Amendment activity.[173] The trial court denied the motion to strike, stating that CBS had "not shown that its hiring decisions regarding weather anchors constitute conduct in furtherance of [CBS's] right of free speech in connection with a public issue."[174]

In determining if a cause of action arises from a protected activity, the appellate court noted that it must set aside the labeling of the claim and instead look at the

> '*[P]rincipal thrust* or *gravamen* of a plaintiff's cause of action to determine whether the anti-SLAPP statute applies'. . . . [We assess] the principal thrust by identifying '[t]he allegedly wrongful and injury-producing conduct…that provides the foundation for the claim.' [Citation.] If the core injury-producing conduct upon which the plaintiff's claim is premised does not rest on protected speech or petitioning activity, collateral or incidental allusions to protected activity will not trigger application of the anti-SLAPP statute.[175]

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[170] *Id.* at 126-28.

[171] *Id.*

[172] *Id.* at 129.

[173] *Id.*

[174] *Id.* at 130.

[175] *Hunter*, 165 Cal. Rptr. 3d at 130 (quoting Tuszynska v. Cunningham, 131 Cal. Rptr. 3d 63, 70 (Ct. App. 2011) (emphasis in original) (internal citation omitted).

Emphasizing the need to distinguish between conduct and motives for that conduct, the appellate court stated that causes of action arise from acts, not from motives.[176] Moreover, in assessing CBS's actions, the court agreed with CBS's argument: that choosing a weather reporter was an act in furtherance of its right to free speech.[177] CBS argued that the conduct leading to the plaintiff's claims had to be considered separately from any discriminatory motives behind that conduct, and therefore "the conduct here is *not* CBS' alleged discriminatory motive behind its hiring decision but instead CBS' actual selection of an individual to speak for it by choosing an on-air weather anchor for a news broadcast, an act which is in furtherance of its First Amendment rights."[178] Classifying CBS's choice of weather anchors as "essentially casting decisions," the court determined that making such selections were acts in furtherance of CBS's First Amendment rights, and thereby should be considered protected activity.[179]

The court then turned to Hunter's arguments as to why the trial court correctly concluded that Section 425.16 should not apply to his claims.[180] Hunter contended that the underlying action that gave rise to his claims was CBS's use of discriminatory criteria when choosing weather anchors.[181] The appellate court disagreed, again stating the need to differentiate between the conduct itself — selecting weather anchors — and the allegedly unlawful motives behind that conduct — employment discrimination.[182] Referencing the decision in

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[176] *Id.* at 130-31.

[177] *Id.* at 131.

[178] Opening Brief for Appellant CBS Broadcasting Inc., Hunter v. CBS Broad. Inc., 165 Cal. Rptr. 3d 123 (Ct. App. 2013) (No. B244832), 2013 WL 1884645, at *2 (emphasis in original).

[179] *Hunter*, 165 Cal. Rptr. 3d at 131.

[180] *Id.* at 132.

[181] *Id.*

[182] *Id.*

Tuszynska, the court discussed the importance of the discriminatory motive being separate "from whether, under the anti-SLAPP statute, plaintiff's gender discrimination claims are based on defendants' selection . . . decisions."[183] Unable to distinguish between Hunter's case and *Tuszynska*, the court found that Hunter's claims were based on CBS's activity of hiring a weather reporter, which was in furtherance of its protected free speech rights.[184] Any discriminatory motive would be a separate question from whether Hunter's employment discrimination claims arose from CBS's hiring decisions.[185]

Next, Hunter argued that Section 425.16 should not apply because CBS's hiring of weather reporters did not constitute "protected speech" or an "exercise of free speech rights by CBS."[186] The court rejected that argument as well, pointing out that Section 425.16 covers free speech and petition rights, as well as actions taken "in furtherance of" those protected activities.[187] In response to Hunter's position that to apply Section 425.16 in his case would be "tantamount to affording news broadcasters with . . . immunity from anti-discrimination laws" the court explained that "a plaintiff may pursue a discrimination claim or any other cause of action based on protected activity if he or she is able to present the 'minimal' evidence necessary to demonstrate a reasonable probability of prevailing on the merits."[188] As the California Supreme Court stated in *Navellier*, "[t]he Legislature's inclusion of a merits prong to the statutory SLAPP definition (§ 425.16, subd. (b)(1)) . . . preserves appropriate remedies for [causes of action based on protected activity] by ensuring that claims with the requisite minimal merit may proceed."[189] Although Hunter asserted that

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[183] *Id.* at 132-33 (quoting *Tuszynska*, 131 Cal. Rptr. 3d at 72).

[184] *Id.* at 133.

[185] *Hunter*, 165 Cal. Rptr. 3d at 133.

[186] *Id.* at 135.

[187] *Id.*

[188] *Id.*

[189] *Id.* (quoting *Navellier I*, 124 Cal. Rptr. 2d at 540).

no authority supported the First Amendment providing protection for acts of employment discrimination, the court stated that once again, Hunter

> [C]onfuses the threshold question of whether the SLAPP statute applies with the question whether [plaintiff] has established a probability of success on the merits. The Legislature did not intend that in order to invoke the special motion to strike the defendant must first establish [his] actions are constitutionally protected under the First Amendment as a matter of law. If this were the case then the inquiry as to whether the plaintiff has established a probability of success would be superfluous.[190]

Finally, the appellate court rejected Hunter's contention that even if CBS's hiring decision was an exercise of its free speech rights, it was not "in connection with a public issue," as required by Section 425.16(e), an argument that the court rejected on procedural grounds because he had failed to raise the issue at trial.[191] The court likewise would have rejected the argument on substantive grounds.[192] The "connection with a public issue" question hinges on whether or not hiring a weather reporter is connected to a matter of public interest, not whether or not the hiring decision *itself* is a matter of public interest.[193] Because Hunter had already conceded that weather reporting was a matter of public interest, his argument would have failed even if he had raised it at trial.[194] Because the trial court did not consider the second prong of the test, having found that the defendants did not meet their burden in the first prong, the appellate court remanded the case back to the trial court to

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[190] *Id.* (quoting Fox Searchlight Pictures v. Paladino, 106 Cal. Rptr. 2d 906, 916 (Ct. App. 2001)).

[191] *Hunter*, 165 Cal. Rptr. 3d at 129.

[192] *Id.* at 136.

[193] *Id.*

[194] *Id.*

determine if Hunter had met his burden of demonstrating a probability of prevailing on the merits.[195]

V. ANTI-SLAPP SUITS: PROBLEMS AND PROPOSED SOLUTIONS

A. THE OVERUSE OF ANTI-SLAPP MOTIONS

As early as 1999, courts took notice of the potential for an anti-SLAPP motion to be used as a blunt instrument, rather than a proper tool to address lawsuits designed to squelch people's First Amendment rights.[196] One dissent to a California Supreme Court decision noted that the majority's holding would "authorize use of the extraordinary anti-SLAPP remedy in a great number of cases to which it was never intended to apply."[197] Another dissent, this time in *Navellier*, presciently pronounced that "[t]he cure has become the disease — SLAPP motions are now just the latest form of abusive litigation."[198] One year after *Navellier*, in an echo of the preamble to Section 425.16, lawmakers found "a disturbing abuse" of anti-SLAPP motions, and eliminated their use in certain types of lawsuits, apparently to no significant effect.[199]

By 2011, some judges openly communicated their dissatisfaction with the delays occurring in cases due to anti-SLAPP motions, and the explosion of cases themselves.[200] Writing for a three-judge panel, Justice James A. Richman expressed dismay at the number of anti-SLAPP cases included in *West's Annotated California Code*, noting that while there were an average of six pages of Section 425.16 cases for the

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[195] *Id.* at 136-37.

[196] *See* Briggs v. Eden Council for Hope & Opportunity, 969 P.2d 564 (Cal. 1999) (Baxter, J., dissenting).

[197] *Id.* at 576.

[198] Navellier v. Sletten (*Navellier I*), 52 P.3d 703, 714 (Cal. 2002) (Brown, J., dissenting).

[199] *See* CAL. CIV. PROC. CODE § 425.17 (West 2015).

[200] Grewal v. Jammu, 119 Cal. Rptr. 3d 835, 851 (Ct. App. 2011).

entire twelve-year period between 1992 and 2004, over the next five years, anti-SLAPP cases were annotated at a rate of over twenty per year.[201] He saw no end in sight, commenting "one cannot pick up a volume of the official reports without finding an anti-SLAPP case. Or four."[202] In fact, in the first nineteen years since the passage of Section 425.16, there were 4,000 opinions published in response to anti-SLAPP motions.[203] The court in *Martin* observed that "despite the strong policy reasons behind the statute's enactment, both the Legislature and the courts have found that the anti-SLAPP statute has as much potential for abuse as the frivolous SLAPP suits it was enacted to summarily resolve."[204]

The anti-SLAPP motion has become a "potent weapon" for defendants, giving them the chance to have complaints filed against them dismissed early in the process.[205] It stays discovery, includes a mandatory award of attorney's fees to successful defendants, plus defendants have the automatic right to appeal.[206] "[T]he motion has proved far too useful to far too many lawyers. . . . The Judicial Council reports that since 2000, nearly 6,500 such motions have been filed in California courts. And that number may be quite low, since the reporting requirement isn't enforced. Inevitably, the litigation tactic is subject to abuse."[207] Although anti-SLAPP motions were intended to prevent unmeritorious cases from moving forward, in practice, they are frequently used by defendants to delay

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[201] *Id.* at 852.

[202] *Id.*

[203] Michael C. Denison, *SLAPP HAPPY: Courts Continued to Refine the Reach of the Anti-SLAPP Law in Numerous Decisions in 2010*, 34 L.A. LAW. 21 (2011), *available at* http://www.lacba.org/showpage.cfm?pageid=13009.

[204] Martin v. Inland Empire Utils. Agency, 130 Cal. Rptr. 3d 410, 420 (Ct. App. 2011).

[205] Pamela A. MacLean, *Getting SLAPPED Around: What Could Be Wrong with Protecting First Amendment Rights? Plenty, According to Some Judges,* CAL. L., Apr. 2014, at 41, *available at* http://mobile.callawyer.com/clmobilestory.cfm?eid=934214.

[206] *See supra* Section I.

[207] MacLean, *supra* note 205, at 24.

proceedings. Referring to the automatic right to appeal, one attorney noted how the system is being abused by pointing out that "[a] defendant can file an anti-SLAPP, [then] appeal, and get a one-and-a-half year delay with no consequences. That is grossly out of whack."[208]

No one questions that Section 425.16 has done a lot of good, not only by disposing of lawsuits at an early stage, but also by dissuading plaintiffs from filing meritless lawsuits.[209] Part of the current problem is traceable back to the expansion of the application of Section 425.16, due to the Legislature's added instruction in 1997 that the law be "construed broadly."[210] Prior to the amendment, anti-SLAPP motions were not extensively used, but afterwards it "blossomed into a really powerful tool."[211] One litigator commented that if California attorneys are unfamiliar with anti-SLAPP motions, they are not properly representing their clients, adding that the motions have "become quite the norm."[212] Another attorney agreed that anti-SLAPP motions were being overused. "Anti-SLAPP is now a standard operating procedure in all types of cases. It's almost like a demurrer. Clearly . . . it is being abused."[213]

B. TIME FOR A CHANGE

Suggestions to change Section 425.16 have gone unheeded. In *Grewal v. Jammu* Justice Richman proposed allowing defendants to file a writ in the unusual case where the trial court denies a meritorious anti-SLAPP motion.[214]

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[208] *Id.* (quoting attorney Andrew A. Kurz, Esq., sole practitioner who, along with Gregory S. Day, Esq., filed the trustee's lawsuit in Kleveland v. Seigel & Wolensky, L.L.P., 155 Cal. Rptr. 3d 599 (Ct. App. 2013)).

[209] Maclean, *supra* note 205, at 25.

[210] 1997 Cal. Legis. Serv. 271 (West) (current version at CAL. CIV. PROC. CODE § 425.16 (West 2015)).

[211] MacLean, *supra* note 205, at 25.

[212] *Id.*

[213] *Id.* at 26 (quoting attorney Andrew A. Kurz again, counsel in the *Kleveland* case).

[214] *Grewal*, 119 Cal. Rptr. 3d at 855.

Immediately following the *Grewal* decision, University of San Diego law professor Sean Martin proposed expedited appeals. His timetable: have the opening brief due in thirty days; the response brief due thirty days later; and if there is a reply brief, it would be due fifteen days after the response brief.[215] Neither proposal went anywhere. Some even analogized expediting anti-SLAPP appeals to writing a law review article without footnotes, while others agreed that anti-SLAPP motions were being overused.[216] There is no indication that either the Legislature or the Judicial Council is inclined to make any changes to the law or to court rules, and some practitioners are satisfied with Section 425.16 as it stands. Others, however, hope that the Legislature will take up the issue and address the problem of meritless anti-SLAPP motions.[217]

Hunter illustrates exactly how far anti-SLAPP motions have come: from providing protection to plaintiffs who are exercising their free speech and public participation rights to acting as an impediment to an individual bringing an employment discrimination claim against a giant corporation. Professor Martin views the California Appellate Court's decision in *Hunter* wrong from both a public policy and doctrinal perspective.

> Just because you're running a news station doesn't mean that everything you do – including discriminating (allegedly) against various protected groups – entails conduct 'in furtherance' of your right to free speech. . . . The fact that you're engaged in corporate speech doesn't mean that everything you do is somehow immunized and protected by either the Constitution or the anti-SLAPP statute.[218]

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[215] MacLean, *supra* note 205, at 26.

[216] *Id.*

[217] *Id.*

[218] Shaun Martin, *Hunter v. CBS Broadcasting*, CAL. APP. REP. (Dec. 11, 2013, 1:42 PM), http://calapp.blogspot.com/2013/12/hunter-v-cbs-broadcasting-cal-ct-app.html.

Characterizing the Court of Appeal's decision "wrong — and sufficiently pernicious," Professor Martin calls on the California Supreme Court to correct it.[219]

Inevitably, legislation will produce unintended consequences, but the legislative history of Section 425.16 is clear: the anti-SLAPP motion to strike was intended to curtail lawsuits brought to chill free speech and petition rights and to protect defendants who did not have limitless resources when large companies brought actions against them with the primary purpose of delaying proceedings and potentially bankrupting them. The classic SLAPP suit involved a large corporate plaintiff bringing a meritless lawsuit against an individual or small organization focused on the public good, where the corporate player's goal was to distract, to delay, and to bleed the opposing side dry, not to win.[220] The point of Section 425.16 was to encourage participation in activities such as testifying at a city council meeting or writing a letter to the editor to protest construction of a nuclear power plant.[221] The goal was not to give corporations a tool to use against individuals bringing discrimination lawsuits against them. So what happened? How courts interpreted specific language in the anti-SLAPP law ultimately led to the outcome in the *Hunter* case, which hardly seems the type of case that the Legislature envisioned when it passed Section 425.16.

Courts have relied on three phrases in particular when expanding how they rule on anti-SLAPP motions to strike. First, as noted above, the addition of the direction to construe the section "broadly"[222] brought a rapid increase in anti-SLAPP motions. Suddenly, defendants in lawsuits with arguably a tenuous connection to free speech and petition rights could use the potent weapon of a Section 425.16 motion to strike by having cases brought against them classified as SLAPP suits. Second, courts have focused on what "arises from" an act "in

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[219] *Id.*

[220] *See* Equilon Enters. v. Consumer Cause, Inc., 52 P.3d 685 (Cal. 2002).

[221] *See* CAL. CIV. PROC. CODE § 425.16(e).

[222] *Id.* § 425.16(a).

furtherance of"[223] someone's free speech or petition rights. Building on the instruction to interpret the law broadly, courts have found that a wide range of activities arise from acts that aid or assist in the exercise of free speech or petition rights. Acts such as news gathering[224] to using people's names in an early script for a TV show[225] to not assigning cases to the only woman on an attorney panel that provided services through a pre-paid plan[226] have all been determined to aid or assist the defendant's free speech rights, with no consideration given for the motives behind those actions.[227] Even the lawfulness of conduct engaged in to further free speech rights may not be considered until the court reaches the second prong of the test.[228] Finally, the courts have interpreted acts that aid or assist a person's exercise of free speech or petition rights relating to a "public issue or an issue of public interest"[229] as simply meaning that the acts concern an issue that would interest the public.[230]

The court in *Hunter* classified CBS's choice of weather anchors as aiding CBS in its First Amendment right of reporting the news.[231] As CBS pointed out in its opening brief, "Weather is the number one reason why people watch local news,"[232] thus meeting the requirement that the issue interest the public. Does it make sense that an anti-SLAPP motion to strike could be used to interfere with an individual's ability to bring a discrimination

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[223] *Id.* § 425.16(b)(1).

[224] *See* Lieberman v. KCOP Television, Inc., 1 Cal. Rptr. 3d 536, 541 (Ct. App. 2003).

[225] *See* Tamkin v. CBS Broad., Inc.,122 Cal. Rptr. 3d 264, 267 (2011).

[226] *See* Tuszynska v. Cunningham, 131 Cal. Rptr. 3d 63, 64 (Ct. App. 2011)

[227] *See Id.*

[228] *See* Doe v. Gangland Prods. Inc., 730 F.3d 946, 953-57 (9th Cir. 2013).

[229] CAL. CIV. PROC. CODE § 425.16(e)(4).

[230] *Tamkin*, 122 Cal. Rptr. 3d at 271.

[231] *Hunter*, 165 Cal. Rptr. 3d at 131.

[232] Opening Brief for Appellant CBS Broadcasting Inc., Hunter v. CBS Broad. Inc., 165 Cal. Rptr. 3d 123 (Ct. App. 2013) (No. B244832), 2013 WL 1884645, at *6.

case? Is it truly the case that one individual's discrimination claim is an attempt to interfere with the First Amendment rights of a major broadcast network? How did SLAPP cases metamorphose from suits where large corporations were trying to silence the public, whether or not their cases had merit, to large corporations using the anti-SLAPP motion to silence the public? *Hunter* exemplifies how the court has construed Section 425.16 so broadly that it becomes difficult to conjure up a hypothetical where it would *not* apply. A talent agency could file an anti-SLAPP motion to strike against an employee who claimed discrimination. The discrimination would only be the alleged motive — and thus not considered in the first prong of the test — behind the act of representing celebrities, which is related to the agency's free speech rights, and is something that greatly interests the public. A car dealership or clothing boutique could bring an anti-SLAPP motion to strike if a salesperson sued for discrimination. Both enterprises could argue that choosing a salesperson assists their free speech rights because salespeople represent the companies to the customers and speak on the companies' behalf. And again, the employment action would be separate and apart from the motive behind it. Plaintiffs do have the opportunity to demonstrate the probability of prevailing per the second part of the test, but that prong acts as an additional hurdle for plaintiffs to overcome that would not be present in a standard discrimination case.

What if the courts focused on the preamble and the stated purpose of Section 425.16 when considering discrimination cases? Instead of expanding the application of the two-part test to situations not considered when the law was passed, what if the courts made one inquiry to determine if a lawsuit should be classified as a SLAPP suit: is the primary purpose of the lawsuit "to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances."[233] Appellate courts have complained about plaintiffs (and trial courts) conflating conduct and motive, but what if the sole question centered on the primary intent of the plaintiff in bringing the lawsuit? Was the primary purpose of Hunter's lawsuit to chill CBS's speech? Was the primary purpose of

[233] CAL. CIV. PROC. CODE § 425.16(a).

Tuszynska's lawsuit to interfere with the administration of a county's pre-paid legal services plan? Defendants will continue to abuse Section 425.16 until courts stop finding so frequently that the first prong of the test in an anti-SLAPP motion to strike is met and the second is not. Additionally, the legislature could amend the law to state explicitly that the motion is not intended to apply to employment discrimination cases, the same way it excluded its use against specific types of public interest lawsuits.[234] Suing an employer or prospective employer for discrimination should not constitute a SLAPP suit.

VI. CONCLUSION

Section 425.16 anti-SLAPP motions to strike serve an important purpose. Designed to address the proliferation of SLAPP suits, they dispose of meritless or frivolous lawsuits in the early stages of legal proceedings and protect the exercise of free speech and petition rights. Over time, courts have refined the two-part test necessary to prevail in an anti-SLAPP motion. The underlying lawsuit brought against an individual must arise from acts that further that person's Constitutional rights to free speech and petition and be connected to a public issue, such as when a clothing company sues a workers' rights group for protesting legally against the company's use of child laborers. In this case, the workers' rights group can meet the requirements of the first part of the test because the underlying lawsuit arises from the group's free speech exercise in connection with an issue concerning the public. Once the burden shifts to the clothing company to demonstrate a probability of prevailing on the merits of the case, an anti-SLAPP motion to strike would be granted because the company has no basis for its lawsuit.

But once the Legislature broadened the application of Section 425.16, courts shifted their interpretations of what constituted SLAPP suits, and by extension when anti-SLAPP motions to strike would be granted. Finding that more and more acts did further free speech and petition rights connected to a public issue, courts allowed anti-SLAPP motions in an ever increasing number of cases. The increase in anti-SLAPP suits has been especially problematic in discrimination cases, where

[234] *Id.* § 425.17.

the plaintiff's case was delayed by having to address the anti-SLAPP motion and show a probability of prevailing. More importantly, discrimination cases were not the type of cases contemplated by the Legislature when passing Section 425.16 and should be excluded from anti-SLAPP suits. The pendulum has swung too far away from the original intent of the law; it is time to slap it back into place.