Case No. S239686

SUPREME COURT
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IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

STANLEY WILSON,
Plaintiff and Appellant,

v.

CABLE NEWS NETWORK, INC. et al.,
Defendants and Respondents.

After a Decision By the Court of Appeal
Second Appellate District, Division 1, Case No. B264944
Los Angeles Superior Court Case No. BC559720 (Hon. Mel Red Recana)

RESPONDENTS' ANSWER TO THE AMICUS BRIEF SUBMITTED BY THE CONSUMER ATTORNEYS OF CALIFORNIA

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Pursuant to California Rule of Court 8.520(f)(7), Respondents[1] hereby file the following answer to the amicus curiae brief submitted by Consumer Attorneys of California ("CAOC").

I. INTRODUCTION

Though the anti-SLAPP statute is "construed broadly" "to encourage participation in matters of public significance," *Flatley v. Mauro* (2006) 39 Cal.4th 299, 312 [*citing* Code Civ. P. § 425.16(a) (statute is "construed broadly")], CAOC's goal is to limit its application by affixing to it requirements found nowhere in the statute's express terms or stated purpose, or even in extant precedent. CAOC's cynical effort to rewrite the statute to serve its purposes should be rejected.

CAOC argues in favor of four limitations on application of the statute:

- the moving party must prove that the challenged claim has a "greater than incidental effect on free speech" to satisfy the first prong of the statute.
- the trial court should "balance the equities."
- the trial court should consider the moving defendant's motive in bringing an anti-SLAPP motion.
- the "catch-all" provision of Section 425.16(e) should be applied only to conduct, not speech.

None of these newly minted requirements has any support in the plain terms of the statute, its legislative history or governing precedent, and thus they should all be rejected.

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[1] Respondents and defendants consist of Cable News Network, Inc., CNN America, Inc., Turner Services, Inc., Turner Broadcasting System, Inc., and Peter Janos.

II. ARGUMENT

A. The Anti-SLAPP Statute Applies To Any Claims In Furtherance Of The Exercise Of Free Speech, Not Simply Those With Greater Than Incidental Effect On Free Speech.

CAOC argues that, to satisfy the first prong, a defendant must show that the challenged cause of action arises from an act that furthers a defendant's free speech *with "greater than incidental or collateral effect."* (CAOC Br. 13.) Having fabricated this new legal standard, CAOC goes on to argue that Wilson's employment claims do not satisfy it because they are not based on Wilson's termination, but on other acts that have only an incidental effect on CNN's exercise of free speech. However, CAOC's new standard is unsupported and its application to this case misguided.

1. The anti-SLAPP Statute contains no requirement that a plaintiff's claim arise from an act having greater than incidental effect on the defendant's exercise of free speech.

CAOC's newly minted standard, under which the anti-SLAPP statute would protect only those acts having "greater than incidental or collateral effect" on free speech is based on a misconstruction of this Court's precedent. While it is true that in *Park* this Court held that acts that are "incidental" to claims – i.e., do not give rise to the claims – are irrelevant, *Park v. Board of Trustees of California State University* (2017) 2 Cal.5th 1057, 1060-61, neither this Court nor any other court has held that the acts that are the gravamen of a complaint must be "greater than incidental" to free speech. Indeed, the anti-SLAPP statute requires only that those acts be "in furtherance of the exercise of ... free speech."

Moreover, the CAOC's proposed standard is impossibly vague and would infuse uncertainty into the anti-SLAPP statute's application. It would add an unnecessary extra layer of analysis in which the parties presumably would have to present dueling evidence as to the theoretical value of the act

in question to the defendant's exercise of free speech and the court would then have to assess whether the act crossed some unidentified threshold of importance.

CAOC's standard also assumes that such subjective questions could have objective answers. For example, here, before a news story is broadcast to the public, decisions must be made as to what story will be reported on, who will investigate the story, who will write the story, and who will ultimately convey it to the public. These are all undoubtedly acts in furtherance of the media outlet's exercise of free speech but who is to say which is more important or if any are more important than another. To begin to weigh and compare acts in furtherance of free speech against each other is to have already attacked the exercise of free speech and potentially chilled the exercise of speech itself.

There is no reason to go down this road. The language of the anti-SLAPP statute is clear and its application does not depend on subjective determinations about the value of the act in question and its supposed importance to a defendant's free speech. If a claim arises from an act – *any* act – in furtherance of the exercise of free speech, the first prong is satisfied and the anti-SLAPP statute applies.

2. Wilson's employment claims arise from his termination, which is an act in furtherance of CNN's exercise of free speech (producing and reporting the news)

CAOC goes on to recast Wilson's claims in a tortured attempt to show how they fail to satisfy its newly minted standard.

Though most of the claims alleged in Wilson's complaint are based on his termination, and Wilson has relied on his termination in the briefs he filed with this and lower courts, CAOC baldly asserts that Wilson's claims are actually based on other acts such as failing to promote Wilson and passing him over for assignments. (CAOC Br. 11-12.) CAOC argues that

"the firing decision" was just the culmination of these other acts, merely "triggered" Wilson's suit against CNN for longer-standing employment discrimination, and was somehow "incidental to the furtherance of CNN's dissemination of the news." (CAOC Br. 12-13.)

CAOC's argument is baseless. It is clear on the face of Wilson's complaint that Wilson's lawsuit is based in substantial part on the termination of his employment for plagiarism. Wilson alleges his termination as an adverse action under his first cause of action (Para. 85 – discrimination based on race, national origin and association with a person with a disability); second cause of action (Para. 95 – FEHA retaliation); third cause of action (Para. 109 – CFRA retaliation); fourth cause of action (Para. 116 – failure to prevent discrimination and retaliation); fifth cause of action (Para. 125 – wrongful termination); and sixth cause of action (Para. 133 – declaratory judgment.) And, in connection with CNN's anti-SLAPP motion, both parties presented to the court considerable evidence concerning Wilson's termination, and acknowledged it to be the gravamen of the foregoing causes of action. (1AA46, 62, 65-67, 69-105, 110, 2AA333-334.)

Furthermore, all of the acts about which Wilson complains in the foregoing six causes of action were in furtherance of CNN's rights of free speech. The decisions to not assign Wilson certain work, not promote him to a position writing particular stories, and to terminate his employment for admitted plagiarism, are all directly in furtherance of CNN's editorial discretion to determine who will write the news stories that it publishes to the public. Accordingly, even if the court applied CAOC's "incidental" test, clearly each of these decisions was far more than "incidental" to CNN's free speech rights.

B. A Court Need Not Balance First Amendment Principles Against Civil Right Interests To Determine Whether The Anti-SLAPP Statute Applies.

CAOC next attempts to limit the scope of the anti-SLAPP statute by advocating for some sort of "balancing of the equities" that the trial court would engage in when an anti-SLAPP motion is directed at employment claims. (CAOC Br. 14-17.) According to CAOC, this "balancing" would involve the free speech rights of the defendant against the civil rights violations alleged by the plaintiff's claims.

But, here again, the plain terms of the anti-SLAPP statute are clear and unambiguous and contain no room for any "balancing" of interests. Instead, the statute expressly encompasses "acts in furtherance of the exercise of ... free speech," and it matters not what rights are advanced by the alleged claim itself. (Code Civ. P. § 425.16(b)(1).) Such a qualification would also be contrary to the statute's broad interpretation and application. (Code Civ. P. § 425.16(a).)

Indeed, neither this Court nor any Court of Appeal has ever engaged in any "balancing of the equities" on the first prong. Quite the contrary, this Court has previously made clear that there is no type of claim that is categorically excluded from the scope of the anti-SLAPP statute. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 92 ["Nothing in the statute itself categorically excludes any particular type of action from its operation ... ."].)[2]

Beyond the plain language of the statute, its purpose, and long-standing precedent, there is another reason that a "balancing of the equities"

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[2] The balancing test advocated by CAOC would create a *de facto* exclusion to the anti-SLAPP statute for civil rights claims of sufficient gravity. As such, a plaintiff could avoid application of the anti-SLAPP statute altogether simply by alleging acts of discrimination, retaliation or harassment.

is unnecessary on the first prong – there is no tension between the First Amendment and other interests such as civil rights because a balancing effectively occurs on the second prong. The fact that a defendant has satisfied its burden on the first prong by showing that the plaintiff's claim falls within the scope of the anti-SLAPP statute does not mean that it will be able to attack an individual's civil liberties or "evade scrutiny or liability for discriminatory purposes." (CAOC Br. 14, 15, 17.) Instead, a plaintiff with a valid employment claim (or any other type of claim) will be able to prevail on the second prong and move forward by showing a probability of success. Put another way, the anti-SLAPP statute does not prevent *all* claims falling within its scope from proceeding; it simply prevents those without merit from moving forward. In this way, it upholds the First Amendment by protecting defendants from *meritless* claims; it does not chill a plaintiff's ability to bring a legitimate claim seeking to redress violations of civil rights.

In short, the additional layer of analysis advocated for by CAOC lacks legal and logical support and is unnecessary.

C. A Court Need Not Inquire Into A Defendant's "Motive" In Moving To Strike Under The Anti-SLAPP Statute In Determining Whether It Applies.

CAOC also attempts to limit the application of the anti-SLAPP statute by excluding motions brought by a defendant for improper purposes. (CAOC Br. 18.)

Here again, the anti-SLAPP statute contains no such exclusion. The defendant's motive in filing an anti-SLAPP motion is relevant under the statute only if the motion is denied and the plaintiff seeks to recover attorneys' fees. (Code Civ. P. § 425.16(c)(1).) Whether the plaintiff can satisfy the standard for recovering attorneys' fees, however, has no bearing on the first prong inquiry – whether the plaintiff's claims arise from an act

in furtherance of the defendant's exercise of free speech on an issue of public interest.

D. The Anti-SLAPP Statute Encompasses All Speech.

CAOC's final attempt to narrow the scope of the anti-SLAPP statute is directed at Wilson's defamation claim. CAOC argues that the anti-SLAPP statute does not apply because the statement at issue – a statement by one CNN employee to another that Wilson plagiarized – was not made in a public forum. (CAOC Br. 18-22.)[3] According to CAOC, when it comes to oral and written statements, only those made in a public forum can be considered acts in furtherance of free speech under the anti-SLAPP statute.

CAOC's argument depends on an illogical and tortured interpretation of Section 425.16(e), which is the subsection that elaborates on what conduct is "include[d]" within the definition of "acts in furtherance of a person's right of petition or free speech" under the anti-SLAPP statute. (*Ibid.*) CAOC recites verbatim subsection (e) and then points out that subsections (e)(1), (e)(2), and (e)(3) each use the words "any written or oral statement or writing made" in detailing certain types of conduct that are considered free-speech furthering acts. CAOC then contrasts this with subsection (e)(4), the statute's catch-all provision, which is not limited to written or oral statements but, instead, encompasses "any other conduct in

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[3] CAOC actually contends, without citation, that Wilson's defamation claim arises from a "*written* statement permanently recorded in Wilson's employee file" (CAOC Br. 20) but this is not what Wilson alleged, nor what he sought to prove. Instead, his pleadings and declaration make clear that his defamation claim arises from his supervisor, CNN Vice-President and Bureau Chief of the CNN Wester Region, Peter Janos, telling CNN's Human Resources Manager, Dina Zaki, that Wilson had plagiarized. (1AA23, 2AA360.) As such, Defendants respond to CAOC's arguments in the context of the oral statement at issue, not some hypothetical written statement not sued upon. In any event, the analysis is the same regardless of the mode of communication.

furtherance of the exercise … of free speech." (CAOC Br. 20-22.) According to CAOC, the fact that subsections (e)(1)-(3) refer to written and oral statements made in specific contexts, but subsection (e)(4) refers to "any other conduct" is illuminating and must mean that only oral and written statements made in the specific contexts identified in subsections (e)(1)-(3) can constitute free-speech furthering conduct. Oral and written statements made in any other context are apparently excluded.

CAOC then applies this logic to Wilson's defamation claim and argues that, because the statement underlying Wilson's defamation claim was made in private instead of in an official proceeding (§ 425.16(e)(1) & (2)) or in a public forum (§ 425.16(e)(3)), Wilson's claim does not arise from an act in furtherance of free speech and Defendants cannot satisfy the first prong. CAOC's contention that written and oral statements – the very epitome of free speech – must be made in one of three specific contexts to constitute free speech or free speech-furthering conduct finds no support in the statute's plain language or purpose, or in the case law.

First, the argument is contrary to the plain language of Section 425.16(e). The section's plain language makes clear that the categories enumerated in Section 425.16(e) are not comprehensive. Instead, Section 425.16(e) explicitly states that acts in furtherance of free speech "*include[]*" the conduct stated therein. (*Averill v. Superior Court* (1996) 42 Cal.App.4th 1170, 1175-76.) Thus, by definition, acts in furtherance of free speech can include more than what is enumerated.

Second, the argument is contrary to the plain language of subsection (e)(4) and the purpose of the anti-SLAPP statute. Subsection (e)(4) is a catch-all provision and expansive, not restrictive. It is designed to capture "any other conduct" in furtherance of the exercise of free speech – whether that conduct is an oral statement, written statement, or other act. (*See, e.g., Doe v. State of California* (2017) 8 Cal.App.5th 832, 841 ["The last catchall

category is not limited to the exercise of a person's right of free speech, but to all conduct in furtherance of the exercise of the right of free speech in connection with a public issue."]; *Lieberman v. KCOP Television, Inc.* (2003) 110 Cal.App.4th 156, 166 [same).] To exclude private oral and written communications, which are undoubtedly speech, would be to limit the catch-all provision in a way that makes no sense logically and is contrary to the statute's mandate to construe it broadly. (Code Civ. P. § 425.16(a); *Cf. City of Montebello v. Vasquez* (2016) 1 Cal.5th 409, 419 ["[E]xpansive interpretation of exemptions from the anti-SLAPP statute is inconsistent with the Legislature's express intent that the statute's core provisions shall be construed broadly.").]

Equally unavailing is CAOC's related argument that to include *any* written or oral statements under subsection (e)(4) would be to render the previous subsections unnecessary or redundant. (CAOC Br. 21-22.) Not so, as proven by this very case. Here, if the defamatory statement had been made in a public forum, then subsection (e)(3) would apply. If – as is the case here – the statement was not widely disseminated, this does not somehow morph the communication into non-speech (as CAOC contends); instead, the communication undoubtedly remains speech. Thus, it necessarily still falls under the catch-all provision of subsection (e)(4) Again, that is the entire point of the catch-all provision: to capture speech and speech-furthering acts that do not fall neatly into subsections (e)(1)-(3) but nevertheless warrant protection.[4]

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[4] That is the general purpose of catch-all provisions in statutes; to be expansive enough to capture acts not specifically identified by the Legislature. (*See, e.g., Los Angeles v. Belridge Oil Co.* (1954) 42 Cal.2d 823, 828 ["There can be no doubt that the legislative body intended the 'catch-all' sections to be sufficiently broad to cover all business enterprises not licensed under other sections of the ordinance."].).

Third, CAOC's argument is not supported by precedent. CAOC certainly does not cite any. To the contrary, in the context of a wide variety of claims, including defamation, the Courts of Appeal have consistently held oral and written statements – whether public or private – as falling within the scope of subsection (e)(4). (*See, e.g., Dickinson v. Cosby* (2017) 17 Cal.App.5th 655, 666; *Jackson v. Mayweather* (2017) 10 Cal.App.5th 1240, 1254; *Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1347; *McGarry v. University of San Diego* (2007) 154 Cal.App.4th 97, 111; *Carver v. Bonds* (2005) 135 Cal.App.4th 328, 342; *Terry v. Davis Community Church* (2005) 131 Cal.App.4th 1534, 1545.)

In sum, CAOC cannot succeed in its attempt to exclude speech itself from the scope of the anti-SLAPP statute solely because the speech had a limited audience.

III. CONCLUSION

In sum, all of CAOC's arguments to limit the application of the anti-SLAPP statute and impose additional burdens on a defendant to satisfy the first prong inquiry fail to persuade and certainly do not counsel against finding that Respondents satisfied the first prong inquiry in this case; they did satisfy that inquiry.

DATED: March 16, 2018

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Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) of the California Rules of Court, the enclosed RESPONDENTS' ANSWER TO THE AMICUS BRIEF SUBMITTED BY THE CONSUMER ATTORNEYS OF CALIFORNIA is produced using 13-point Times New Roman type including footnotes and contains approximately 2,901 words, which is less than the 14,000 words permitted by this Rule. Counsel relies on the word count of the computer program used to prepare this brief.

DATED: March 16, 2018

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Executed on March 16, 2018, at Los Angeles, California.

Greg Fisk