

1 Cindy A. Cohn, Esq. (State Bar No. 145997)
Gwen A. Hinze, Esq. (State Bar No. 209562)
2 ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
3 San Francisco, CA 94110
Telephone: (415) 436-9333 x108
Facsimile: (415) 436-9993

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I. INTRODUCTION

2 Because Cullens has invoked the subpoena power granted under the California Code of
3 Civil Procedure, Doe's Special Motion to Strike should be granted along with his Motion to Quash.
4 If Cullens wishes to enjoy the benefits of California process, he should also bear its burdens. More
5 importantly, unless persons like Doe can avail themselves of California's special protection against
6 SLAPP suits, litigants who seek to use California's judicial processes to silence their critics have
7 little disincentive to do so and the statute's goal of protecting speech is lost.

II. FACTUAL BACKGROUND

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9 To avoid unnecessary repetition, Doe hereby incorporates by reference the Factual
10 Background section of his concurrently filed Motion to Quash (pp. -4).

A. California's Anti-SLAPP Statute

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12 To encourage public participation in matters of public significance that is a hallmark of
13 American democracy, the California Legislature in 1992 enacted a procedure to "allow prompt
14 exposure and dismissal" of "civil lawsuits . . . aimed at preventing citizens from exercising their
15 political rights or punishing those who have done so." Wilcox v. Superior Court, 27 Cal.App.4th
16 809, 815, 817 (1994); Code Civil Proc. §425.16(a) ("[I]t is in the public interest to encourage
17 continued participation in matters of public significance, and that this participation should not be
18 chilled through the abuse of the judicial process."). These lawsuits, commonly known as SLAPPs—
19 Strategic Lawsuits Against Public Participation—are brought against those who have exercised their
20 speech and petition rights protected by the First Amendment to the U.S. Constitution and articles 1,
21 2, and 3 of the California Constitution. Code Civ. Proc. §425.16(a). The danger to fundamental
22 liberties posed by these lawsuits is quite real. "Short of a gun to the head, a greater threat to First
23 Amendment expression can scarcely be imagined." Gordon v. Marrone, 590 N.Y.S.2d 649, 656
24 (N.Y.Sup. Ct. 1992), aff'd, 616 N.Y.S.2d 98.

25 Both the Legislature and the state high court have mandated that the statute be applied
26 broadly to serve these purposes. Briggs v. Eden Council for Hope & Opportunity, 19 Cal.4th 1106,
27 1119-23 (1999); Code Civ. Proc. §425.16(a) (as amended 1997).

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B. The Subpoena is a "Cause of Action" to Which the Anti-SLAPP Statute Should be Applied

Section 425.16 subjects "causes of action" to special motions to strike. This phrase, like the whole of the anti-SLAPP, must be interpreted broadly so as to fulfill the intent of the statute: to prevent the judicial process from being used as a tool for punishing or chilling the exercise of First Amendment rights. Briggs, 19 Cal.4th at 119-23. In this case, the subpoena issued in California should be considered a "cause of action" subject to a special motion to strike in order to give the anti-SLAPP statute its full force and effect and to discourage out of state litigants from using a California judicial process to chill First Amendment rights.

C. The Anti-SLAPP Statute Provides for a Shifting Burden of Proof

To invoke §425.16, the moving party need only show the existence of a "cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue." Code Civ. Proc. §425.16(b). The burden then shifts entirely to the respondent to demonstrate a reasonable probability of prevailing on each challenged claim. Navallier v. Sletten, 29 Cal.4th 82, 88 (2002); Wilcox v. Superior Court, 27 Cal.App.4th 809, 819-20 (1994).

D. The Anti-SLAPP Statute Applies Because Cullens's Complaint Arises Out of Doe's Conduct in Furtherance of His Rights to Petition and Free Speech

Doe need only establish that the acts complained of are of the character the statute seeks to protect, that is, that the acts were taken in furtherance of the defendant's right to petition or the defendant's right of free speech in connection with a public issue. Equilon Ent. v. Consumer Cause, 29 Cal.4th 53, 67 (2002). Doe may meet this burden by showing that the complaint arises from, among other conduct, any written statement made in connection with an issue under consideration or review by a judicial body, or made in a public forum in connection with an issue of public interest. Code Civ. Proc. §425.16(e)(2), (3). See City of Cotati v. Cashman, 29 Cal.4th 69, 76-78 (2002) (defining "arising under" to mean "based upon," and not merely "in response to"). Doe may also meet its burden simply by showing that the complaint is based upon "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional

right of free speech in connection with a public issue or an issue of public interest." Code Civ. Proc. §425.16(e)(4); Equilon, 29 Cal.4th at 66.

Doe need not prove that his actions are constitutionally protected as a matter of law. See Navallier, 29 Cal.4th at 94-95 (rejecting the contention that the moving party must prove the constitutional "validity" of his conduct in order to invoke the anti-SLAPP statute). It remains the complainant's burden to prove that the defendant's purported constitutional defenses are not applicable as a matter of law or are negated by a sufficient showing of fact. Navallier, 29 Cal.4th at 94. Accord Chavez v. Mendoza, 94 Cal.App.4th 1083, 1089-90 (2001) (explaining that the court "must generally presume the validity of the claimed constitutional right in the first step of the anti-SLAPP analysis, and then permit the parties to address the issue in the second step of the analysis, if necessary"); Wilcox, 27 Cal.App.4th 819-20, 82-23 (instructing courts to determine only whether the defendant's conduct is "at least arguably protected" by the First Amendment). Nor is Doe required to demonstrate that the plaintiff filed the action in bad faith or intended to hinder or discourage the defendant's exercise of his constitutional rights, or that the movant himself was in fact so hindered or discouraged. Equilon, 29 Cal.4th at 60-62; City of Cotati, 29 Cal.4th at 74-76.

E. Doe Has Met His Initial Burden under § 425.16.

Doe has plainly met his initial burden under the law. He spoke in a public forum about an issue of public concern and the attempt to identify him arose directly from his speech.

Internet message boards, like the Yahoo message boards at issue in this case, are forums for the communication of a message about public matters to a large and interested community. As such, they are "public forums" for the purposes of the anti-SLAPP law. ComputerXpress, Inc. v. Jackson, 93 Cal.App.4th 993, 1007 (2001); Global Telemedia Int'l v. Doe 1, 132 F.Supp.2d 1261, 1264 (C.D. Cal. 2001). Compare Damon v. Ocean Hills Journalism Club 85 Cal.App.4th 468, 476-78 (2000) (concluding that a newsletter distributed to 3,000 members of a residential community was a public forum); compare Macias v. Hartwell, 55 Cal.App.4th 669, 674 (1997) (holding that letters sent through the mail system between private persons were a public forum for purposes of the anti-SLAPP motion).

Moreover, Doe's speech about the management of a large publicly traded corporation on

message boards devoted to that corporation and its competitor clearly concerned an "issue of public interest." ComputerXpress, 93 Cal.App.4th at 1007-08; Global Telemedia, 132 F.Supp.2d at 1264. It is well settled that this "public interest" includes not only government matters, but also private conduct when "a large, powerful organization impacts the lives of many individuals." Macias, 55 Cal.App.4th at 674. See also Damon, 85 Cal.App.4th at 476 (holding that the manner of governance for 3,000 members of a private homeowners community was a matter of public interest with respect to a forum devoted to that community); Paradise Hills Associates v. Procel (1991) 235 Cal.App.3d 1528, 1544-45 (the performance and commercial activities of a building company constitutes a "matter of public interest" for First Amendment purposes); See also Morningstar v. Superior Court, (1994) 23 Cal.App.4th 676, 696 (holding that the reports on corporate misdeeds in a financial newsletter were entitled to strong First Amendment protection).

Here, Doe's statements concerned the activities of a large, publicly traded company, with a significant number of shareholders, both direct and indirect. Westell has sought the public eye; its website lists 10 newspaper articles about it last year, including several in the *Chicago Tribune* <http://westell.com/pages/news_events/>. Westell apparently believes its general activities and financial health are a matter of public interest as well, since it regularly issues press releases and courts investors to purchase the companies stock. In 2003 alone it has issued seven press releases; in 2002 it issued 23 press releases, nearly all of which include quotes from Cullens. *Id.* Thus, Westell's financial health and activities are an issue of public interest.

F. Plaintiff Must Meet His Burden of Establishing a Probability of Prevailing on Its Claims.

The burden now shifts to Plaintiffs to establish a reasonable probability of prevailing on his claims. To meet this burden and survive the special motion, Cullens must "state and substantiate a legally sufficient claim." Wilson v. Parker, Covert & Chidester, 28 Cal.4th 811, 821 (2002); Briggs, 19 Cal.4th at 1123. The action will be dismissed if the plaintiff fails to either (1) demonstrate the legal sufficiency of the claim or (2) make a sufficient prima facie showing of facts that would sustain a favorable judgment should the evidence be credited. Wilson, 28 Cal.4th at 821. In deciding this question of probable success, the court considers the pleadings and evidence

submitted by both the plaintiff and defendant. Id. The court does not weigh the credibility or comparative strength of the evidence, but it should grant the special motion to strike "if, as a matter of law, the defendant's evidence supporting the motion defeats the plaintiff's attempt to establish evidentiary support for the claim." Id.

Artful pleading, mere allegations or averments, and suggestions of additional evidence to be adduced will not suffice. Actual, credible, admissible evidence is required. Wilcox, 27 Cal.App.4th at 828, 830. Moreover, Cullens must come forward with an evidentiary basis for its claims immediately, and not use the mechanism of litigation to prolong the case once §425.16 has been properly invoked. "The legislative intent [of the statute] is best served by an interpretation which would require a plaintiff to marshal facts sufficient to show the viability of the action *before* filing a SLAPP suit." Ludwig v. Superior Court, 37 Cal.App.4th 8, 16 (1995) (emphasis in original).

Once the appropriate evidence is submitted, the special motion to strike must be granted "unless the court determines that the plaintiff has established that there is a probability that [it] will prevail on the claim." Wilcox, 27 Cal.App.4th at 828, 830.

G. Cullens Cannot Meet His burden

As explained in the accompanying Motion to Quash – pages 8-15 of which are incorporated herein by this reference – Cullens's cause of action for libel per se against Doe is manifestly without merit. Cullens cannot meet his burden to show a reasonable probability of prevailing on his claims for several independent reasons. First, the statements were not "of and concerning" Cullens and can be given nondefamatory construction. Second, Doe was reporting accurately about judicial proceedings and third, the statements are obviously opinion and rhetorical, especially given the context of the message board.

Quite simply, the statements do not rise to the level of libel and they are not even close. Instead, they smack of an attempt to use the threat of the judicial system to silence a critic – exactly the sort of situation that CCP §425.16(a) was intended to address.


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III. CONCLUSION

2 Since Cullens plainly attempted to use California's legal processes to try to silence Doe
3 from speaking in public on a matter of public concern, Doe should be granted the protections of
4 California's Anti-SLAPP statute.

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6 DATED: March 17, 2003

7 By 
8 Cindy A. Cohn, Esq. (SBN.145997)
9 ELECTRONIC FRONTIER FOUNDATION
10 454 Shotwell Street
11 San Francisco, CA 94110
12 Telephone: (415) 436-9333 x108
13 Facsimile: (415) 436-9993

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Attorneys for Defendant
JOHN DOE