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IN THE SUPREME COURT OF CALIFORNIA

**BOARD OF TRUSTEES OF THE
CALIFORNIA STATE UNIVERSITY**

Defendant and Appellant,

vs.

SUNGHO PARK

Plaintiff and Respondent.

SUPREME COURT
FILED

JUN 14 2016

Frank A. McGuire Clerk
Deputy

After the Published Decision of the Court of Appeal, Second Appellate
District, Division Four, Case No. B260047
Superior Court for the County of Los Angeles, Case No. BC546792
Honorable Richard E. Rico

**SUPPLEMENTAL BRIEF ON THE MERITS OF BOARD OF
TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY**

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SUPPLEMENTAL BRIEF ON THE MERITS

Pursuant to California Rules of Court, Rule 8.520(d), Defendant and Appellant Board of Trustees of the California State University (“CSU”) submits this Supplemental Brief to advise the Court of authority that was not available in time to be included in CSU’s Answer Brief On The Merits.

CSU’s Answer Brief On The Merits was served on February 16, 2016 and filed on February 17, 2016. On February 24, 2016, the California Court of Appeal published the opinion in *Sweetwater Union School District v. Gilbane Building Co.* (2016) 245 Cal.App.4th 19 (“*Sweetwater*”).

Plaintiff and Respondent Sungho Park did not cite *Sweetwater* in his Reply Brief On The Merits. Nor was *Sweetwater* cited in the four subsequently filed Amicus Curiae Briefs.¹ Accordingly, CSU is bringing *Sweetwater* to the Court’s attention by this Supplemental Brief. The *Sweetwater* opinion is relevant to the argument made in the Answer Brief On The Merits at pages 26-30, and the Reply Brief On The Merits at pages 12-13, relating to the issue that mere “allegations” of illegality are insufficient to invoke the

¹ On April 6 and 7, 2016, after the parties completed their briefing on the merits, four amicus briefs supporting Professor Park were filed by the following entities and individuals: 1) San Diegans for Open Government and The Inland Oversight; 2) California Employment Lawyers Association; 3) First Amendment Coalition; and 4) Californians Aware, First Amendment Project, Penelope Canan, PhD, Libertarian Law Counsel, Angie Morfin Vargas, City Watch, Inc., and Consumer Attorneys of California.

illegality exemption to the anti-SLAPP statute recognized in *Flatley v. Mauro* (2006) 39 Cal.4th 299 (“*Flatley*”).

In *Sweetwater*, a school district sued contractors to void management contracts with three entities, and to require disgorgement of sums paid under Government Code §1090, which prohibits financial interests in contracts. *Id.* at 4. Based in large part on criminal convictions, the trial court denied the contractors’ anti-SLAPP motion on Step One on the ground that the conduct underlying the complaint was illegal as a matter of law and therefore not protected free speech or petition. *Id.* at 25. The Court of Appeal affirmed; however, it did not do so on Step One. Instead, it affirmed on Step Two of the anti-SLAPP motion analysis, finding that plaintiff had met its burden of establishing a probability of prevailing on its claims. *Id.* at 25, 51.

Citing *Flatley*, the *Sweetwater* court stated,

“[S]ection 425.16 cannot be invoked by a defendant whose assertedly protected activity is illegal as a matter of law and, for that reason, not protected by constitutional guarantees of free speech and petition.” [Citation.] Therefore, “where a defendant brings a motion to strike under section 425.16 based on a claim that the plaintiff’s action arises from activity by the defendant in furtherance of the defendant’s exercise of protected speech or petition rights, but *either the defendant concedes, or the evidence conclusively establishes, that the assertedly protected speech or petition activity was illegal as a matter of law*, the defendant is precluded from using the anti-SLAPP statute to

strike the plaintiff's action. . . ." For these purposes, "illegal" means criminal in nature, and not simply in violation of a statute."

Id. at 30 (emphasis added). In the case before this Court, there is no concession, nor does the evidence conclusively establish that protected speech or petition activity was illegal as a matter of law.

Significantly, the *Sweetwater* opinion confirmed that mere "allegations" of illegality are not enough to deny an anti-SLAPP motion, stating as follows:

The mere fact that the plaintiff *alleges* that the defendant engaged in unlawful conduct does not cause the conduct to lose its protection under the anti-SLAPP statute, under the illegal-as-a-matter-of-law standard set out in *Flatley*. . . . Even when a plaintiff alleges that the conduct at issue is unlawful, a defendant can satisfy his or her burden to show that he or she was engaged in conduct in furtherance of the right of free speech under the anti-SLAPP statute if the court cannot determine that the conduct at issue is illegal as a matter of law. . . .

Id. at p. 43 (italics in original; citations omitted).

The court went on to conclude,

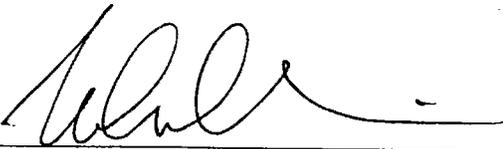
While [plaintiff] *Sweetwater* *alleges* that all the gifts and lobbying efforts mentioned in its complaint were part of an illegal scheme, the allegation that all of this conduct was illegal is not sufficient to establish, as a matter of law, that the conduct was, in fact, illegal.

Id. at 46 (emphasis in original).

DATED: June 13, 2016

Respectfully submitted,

TOWLE DENISON & MANISCALCO LLP

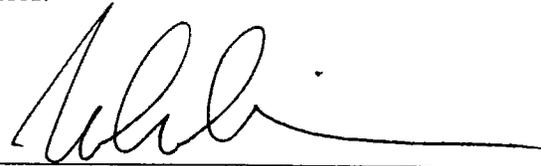
By: 

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**CERTIFICATE OF WORD COUNT
(California Rules of Court, Rule 14(c))**

The text of this Supplemental Brief, excluding cover and tables,
consists of 815 words as counted by the Microsoft Word 2007 word-
processing program used to generate the Brief.

DATED: June 13, 2016

A handwritten signature in black ink, appearing to read "Michael C. Denison", written over a horizontal line.

Michael C. Denison

PROOF OF SERVICE

I, the undersigned, certify that I am a citizen of the United States and employed in the City of Los Angeles, County of Los Angeles, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 10866 Wilshire Boulevard, Suite 600, Los Angeles, California 90024.

On **June 13, 2016**, I served copies of the following document(s):

SUPPLEMENTAL BRIEF ON THE MERITS OF BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY

on the Parties in this action by placing true copies thereof in sealed envelopes with first class postage thereof fully prepaid and depositing the same in the United States mail at Los Angeles, California, addressed to:

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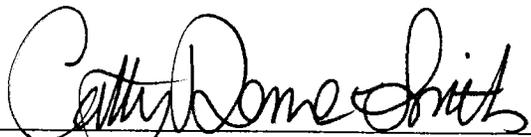
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **June 13, 2016**, at Los Angeles, California.


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